

Grade Insurance

James Fallows Tierney*

The conventional structure of law school assessments, particularly the pressure of end-of-term exams, tends to create a stressful environment for students. This article introduces an alternative form of assessment, drawing on “specifications” or competency-based grading in other fields. Under what’s known as “grade insurance,” students have the option of doing nightly homework, graded on a pass-fail basis, throughout the semester. If they consistently pass, they lock in a minimum grade for the course—perhaps up to a B+—and can opt to do better on the final exam or even skip it if they prefer. This approach not only alleviates student anxiety but aligns with contemporary learning theories that advocate for more regular, low-stakes evaluations.

From the faculty perspective, the traditional grading system is also taxing, especially when modern educational standards demand more comprehensive and formative assessments. Recent guidelines from the ABA, for instance, encourage law schools to adopt more holistic evaluation methods. This article engages the literatures on legal education and “specifications grading,” a grading method that takes from various teaching models and offers students more autonomy, leading to increased motivation and a better grasp on the material.

In essence, grade insurance and specifications grading cater to adult learning needs, encouraging deeper understanding and active participation from students. By integrating these methods, law schools can foster a healthier learning environment and better align with modern pedagogical standards. This article further explores how grade insurance can be implemented effectively, drawing from firsthand experiences and addressing potential critiques.

***James Fallows Tierney**, Assistant professor of law, Chicago-Kent College of Law. I particularly thank Steve Bradford, William O. Fisher, Joan MacLeod Heminway, and Adam Thimmesch for introducing me to the varieties of assessment I now use in my doctrinal classes (which have included grade insurance and specifications grading), my colleagues for the trust and flexibility to let me implement this approach, and most of all my students. Thanks to Tanmayee Chengalasetty, John Debbie, Nate Netz, Rodrigo Pires, Tom Simonson, Olivia Steffensen, Lauren Taylor, Cal Thomas, Zachary Van Kovering, Jack Walther, and Claudia Wojslaw for research or teaching assistance. For useful conversations on teaching or on this paper, I thank participants at a faculty pedagogy workshop at Chicago-Kent, as well as Eric Berger, Ben Edwards, Jordi Goodman, Chelsi Hayden, Alan Kluegel, Anita Krug, Richard Moberly, Austen Parrish, Marc Pearce, Greg Reilly, Brett Stohs, Chris Schmidt, Skylar Wolphe, and Elana Zeide. Special thanks to the editorial team, including Alice Doyle, Julie Lipkin, and Austen Parrish, for improving this work. This article was made possible by summer research grants from Nebraska College of Law and Chicago-Kent College of Law.

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“Grade insurance is the most successful technique I have used in the federal income tax class.”¹

“Learning results from what the student does and thinks and only what the student does and thinks. The teacher can advance learning only by influencing what the student does to learn.”²

I. Introduction

In perhaps most doctrinal classes, students are assessed based on a final exam.³ So most law students are familiar with the anxiety about risk of poor performance on a high-stakes, one-off assessment.⁴ While understandable, this anxiety can be detrimental to student wellness and learning outcomes.⁵ After all, law school’s hustle culture makes everyone’s lives harder and doesn’t set us up for our best learning.⁶ But what if there were another way?

Suppose the instructor offered the option of submitting nightly homework through the semester, graded on a pass-fail basis, in exchange for locking in a minimum course grade (which students could settle with and skip the final). Those who opt in would have meaningful, low-stakes chances to build practical lawyering and legal-writing skills. Would students take the deal?

This “grade insurance” deal, and why it might be appropriate to offer it to law students, is the subject of this article. Perhaps the most important reason boils down to the same reason risk-averse people insure against catastrophic risk elsewhere in their lives.⁷ Hedging bad outcomes relieves our worries about an uncertain future, lightening our cognitive loads to let us focus on other things in our lives. When we become less worried about downside risk we can prosper.

- 1 Samuel A. Donaldson, *The Care and Feeding of Anxious Tax Law Students*, 19 PITT. TAX REV. 407, 423-27 (2022) (describing his own approach to grade insurance); see also *infra* notes 23, 91-95.
- 2 SUSAN A. AMBROSE, MICHAEL W. BRIDGES, MICHELE DIPIETRO, MARSHA C. LOVETT & MARIE K. NORMAN, *HOW LEARNING WORKS: SEVEN RESEARCH-BASED PRINCIPLES FOR SMART TEACHING I* (2010).
- 3 See *infra* Section II.B.
- 4 See Emily Zimmerman, *Do Grades Matter?*, 35 SEATTLE U. L. REV. 305, 309 (2012).
- 5 Students are often so focused on grades that they skip important steps in the learning process. See *infra* notes 64-69.
- 6 Students are genuinely struggling, a problem more acute than ever in the aftermath of disrupted educational and life experiences during the pandemic. See, e.g., D. Benjamin Barros & Cameron M. Morrissey, *A Survey of Law School Deans on the Impact of the COVID-19 Pandemic*, 52 U. TOL. L. REV. 241, 251 (2021) (reporting survey evidence about the effect of the pandemic on student mental health); Catherine Martin Christopher, *Normalizing Struggle*, 63 ARK. L. REV. 27, 36-38 (2020). On trouble with hustle culture, see Tressie McMillan Cottom, *The Hustle Economy*, 67 DISSENT 19 (2020).
- 7 See, e.g., Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); cf. Robert M. Schindler & Mathew S. Isaac, *Anxiety, Cognitive Availability, and the Talisman Effect of Insurance*, 49 PERSONALITY & PSYCH. BULL. 642 (2023); see also *infra* notes 69, 169.

But while student wellness and learning are important considerations, the problem of grading takes on similarly harsh light from the faculty perspective. Assessment and grading are among the most difficult processes for instructors.⁸ Faculty also face rising institutional demands to focus on “learning outcomes” and “formative assessment.”⁹ Those demands contemplate moving away from the traditional law school class structure and toward a more holistic approach to assessment. That is the strong normative underpinning, even if not the explicit prescription, of recent ABA standards requiring law schools to incorporate more formative and outcomes-based assessment.¹⁰

Law schools could carry on as before, in the name of tradition or inertia.¹¹ But that leaves something to be desired.¹² As one scholar of legal pedagogy has observed, “[m]any of us are borrowing teaching techniques” while “tolerating a deficit of understanding in effective teaching techniques that we would never

8 See *infra* notes 83, 174–77.

9 See I KARINE TREMBLAY, DIANE LALANCETTE & DEBORAH ROSEVEARE, ASSESSMENT OF HIGHER EDUCATION LEARNING OUTCOMES: FEASIBILITY STUDY REPORT 35–36 (2012), [https://one.oecd.org/document/EDU/IMHE/AHELO/GNE\(2013\)1/en/pdf](https://one.oecd.org/document/EDU/IMHE/AHELO/GNE(2013)1/en/pdf) (observing the “paradigm shift” in which “the focus is moving away from input-based conceptions . . . towards outcome-based notions of higher education throughput”); see also, e.g., GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 25–29 (2000) (citing ABA SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT]) (recounting the history of learning outcomes promotion in American law schools, and noting that “[c]mbodied in the *MacCrate Report* are strong underpinnings for a program of assessment in American law schools”); Carolyn Grose, *Outcomes-Based Education One Course at a Time: My Experiment with Estates and Trusts*, 62 J. LEGAL EDUC. 336, 339 n.19 (2012) (describing the “active and lively debate within the academy and the legal profession about whether legal education should be outcomes-based”). For a skeptical view, see Gayle Greene, *The Terrible Tedium of “Learning Outcomes,”* CHRON. OF HIGHER EDUC. (Jan. 4, 2023), <https://www.chronicle.com/article/the-terrible-tedium-of-learning-outcomes> (“This outcomes-assessment rigmarole has been foisted on all colleges, adding a whole new layer of bureaucratic make-work.”).

10 See *infra* Section IV.C.1; see also, e.g., Christopher, *supra* note 6, at 33–34 (describing ABA reform proposal and backlash); Steven Bahls, *Adoption of Student Learning Outcomes: Lessons for Systemic Change in Legal Education*, 67 J. LEGAL EDUC. 376, 386–96 (2018) (discussing comments from legal education organizations on draft of ABA student-learning outcome standards).

11 See Steven I. Friedland, *Rescuing Pluto from the Cold: Creating an Assessment-Centered Legal Education*, 67 J. LEGAL EDUC. 592, 597 (2018) (“[C]onsiderable obstacles to a functional assessment-centered environment remain; few if any incentives exist to add more assessments, especially since any faculty time and effort committed to it do not increase a teacher’s position, salary, or perception of teaching quality.”).

12 See M.H. Sam Jacobson, *The Curse of Tradition in the Law School Classroom: What Casebook Professors Can Learn from Those Professors Who Teach Legal Writing*, 61 MERCER L. REV. 899, 923 (2010) (“What was done in the past does not necessarily fit with or respond to the needs of today or the demands of the future.”). It may reflect teacher-oriented pedagogical approaches, which have a major “flaw”: “focus[ing] on how teachers teach without taking into account how students learn.” SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, 48 CAL. WEST. L. REV. 467, 472 (2012) (quoting Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Students*, 43 SANTA CLARA L. REV. 1, 18 (2002)).

accept in our scholarship.”¹³ For many law school community members not focused on learning outcomes, there is scarce time to learn about, generate, and carry out formative assessment.¹⁴

Our collective ambition as teachers and scholars is to promote learning environments that foster genuine student engagement with the material, an ambition that contemplates an atmosphere of learning rather than one of competition and grade grubbing. It is up to law schools, as educational communities, to consider how best to continue to create environments in which students can learn without feeling overwhelmed by anxiety about grades.

As readers of this journal know, educational practices vary widely, and many faculty are already promoting environments like these. Scholars of legal education recognize that “efficient application of educational effort is significantly enhanced by the use of formative assessment.”¹⁵ There is overall room for improvement, however, and this article suggests that many faculty could do better without too heavier a lift. At the risk of sounding like one more article calling for more formative assessment in the doctrinal classroom,¹⁶

- 13 Lindsey P. Gustafson, *The Compounding Effects of Assessment: How Our Failure to Coordinate Formative Assessments May Impact Their Validity*, 11 (May 8, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3175668; see also Eric E. Johnson, *A Populist Manifesto for Learning the Law*, 60 J. LEGAL EDUC. 41, 43 (2010) (“We lack good rationales for insisting on more difficult modes of learning, and in the absence of a convincing case to the contrary, we ought to try to make learning the law easier.”).
- 14 See, e.g., AMBROSE ET AL., *supra* note 2, at xiv–xv (noting how overstretched faculty have neither time nor, frankly, the training to wade through reams of scholarly literature on best practices in higher education); cf. Melissa N. Henke, *When Your Plate Is Already Full: Efficient and Meaningful Outcomes Assessment for Busy Law Schools*, 71 MERCER L. REV. 529 (2019).
- 15 WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 189 (2007); see *infra* notes 43–48. For literature on formative assessment specific to business law, the area where I teach, see Joan MacLeod Heminway, *The Value of Document Treasure Hunts in Teaching Transactional Law and Skills*, 20 TRANSACTIONS: TENN. J. BUS. L. 301 (2018) (describing assessment in which students undertake a “treasure hunt” for corporate finance documents and use them as transactional precedent in a drafting exercise); Mary Ann Robinson, *What Are Some Different Approaches to Teaching Transactional Lawyers Skills: Building Business and Financial Literacy in Law Students*, 20 TRANSACTIONS: TENN. J. BUS. L. 649 (2018) (describing assessment in which student groups review valuation reports, develop a buy/sell offer, exchange term sheets with other groups, and negotiate for the purchase/sale of a company); Richard K. Neumann, Jr., J. Lyn Entrikin & Joan M. Heminway, *Fresh Approaches to Teaching Transactional Drafting*, 18 TRANSACTIONS: TENN. J. BUS. L. 399 (2017); Joan MacLeod Heminway, *Teaching Business Associations Law in the Evolving New Market Economy*, 8 J. BUS. & TECH. L. 175 (2013); Joan MacLeod Heminway, Michael A. Woronoff & Lyman P.Q. Johnson, *Innovative Transactional Pedagogies*, 12 TRANSACTIONS: TENN. J. BUS. L. 243 (2011) (describing three professors’ approaches to assessment and teaching in transactional courses).
- 16 See, e.g., Kenneth R. Swift, *The Seven Principles for Good Practice in (Asynchronous Online) Legal Education*, 44 MITCHELL HAMLINE L. REV. 105, 142–43 (2018) (describing the “growing number of legal scholars” who have called for greater use of formative assessment, as well as the growing “criticism within the academy” of “reliance only on an end-of-semester exam for assessment and feedback”); Judith Welch Wegner, *Law School Assessment in the Context of Accreditation: Critical Questions, What We Know and Don’t Know, and What We Should Do Next*, 67 J. LEGAL EDUC. 412, 440

I suggest that the approach discussed in this article can help improve how law school faculty promote a positive, healthy learning experience for students while maintaining rigorous standards for achieving specific learning outcomes.¹⁷

This article situates trends toward formative assessment within a broader theoretical and empirical literature, drawing on contemporary learning theory, about how to promote learning by adult students.¹⁸ Building a foundation for the article's two main contributions, I also draw on classroom-justice principles, in which "teachers make a conscious attempt to minimize the chasm between teacher and student and employ evidence-based models of teaching."¹⁹

The first of this article's two primary scholarly contributions is to bring legal education scholarship in conversation with "specifications grading," an increasingly common approach in undergraduate and postgraduate settings.²⁰ Specifications grading is an "approach [that] borrows elements of pass-fail grading, competency-based education, and classic contract grading and incorporates opportunities for student choice and control that boost motivation and sense of responsibility."²¹ I describe the literature on specifications grading in nonlegal education and discuss autoethnographic evidence from experience assessing with these approaches.²²

(2018) ("A growing number of innovative faculty members have written about formative assessment regimes that they have adopted in a diverse range of classes.").

17 See *infra* Section IV.C.1; see also, e.g., Warren Binford, *How to Be the World's Best Law Professor*, 64 J. LEGAL EDUC. 542 (2015).

18 See *infra* notes 28–33. On this debate, see Jennifer A. Gundlach & Jessica R. Santangelo, *Teaching and Assessing Metacognition in Law School*, 69 J. LEGAL EDUC. 156, 158 (2020) ("Legal scholars have sought to understand how best to teach law students to acquire, retain, and retrieve knowledge by being independent, intentional, and self-directed learners."); Patti Alleva & Jennifer A. Gundlach, *Learning Intentionally and the Metacognitive Task*, 65 J. LEGAL EDUC. 710 (2016); Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 WIDENER L. REV. 33, 41 (2006).

19 SpearIt, *supra* note 12, at 470 (describing critical pedagogies as those that seek to "devise more equitable methods of teaching, help students develop consciousness of freedom, and connect knowledge to power"); see *infra* Section IV.E.

20 See generally LINDA B. NILSON, SPECIFICATIONS GRADING: RESTORING RIGOR, MOTIVATING STUDENTS, AND SAVING FACULTY TIME (2014). Other scholars have discussed aspects of what I describe as "grade insurance" as a formative assessment practice, but without situating them within literatures on contemporary learning theory literature or critical pedagogy, and without connecting them to the "specifications grading" framework. See, e.g., *infra* note 27. Westlaw, Google Scholar, and Lexis searches turned up little discussion of alternative grading practices like "ungrading" or "specifications grading" that educators have been adopting in other fields. Cf. *infra* Sections II.B.1, .5 (describing traditional grading practices, as well as alternative practices and their critics).

21 NILSON, *supra* note 20, at 11; see *infra* Section III.A.

22 I have experimented with a form of specifications in most of my classes since starting as a faculty member. See *infra* Section III.B. On autoethnographic methods in legal education research, see Elaine Campbell, *Exploring Autoethnography as a Method and Methodology in Legal*

The second contribution is to describe a way of implementing specifications grading in the law school classroom using a “grade insurance” approach, informed by contemporary learning theory. The core of grade insurance is to give students something like the deal offered at the beginning of the article: Try some low-stakes problems, do good-faith work assessed pass-fail for competence, and lock in a minimum grade. I do not claim novelty, as many instructors already promote learning through the use of frequent low-stakes formative assessment. Some already offer something resembling what I call “grade insurance,” though evidence is spotty, as not all instructors write on the innovative methods they use in class.²³ I do write to describe and defend certain salient features of how I implement specifications grading using an approach that is more “insurance”-like than other reports have suggested.

What makes “grade insurance” interesting *now* is that it responds to several key imperatives for designing and implementing legal education.²⁴ It has the potential to challenge traditional approaches in several ways: promoting more frequent low-stakes formative assessment, giving students agency and choice over their effort and achievement, promoting student wellness, and encouraging deeper learning through reflective practice and metacognition.²⁵ And if I told you this might *also* be better for faculty fed up with grade grubbing, would you think I was scamming you?²⁶

The rest of this article suggests how law faculty might structure the grade insurance deal—and why folding it into at least some traditionally structured doctrinal classes might make law students, teachers, and schools better off. Part II sets up the problem: Contemporary learning theories have much to say about how to promote effective adult learning, yet law faculty are understandably slow to change from traditional assessment practices, so there is room for improvement. Part III lays out the grade insurance deal and situates it within the literature on learning and critical pedagogy. Drawing on autoethnographic methods, I discuss anecdotal evidence of effective and ineffective practices for implementing grade insurance in upper-level doctrinal classes. I address several objections about grade insurance, including those about mandatory grading curves and grade inflation, contract grading, use of generative artificial intelligence, and gamification. Finally, Part IV considers

Education Research, 3 ASIAN J. LEGAL EDUC. 95 (2016).

23 See *infra* Section II.E (discussing this scholarship). Among other articles on alternative grading practices in legal education, one report of a similar practice even describes it as “grade insurance,” as discussed below. Donaldson, *supra* note 1, at 423–27; see also, e.g., Michael A. Oberst, *Teaching Tax Law: Developing Analytical Skills*, 46 J. LEGAL EDUC. 79, 96 (1996); John M. Burman, *Out-of-Class Assignments as a Method of Teaching and Evaluating Law Students*, 42 J. LEGAL EDUC. 447 (1992); Paul T. Wangerin, “Alternative” Grading in Large Section Law School Classes, 6 U. FLA. J.L. & PUB. POL’Y 53 (1993).

24 See *infra* Sections IV.B, .C.

25 See *infra* Section IV.A.

26 See *infra* Section IV.B.

implications of grade insurance for students, faculty, law schools, client relationships, and approaches to critical pedagogy. Come underwrite grade insurance with me.

II. Law Students as Adult Learners

In the modern law school classroom, student assessment still centers on the high-stakes final exam. Yet this is contrary to what decades of the literature on contemporary learning theory suggest about how we should be designing courses to promote adult learning.²⁷ That literature suggests, among other things, that students learn well through spaced repetition, under low-stakes assessment, in contexts where they can draw practical connections with what they are learning, combined with feedback targeted at improving performance.

Meanwhile, student anxiety about grades potentially impedes student achievement of learning outcomes—and can make the law school experience harder for everyone. From faculty perspective, assessment is already hard, and the behaviors associated with grade anxiety can make matters worse. This part sets up the problem before turning in Part II to grade insurance as a form of specifications grading, a potential solution that gives students autonomy and choice in how they will be graded.

A. *How adult students learn well*

Briefly introducing some literature from contemporary learning theory is necessary to lay a conceptual foundation before turning to challenges with designing legal educational programs. Examining how adults learn informs this article's grade insurance proposal.

Contemporary learning theory is a broad term that refers to the various theories and approaches that have been developed to understand how adults learn and how to effectively facilitate learning in different contexts.²⁸ Taken together, this literature offers some useful takeaways that will be discussed in the rest of this subpart.²⁹ We should promote, for instance, learning environments that are engaging, relevant, and tailored to the characteristics and needs of students—meeting them where they are. How this plays out in a particular classroom will vary but may include approaches and strategies like experiential learning, collaborative learning, and self-directed learning.

27 It's also contrary to what the literature on critical pedagogy suggests about how to promote liberatory educational experiences. See *infra* Section IV.E.

28 See Renée Nicole Allen & Alicia R. Jackson, *Contemporary Teaching Strategies: Effectively Engaging Millennials Across the Curriculum*, 95 U. DET. MERCY L. REV. 1, 2-3 (2017).

29 Of course, law school differs from other educational contexts in which adults are learners. It is not simply a matter of difficulty, as many adults slog their way through learning difficult skills or subjects. Rather, an important challenge is that law school combines subject-matter learning, skills learning, and professional-identity formation. In the main, instructors might try to align this combination of functions with how we design law school assessments: (1) learning the substance of different legal subjects, (2) learning how to act like a lawyer, and (3) learning how to think like a lawyer. See Kimberlee K. Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 CLINICAL L. REV. 359, 373 (1998) (noting a debate of whether students should be taught to think or to act like a lawyer).

One place to start is by recognizing that students come to law school as adults with their own interests, experiences, ambitions, and intrinsic motivations. Drawing on a framework first articulated by Malcolm Knowles, a longtime scholar of how adults learn, legal education scholars have long examined how principles of adult learning might be applied in the law school context.³⁰ These principles include that (1) adults have a chance to take control of their own learning, (2) they can see relevance of what they are learning to their other life goals, (3) experience and practice are what help adults learn, and (4) learning should be oriented toward solving problems.³¹ Educators are encouraged to promote approaches that see law students as autonomous adults rather than vessels into which knowledge and skills can be poured.³² In this view, students are “co-creators” in the production of their education.³³

Whatever one thinks of legal androgogy (or of law students as “adult learners”),³⁴ the general principles are borne out by a great deal of empirical evidence. As the rest of this part explains, that literature suggests that students learn best through spaced repetition, under low-stakes assessment, in contexts in which they can draw practical connections with what they are learning, when they are given the chance to practice combined with feedback targeted at improving performance, and when they can choose their own learning strategies.

First, spaced repetition is a learning method that involves repeated review of information at increasing intervals over time.³⁵ This method is based on the “spacing effect,” a psychological principle that posits that learning is more

30 See, e.g., MALCOLM S. KNOWLES, ELWOOD F. HOLTON III & RICHARD A. SWANSON, *THE ADULT LEARNER: THE DEFINITIVE CLASSIC IN ADULT EDUCATION AND HUMAN RESOURCE DEVELOPMENT* (8th ed. 2015); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 *VAND. L. REV.* 321 (1982) (providing the classical account of andragogy in legal education); see also, e.g., Kovach, *supra* note 29, at 374 (noting that this approach’s “primary premise is that adults learn very differently from children”). For other literature on the andragogical approach to legal education, see Charletta A. Fortson, *Now Is Not the Time for Another Law School Lecture: An Andragogical Approach to Virtual Learning for Legal Education Teaching Law Online*, 65 *ST. LOUIS U. L.J.* 505 (2021); Rebecca Flanagan, *Anthrogogy: Towards Inclusive Law School Learning*, 19 *CONN. PUB. INT. L.J.* 93 (2019); Joni Larson, *The Intersection of Andragogy and Distance Education: Handing over the Reins of Learning to Better Prepare Students for the Practice of Law*, 9 *T.M. COOLEY J. PRAC. & CLINICAL L.* 117 (2007); Linda S. Anderson, *Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results*, 5 *APPALACHIAN J.L.* 127 (2006); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 *CLINICAL L. REV.* 37 (1995).

31 See MALCOLM S. KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION: ANDRAGOGY VERSUS PEDAGOGY* (1970).

32 See *infra* Section IV.E.

33 Anderson, *supra* note 30, at 138; see also *infra* note 194.

34 I would like to apologize in embarrassment for those legal educators who refer to law students as “kids.”

35 See Gabriel H. Teninbaum, *Spaced Repetition: A Method for Learning More Law in Less Time*, 17 *J. HIGH TECH. L.* 273, 278–85 (2017).

effective when study sessions are spread out over time, rather than crammed into one long study session (massed learning). By revisiting the material just as we're about to forget it, we strengthen the memory and make it more resistant to forgetting in the future.³⁶ It may seem harder than massed learning, but “students retain information longer and are able to use that information better in new situations when they work harder to learn the material.”³⁷ Several studies have demonstrated the effectiveness of spaced repetition in different learning contexts, such as language learning, medical education, and more.³⁸ Technology has facilitated the widespread use of spaced repetition in digital learning tools, such as flashcard apps like Anki or language learning platforms like Duolingo.

Second, adult students learn well in contexts in which they can draw practical connections with what they are learning. Adult learners are often motivated by relevance, self-direction, problem-solving, and collaboration.³⁹ Effective legal educators promote learning that accounts for students' prior knowledge and experiences, as well as their goals and motivations.⁴⁰ A significant contributor to motivation, then, appears to be students' degree of autonomy or agency over how to achieve learning objectives.⁴¹

- 36 See, e.g., John Dunlosky, Katherine A. Rawson, Elizabeth J. Marsh, Mitchell J. Nathan & Daniel T. Willingham, *Improving Students' Learning with Effective Learning Techniques: Promising Directions from Cognitive and Educational Psychology*, 14 PSYCH. SCI. PUB. INT. 6, 36 (2013); Nicholas J. Cepeda, Edward Vul, Doug Rohrer, John T. Wixted & Harold Pashler, *Spacing effects in Learning: A Temporal Ridgeline of Optimal Retention*, 19 PSYCH. SCI. 1095 (2008) (finding that spaced repetition significantly enhances learning, with longer lags between study sessions leading to better long-term retention, and suggesting scheduling study sessions with the right spacing); see also, e.g., Paul Smolen, Yili Zhang & John H. Byrne, *The Right Time to Learn: Mechanisms and Optimization of Spaced Learning*, 17 NATURE REVIEWS NEUROSCIENCE 77 (2016) (drawing on “new insights from molecular studies [that] may help to explain the effectiveness of spaced [repetition] training” and situating these mechanisms within contemporary learning theories).
- 37 Karen McDonald Henning & Julia Belian, *If You Give a Mouse a Cookie: Increasing Assessments and Individual Feedback in Law School Courses*, 95 U. DET. MERCY L. REV. 35, 48 (2018).
- 38 See, e.g., Nicholas J. Cepeda, Harold Pashler, Edward Vul, John T. Wixted & Doug Rohrer, *Distributed Practice in Verbal Recall Tasks: A Review and Quantitative Synthesis*, 132 PSYCH. BULL. 354 (2006).
- 39 See Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 56 (2001) (collecting some takeaways from “adult learning theory” for why “students will learn best if they have a context for what they are learning”); Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941, 942-44 (1997).
- 40 See Quigley, *supra* note 30, at 47; see also, e.g., PETER C. BROWN, HENRY L. ROEDIGER III & MARK A. McDANIEL, MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING 5 (2014); James F. Stratman, *When Law Students Read Cases: Exploring Relations Between Professional Legal Reasoning Roles and Problem Detection*, 34 DISCOURSE PROCESSES 57 (2002).
- 41 See PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 71-86 (Myra Bergman Ramos trans., 1970); see also, e.g., PARKER J. PALMER, THE COURAGE TO TEACH: EXPLORING THE INNER LANDSCAPE OF A TEACHER'S LIFE 99-102 (2007); MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD

Third, adult students learn well when given opportunities to practice skills or demonstrate achievement through tasks that are appropriately challenging but low stakes.⁴² Frequent formative assessment provides an important opportunity to do this.⁴³ Meanwhile, faculty can offer targeted feedback.⁴⁴ Effective strategies include pairing low-stakes formative assessment with prompts for self-reflection,⁴⁵ deliberation on how students approached the last assignment and what they will do next time,⁴⁶ or illustration on a class-wide basis about satisfactory and unsatisfactory student submissions.⁴⁷ Low-stakes formative assessment may be particularly valuable to the extent that it “provides the students with insights about themselves”—including about what it might mean to challenge oneself to be a more effective learner.⁴⁸

Finally, effective legal educators provide opportunities for feedback and assessment that promote self-reflection, monitoring, and adjustment of learning strategies as needed.⁴⁹ Combined with targeted feedback, frequent low-stakes assessment helps promote metacognition—learning about learning. Metacognition involves reflection on one’s own thinking processes and can help students become more aware of their own learning strategies.⁵⁰ One

F. HESS, TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM 98–105 (2009).

42 See Olympia Duhart, “*It’s Not for A Grade*”: *The Rewards and Risks of Low-Risk Assessment in the High-Stakes Law School Classroom*, 7 ELON L. REV. 491, 494 (2015).

43 *Id.* at 552 (citing Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 CAP. U. L. REV. 149, 176 (2012)) (noting a meta-analysis that “found significant learning gains linked to the use of formative assessment”).

44 See *id.* at 493; Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. LEGAL EDUC. 139 (2017); Jessica Erickson, *Experiential Education in the Lecture Hall*, 6 NE. U. L. REV. 87, 100 (2013) (noting that achievement of learning outcomes in a business law class, to be able to “evaluate and draft contractual provisions,” cannot be met unless an instructor “devote[s] class time to drafting exercises, giving . . . students feedback”); ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION 125 (2007) (“Prompt feedback allows students to take control over their own learning by obtaining necessary remediation for identified deficiencies in their understanding and to adjust their approaches to future learning endeavors.”).

45 See Duhart, *supra* note 42, at 511–12.

46 See Julie Ross & Diana Donahoe, *Lighting the Fires of Learning in Law School: Implementing ABA Standard 314 by Incorporating Effective Formative Assessment Techniques Across the Curriculum*, 81 U. PITT. L. REV. 657 (2020).

47 See *id.* at 682.

48 Christopher, *supra* note 6, at 56.

49 See Gundlach & Santangelo, *supra* note 18, at 157; Niedwiecki, *supra* note 43, at 176.

50 See, e.g., Gundlach & Santangelo, *supra* note 18, at 157 (linking the professional need for lawyers to be lifelong learners, with the development of “metacognitive skills” about “understanding and monitoring what one knows about strategies that impact one’s thinking and learning, as well as how one controls and adjusts one’s thinking for the purpose of learning”); see also,

implication is that faculty should create opportunities for students to reflect on their own learning processes through activities such as journaling, self-assessment quizzes, and group discussions.

All of this illustrates that education is a project of learner engagement and transfer of skills learned to new domains.⁵¹ It reflects that education is not a unidirectional process of “pouring knowledge into a vessel” but rather a joint project in which students are co-creators of their education.⁵² Many law teachers already promote learning through course design that offers students the choice of learning strategies, together with a chance to practice and engage in critical self-reflection on their performance.⁵³ And for those faculty who have not yet experimented with a specifications-grading approach to formative assessment, contemporary learning theory encourages us to be open to new ways potentially to improve how we promote learning.

B. How law schools have traditionally approached adult learning

Situating the need that grade insurance fills within the curriculum, this subpart identifies four important factors for evaluating how law students have approached adult learning: infrequent, high-stakes assessment; student anxiety and wellness; trends in assessment and learning outcomes; and how faculty time is apportioned. This subpart ends by briefly discussing some similar assessment approaches in the literature on legal education.

1. Infrequent high-stakes assessment

Law schools have gone through different cycles of how to assess students.⁵⁴ The high-stakes final exam has been a familiar part of the law school doctrinal

e.g., Ernesto Panadero, Anders Jonsson & Juan Botella, *Effects of Self-Assessment on Self-Regulated Learning and Self-Efficacy: Four Meta-Analyses*, 22 EDUC. RSCH. REV. 74 (2017); David Boud, Romy Lawson & Darrall G. Thompson, *Does Student Engagement in Self-Assessment Calibrate Their Judgement over Time?*, 38 ASSESSMENT & EVALUATION HIGHER EDUC. 941 (2013); John A. Ross, *The Reliability, Validity, and Utility of Self-Assessment*, 11 PRAC. ASSESSMENT, RSCH. & EVALUATION (2006); Betty McDonald & David Boud, *The Impact of Self-Assessment on Achievement: The Effects of Self-Assessment Training on Performance in External Examinations*, 10 ASSESSMENT EDUC.: PRINCIPLES, POL'Y & PRAC. 209 (2003).

51 See Elizabeth M. Bloom, *Teaching Law Students to Teach Themselves: Using Lessons from Educational Psychology to Shape Self-Regulated Learners*, 59 WAYNE L. REV. 311, 316-18 (2013).

52 Olympia Duhart, *The 'F' Word: The Top Five Complaints (and Solutions) About Formative Assessment*, 67 J. LEGAL EDUC. 531, 539 (2018) (quoting Paul Black & Dylan Wiliam, *Assessment and Classroom Learning*, 5 ASSESSMENT EDUC.: PRINCIPLES, POL'Y & PRAC. 7, 7-8 (1998)) (“[F]ormative assessment is actually a joint process between student and teacher that includes ‘all those activities undertaken by teachers, and/or by their students, which provide information to be used as feedback to modify the teaching and learning activities in which they are engaged.’”).

53 See, *e.g.*, David J. Nicol & Debra Macfarlane Dick, *Formative Assessment and Self Regulated Learning: A Model and Seven Principles of Good Feedback Practice*, 31 STUD. HIGHER EDUC. 199 (2006) (noting shift from thinking about learning “as a simple learning acquisition process” to one “commonly conceptualized as a process whereby students actively construct their own knowledge and skills”).

54 Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis*

classroom for some time. Since the early 1900s, most law school classes have used a single final exam to determine a student's grade for the class.⁵⁵ That is changing, in fits and starts; as discussed below, we are entering a new cycle that places greater emphasis on holistic and formative assessments.⁵⁶

The problems with the traditional approach are well known.⁵⁷ The traditional law school issue-spotter final exam tests a certain set of skills, which may not be skills that the instructor has introduced or practiced with the class, and which must be acquired by students who don't have them.⁵⁸ A single exam score is not always an accurate measure of a student's competence or mastery of the material.⁵⁹ There may also be little reason to think that this approach provides a valid psychometric measure, as one might expect of an examination instrument or technique.⁶⁰

Taken together, all this suggests the traditional approach can be hazardous to educational achievement. The choice to assess students the traditional way

on *Law School Final Exams*, 65 UMKC L. REV. 657, 675-76, 694 (1997) (noting the "cyclical reformation" of assessment strategy in law schools in the nineteenth and twentieth centuries).

- 55 See, e.g., *id.* at 657 (noting the "pattern . . . of hypothetical essay examinations being the sole record of the students' performance" in the typical law school class); see also, e.g., MUNRO, *supra* note 9, at 34 ("Examination practices in law schools are so uniform that one can fairly generalize when describing them.").
- 56 See, e.g., *infra* Section IV.C.1.
- 57 See Duhart, *supra* note 42, at 500-04; Steven Friedland, *A Critical Inquiry into the Traditional Uses of Law School Evaluation*, 23 PACE L. REV. 147, 156-64 (2002); see also, e.g., Jeff Cain, Melissa Medina, Frank Romanelli & Adam Persky, *Deficiencies of Traditional Grading Systems and Recommendations for the Future*, 87 AM. J. PHARMA. EDUC. 908 (2022).
- 58 See, e.g., Adam G. Todd, *Exam Writing as Legal Writing: Teaching and Critiquing Law School Examination Discourse*, 76 TEMP. L. REV. 69, 72-73 (2003) (citing Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 466 (1989)) (identifying these as "(1) issue spotting; (2) identification of relevant legal authority; (3) application of legal authority to facts; and (4) organization of material").
- 59 See Grose, *supra* note 9, at 352 (citing GRANT WIGGINS & JAY MCTIGHE, UNDERSTANDING BY DESIGN 184 (2005)) ("Wiggins and McTighe urge assessors to ask themselves how likely it is that a student could do well on this performance task, but really not demonstrate the understanding the assessor is after, or a student could perform poorly on this task, but still have significant understanding of the ideas and show it in other ways."). It is possible for a student to do well on an exam without having a deep understanding of the material, while another student who has put in more effort and has a better grasp of the concepts may not perform as well because of factors such as test anxiety or fatigue.
- 60 See, e.g., Douglas A. Henderson, *Uncivil Procedure: Ranking Law Students Among Their Peers*, 27 U. MICH. J.L. REFORM 399, 407 (1994) ("Judged by the standards of established psychometric theory, the law school essay is neither precise nor accurate—both of which are necessary foundations of validity"); STUCKEY, *supra* note 44, at 239 (observing that high-stakes final exams are "neither valid, nor reliable, nor fair," with validity referring to a tool that "accomplish[es] the purpose for which it was intended" and reliability referring to "yield[ing] the same results on repeated trials"); see also, e.g., Friedland, *supra* note 57; Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137 (2001); Kissam, *supra* note 58, at 435-36.

may also have detrimental effects on student wellness and mental health, thus creating barriers to achieving learning outcomes.

2. Wellness and student anxiety

From students' perspective, the single-final-exam assessment structure can create significant anxiety for students because of the potential consequences of a bad grade.⁶¹ In professional school, students are often quite concerned about academic performance. This is largely and understandably because grades may dictate future career options. Many students are overwhelmed by the pressure to perform in a one-shot match.⁶²

When students become overly focused on grades they can become overwhelmed and anxious, which can negatively affect both wellness and overall performance and impede consolidation and transfer of the material learned.⁶³ Research into student wellness and cognition has looked closely at "exam anxiety," or the connection between anxiety about an assessment and academic performance.⁶⁴ When anxiety about an exam is salient, students may be less likely to approach the material in ways other than (believed to be) designed to maximize exam performance. Anxiety can promote shallower understanding of the subject matter. Worse yet, high-stakes open-book final exams promote unhealthy dependence on outlining and memorization, to the detriment of developing those higher-order skills.⁶⁵

61 See Duhart, *supra* note 42, at 503 (noting both anxiety in anticipation of an exam and anxiety awaiting grades after an exam).

62 See *id.* at 495-96 (comparing taking a traditional law school final with waiting until the day of the concert to try playing a new piece of music). Student anxiety about grading is also a matter of significant concern about student well-being, according to survey evidence from the Law School Survey of Student Experience. The LSSSE reported in 2016 that around 50% of law students reported high stress levels (a 6 or 7 on a scale of 1 to 7) related to law school, with another 46% having a medium stress level (a 3, 4, or 5). *Law Student Stress*, LSSSE: BLOG (Aug. 8, 2016), <https://lsse.indiana.edu/blog/law-student-stress/>. In 2021 and 2022, this number rose to around 60%, likely as a result of pandemic-related educational disruptions. Jakki Petzold, *Law Student Stress and Anxiety*, LSSSE: BLOG (May 11, 2022), <https://lsse.indiana.edu/blog/law-student-stress-and-anxiety/>. While the high stress levels may be partially attributed to many factors, academic performance was the leading contributor, with 78% of students polled concerned about their academic performance in 2016. *Law Student Stress*, *supra*. Academic performance was rivaled in that year's LSSSE administration by only the academic workload (76%) and far outpaced other stressful subjects of job prospects (62%), debt (51%), peer competition (33%), and teaching methods (32%). *Id.*

63 See Duhart, *supra* note 42, at 502-04.

64 See, e.g., Katie M. Silaj, Shawn T. Schwartz, Alexander L.M. Siegel & Alan D. Castel, *Test Anxiety and Metacognitive Performance in the Classroom*, 33 EDUC. PSYCH. REV. 1809, 1831 (2021); Rolando J. Díaz, Carol R. Glass, Diane B. Arnkoff & Marian Tanofsky-Kraff, *Cognition, Anxiety, and Prediction of Performance in 1st-Year Law Students*, 93 J. EDUC. PSYCH. 420 (2001).

65 Outlining has perhaps the biggest mismatch among law-school study behaviors between effort spent and educational benefit achieved. See Jennifer M. Cooper & Regan A.R. Gurung, *Smarter Law Study Habits: An Empirical Analysis of Law Learning Strategies and Relationship with Law GPA*, 62 ST. LOUIS U. L.J. 361, 387-88, 392 (2018) (finding "a statistically significant negative relationship between [first-year law school grade point average] and weak synthesis

Besides its effect on learning outcomes, law students' grade anxiety also has important consequences for the culture of law schools and for faculty-student relations.⁶⁶ The pressure to perform on a single assessment promotes practices of grade grubbing, by which a small but vocal group of students try to hedge or improve their performance through bargaining, emotional appeals, and the like. Economist Iris Franz has summed up these kinds of grade grubbing as "students' nuisance," or "pestering professors for better grades."⁶⁷ The problem may be even worse when there is a mismatch between students' self-assessment and instructors' assessment of the quality of their work.⁶⁸

In short, the typical law school experience of taking a single high-stakes final exam can set up students for a particularly anxiety-inducing experience. Opportunities to spread out assessment across the semester, or across different modalities besides a single high-stakes final exam, may reduce the anxiety associated with high-stakes final exams.⁶⁹ As we'll return to later, this can promote improved learning outcomes.

skills," such as "a student's course outline [being] too long" or a student's being "unable to distinguish relevant from irrelevant information," and concluding that "outlining course material [is] not sufficient for academic success in law school"). To be sure, there are benefits from organizing knowledge in an outline as a form of sense-making about something new. *Id.* at 375 (discussing evidence that "high-performing students engaged in a multistep process that included 'distilling or condensing' . . . and . . . self-testing in the outlining process"). But outlining and memorizing are generally not part of most lawyers' daily practice. Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1247 (1991) (arguing that rote memorization prepares students for the bar exam, but does not prepare them for the practice of law).

66 See, e.g., Matthew M. Dammeyer & Narina Nunez, *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 LAW & HUM. BEHAV. 55 (1999).

67 Wan-Ju Iris Franz, *Grade Inflation Under the Threat of Students' Nuisance: Theory and Evidence*, 29 ECON. EDUC. REV. 411, 412 (2010); see also Rebecca Flanagan, *The Kids Aren't Alright: Rethinking the Law Student Skills Deficit*, 2015 BYU EDUC. & L.J. 135, 169 (2015) ("[I]t is advantageous for professors, especially assistant professors working towards tenure, to award high grades to reduce the time cost associated with student nuisance.").

68 In Franz's study, most "professors surveyed found student nuisance costly (in terms of time) or very annoying," with most grade-grubbing students being "low-level performers." Franz, *supra* note 67 (describing the study); see also Christopher, *supra* note 6, at 38 ("In a tragic twist, research demonstrates that students who are most incompetent are the most unaware of it, and they are the ones who most overestimate their abilities."); Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCH. 1121 (1999).

69 See Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 571, 576 (1997) ("[O]ut-of-class w[ri]ting assignments permit students to articulate their analyses without the 'hotseat' of classroom performance and without the benefit of visual cues from the teacher and other students."); Nilson, *supra* note 20 at 48-49 (citing JOSÉ ANTONIO BOWEN, *TEACHING NAKED: HOW MOVING TECHNOLOGY OUT OF YOUR COLLEGE CLASSROOM WILL IMPROVE STUDENT LEARNING* (2012) ("For students, more grading opportunities reduce the anxiety associated with any one assignment . . . because it counts less . . . [S]tudents [may] learn best under the conditions of high standards and low stake.")).

3. Assessment and learning outcomes

The use of frequent low-stakes assessment is a common practice in education, but its effectiveness is often debated.⁷⁰ Some argue that frequent assessment can improve learning by providing feedback and motivation.⁷¹ Others contend that it can lead to negative consequences such as decreased motivation and increased anxiety.⁷²

Frequent low-stakes assessment can have a positive impact on achievement of learning objectives for adult learners.⁷³ Meta-analysis of studies on low-stakes assessment, such as in-class quizzes, has found they “are associated with moderately higher academic performance.”⁷⁴ Those given frequent formative assessments, and those given frequent feedback, perform better than those not given these opportunities.⁷⁵ Likewise, students given frequent opportunities to self-assess their progress, or to reflect on their learning, perform better than those not given those opportunities.⁷⁶ These scholarly findings have led many to call for more formative assessment toward achievement of tangible learning outcomes.⁷⁷

- 70 See, e.g., Ruth Colker, Ellen Deason, Deborah Merritt, Abigail Shoben & Monte Smith, *Formative Assessments: A Law School Case Study*, 94 U. DET. MERCY L. REV. 387 (2017); Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N.U. L. REV. 227 (2015); Mantz Yorke, *Formative Assessment in Higher Education: Moves Towards Theory and the Enhancement of Pedagogic Practice*, 45 HIGHER EDUC. 477 (2003).
- 71 See Carol Evans, *Making Sense of Assessment Feedback in Higher Education*, 83 REV. EDUC. RSCH. 70 (2013).
- 72 See Bram E. Vaessen, Antoine van den Beemt, Gerard van de Watering, Ludo W. van Meeuwen, Lex Lemmens & Perry den Brok, *Students' Perception of Frequent Assessment and its Relation to Motivation and Grades in a Statistics Course: A Pilot Study*, 42 ASSESSMENT & EVALUATION HIGHER EDUC. 872, 872, 877, 882–83 (2016).
- 73 See, e.g., David Playfoot, Laura L. Wilkinson & Jessica Mead, *Is Continuous Assessment Inclusive? An Analysis of Factors Influencing Student Grades*, ASSESSMENT & EVALUATION HIGHER EDUC. 1 (2022); Jay McArthur, Margaret Blackie, Nicole Pitterson & Kayleigh Rosewell, *Student Perspectives on Assessment: Connections between Self and Society*, 47 ASSESSMENT & EVALUATION HIGHER EDUC. 698 (2022); Nicol & Macfarlane-Dick, *supra* note 53; Graham Gibbs & Claire Simpson, *Conditions Under Which Assessment Supports Students' Learning*, 2 LEARNING & TEACHING HIGHER EDUC. 3 (2005).
- 74 Lukas K. Sotola & Marcus Crede, *Regarding Class Quizzes: A Meta-Analytic Synthesis of Studies on the Relationship Between Frequent Low-Stakes Testing and Class Performance*, 33 EDUC. PSYCH. REV. 407 (2021); see also Carol Springer Sargent & Andrea A. Curcio, *Empirical Evidence That Formative Assessments Improve Final Exams*, 61 J. LEGAL EDUC. 379 (2012).
- 75 See, e.g., Avraham N. Kluger & Angelo DeNisi, *The Effects of Feedback Interventions on Performance: A Historical Review, a Meta-Analysis, and a Preliminary Feedback Intervention Theory*, 119 PSYCH. BULL. 254 (1996); see also, e.g., Sargent & Curcio, *supra* note 74; Paul Black & Dylan Wiliam, *Assessment and Classroom Learning*, 5 ASSESSMENT EDUC.: PRINCIPLES, POL'Y & PRAC. 7 (1998).
- 76 See, e.g., SARA HORTON-DEUTSCH & GWEN D. SHERWOOD, *REFLECTIVE PRACTICE: TRANSFORMING EDUCATION AND IMPROVING OUTCOMES* (2d ed. 2017); John A. Ross, *The Reliability, Validity, and Utility of Self-Assessment*, 10 PRAC. ASSESSMENT, RSCH. & EVALUATION 10 (2006).
- 77 See *infra* Section IV.C.1.

Yet instructors at the postgraduate level face a unique and difficult challenge when it comes to assessing student achievement of learning outcomes. Students generally possess high but varying academic ability and are all striving to achieve their goals. It can be difficult to differentiate between students who have achieved similar learning outcomes.

Instructors employ a variety of strategies to assess effectively how students achieve learning outcomes at the professional level. While traditional paper-based exams can be used to measure student knowledge and understanding, effective instructors also use online tests, oral presentations, group projects, reflective assignments, and other assessment techniques. As modern portfolio theory in finance teaches about diversification, we ought not put all our eggs in one basket.⁷⁸ In the context of assessment design, a similar approach aims for each student's individual strengths and weaknesses to be taken into account when evaluating progress.

Finally, an approach that prioritizes assessment these ways is consistent with other trends in education more broadly toward competency-based assessment.⁷⁹ In fields like nursing, professional education is shifting to competency-based educational models.⁸⁰ Under these models, students are assessed for whether they can perform some task or skill competently or with mastery (though these terms may be interchangeable).⁸¹ These differences are also reflected in the ways students are graded, creating an opportunity for alternative grading practices.⁸²

4. The political economy of faculty time

The problem with all proposals for more assessment, of course, is that they are hard to implement. Despite the evidence we just saw of positive impact on learning outcomes, many law professors are understandably hesitant to move beyond the traditional model of a high-stakes final because of the lack of time and resources for implementing formative assessment. As it stands, assessment already makes up a large part of faculty labor. In the assessment process, parsing fine gradations between similar student work can sometimes be so cognitively taxing as to approach the limits of our abilities.⁸³ What's more, it

78 See Frank J. Fabozzi, Francis Gupta & Harry M. Markowitz, *The Legacy of Modern Portfolio Theory*, J. INVESTING, Fall 2002, at 7, 8 ("Conventional wisdom has always dictated not putting all your eggs in one basket. In more technical terms, this adage is addressing the benefits of diversification.").

79 Cf. *infra* Sections I.B.5, III.A, IV.C.

80 Melissa Neville Norton, Tressa Quayle, Sally Cantwell, Joyce Barra, Heather J. Chapman & Julian Chan, *Students and Faculty Perceptions of Standards-Based Grading for Clinical Education*, 16 TEACHING & LEARNING NURSING 16 (2021).

81 See, e.g., Lisa S. Lewis, Lisa M. Rebeschis & Ellie Hunt, *Nursing Education Practice Update 2022: Competency-Based Education in Nursing*, 8 SAGE OPEN NURSING 1 (2022).

82 See Matt Townsley & David Schmid, *Alternative Grading Practices: An Entry Point for Faculty in Competency-Based Education*, 5 J. COMPETENCY-BASED EDUC. 1 (2020).

83 See *infra* text accompanying notes 174-77.

can be exhausting to do the pastoral work of counseling those students most concerned about grades.⁸⁴

The apportionment of faculty time is a major factor in why many law professors are reluctant to use frequent low-stakes assessment tools. As law professors, we are expected to juggle a variety of tasks throughout the semester. Faculty may need to fulfill research obligations; advise and mentor students; oversee and work with student organizations; run clinics, centers, institutes, or programs; participate in faculty governance and university committees; and complete other administrative work, in academia and in regional and national organizations. These layered obligations can make it hard to find the time to keep up fully with scholarship in our own areas—let alone with developments in contemporary learning theory.⁸⁵ It takes time and effort to consider innovative ways to assess student learning and develop and implement these practices in our courses.⁸⁶

What's more, in an age of university austerity budgeting, there is a general lack of financial and institutional support for the labor-intensive process of reviewing and giving feedback on frequent low-stakes assessment.⁸⁷ Demands to add more work of this sort parallel the emergence of law school experience that is, at least by some lights, increasingly commodified and leaves less time for research.⁸⁸ Without the necessary resources, some law professors

84 See *supra* notes 67–68 (describing the phenomenon of “students’ nuisance”).

85 Friedland, *supra* note 11, at 601 (“Allocating resources and time on assessment is not encouraged by the systemic design or dominant culture of a professional law faculty Instead [it] is seen as taking time away from . . . scholarship.”); see, e.g., Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 J. LEGAL EDUC. 61, 68 (1988) (“[T]ime with the soon-to-practice student is the price the professor pays to do his scholarship—liberal, radical, or conservative critiques of the direction of lawmaking.”); SpearIt, *supra* note 12, at 467 (describing the “mediocre learning experience” that comes from faculty who view teaching as “the chore that comes with the job”).

86 This is a common complaint about formative assessment. See, e.g., Randy E. Bennett, *Formative Assessment: A Critical Review*, 18 ASSESSMENT EDUC.: PRINCIPLES, POL’Y & PRAC. 5, 19 (2011); Dylan Wiliam, *Formative Assessment: Getting the Focus Right*, 11 EDUC. ASSESSMENT 283, 288 (2006). For a defense of formative assessment against these complaints, see Duhart, *supra* note 52.

87 This is in part why there was such a vehement backlash against the ABA’s standards and why the standards are, of course, choose your own adventure. See Cara Cunningham Warren, *Achieving the American Bar Association’s Pedagogy Mandate: Empowerment in the Midst of a “Perfect Storm,”* 14 CONN. PUB. INT. L.J. 67, 68 (2014) (“[S]uccessful implementation remains an open question, in part because of [institutional inertia], and in part because law schools may be ill-equipped to respond to the crisis [in legal education].”).

88 See *id.* at 76 (describing the need for “improved pedagogy” when teachers are asked to do more with less and when students are pulled in many directions); see, e.g., Debra Moss Vollweiler, *Law School as a Consumer Product: Beat ‘Em or Join ‘Em?*, 40 PACE L. REV. 1 (2019) (observing the trend of law schools marketing and treating their program design in students-as-consumers terms); Margaret Thornton & Lucinda Shannon, *‘Selling the Dream’: Law School Branding and the Illusion of Choice*, 23 LEGAL EDUC. REV. 249 (2013).

are understandably hesitant to invest their time and energy in creating and implementing assessment approaches that go beyond the tried-and-true model.

5. Experimentation with low-stakes formative assessments

Recognizing difficulties with the standard way of teaching, law school instructors have been experimenting with out-of-class assessment. There is extensive literature on formative assessment in law school.⁸⁹ In addition, scholars from around the university have implemented “specifications grading,” “ungrading,” and other alternative assessment approaches, though some of these have apparently gone unremarked-upon in legal education scholarship.⁹⁰ I focus here on the genesis of this article, as well as on a handful of scholarly reports of assessment methods that are like but distinct from this article’s “grade insurance” approach.

This article arose out of my first teaching position at the University of Nebraska, where I was introduced to the basic contours of specifications grading by Steve Bradford and Adam Thimmesch. Bradford, now emeritus, had offered a minimum grade in exchange for completing a fixed number of assignments from the casebook. In the Business Organizations course during the disruptive fall 2020 semester, for instance, he offered students a B+ in exchange for submitting homework for all but two of the classes. He did not offer choices for how much effort would lead to a particular grade, so the “insurance” would kick in like a step function at the B+ threshold. Thimmesch introduced me to the concept of specifications grading and contextualized for me the grade insurance approach as a variant on it. Like perhaps many faculty, Thimmesch uses problem sets in tax classes but at the time anyway was not using them for an insurance function as I describe here. As discussed below, I’ve experimented with the approach, building in multiple bundles (homework, projects, final exam) and giving students greater agency and choice by tying the minimum course grade to the number of assessments completed.

Setting aside the specific experiences that shaped how I approach grade insurance, the legal education scholarship also has several reports of using out-of-class formative work for specifications-grading-like purposes.⁹¹ Most

89 See, e.g., *supra* notes 9, 13, 15.

90 See, e.g., Susan D. Blum, *Introduction: Why Ungrade? Why Grade?*, in *UNGRADING: WHY RATING STUDENTS UNDERMINES LEARNING (AND WHAT TO DO INSTEAD)* (Susan D. Blum ed., 2020); *infra* Section III.A.

91 Michael Oberst describes an extra-credit opportunity for students to get a 1.5 grade boost on the final (capped at a B). Like my approach, Oberst’s provides some measure of insurance; students who complete the assignment are hedged partially against poor performance on the final. The main difference is that this approach does not contemplate work throughout the semester, and students are not obviously offered an opportunity for feedback or self-reflection. Oberst, *supra* note 23. John Burman describes out-of-class assignments, including essay questions throughout the semester worth about 25%-40% of the grade. This approach is similar in that it allows for feedback and reduces some pressure related to the final exam but differs in that the essays are mandatory and are far less frequent than grade insurance.

notably, Samuel Donaldson in 2022 wrote about an assessment approach he uses in tax classes, giving a packet of five multiple-choice questions every two to three weeks, which he described as “grade insurance.”⁹² Notably, this approach is like mine in that students are “guarantee[d] . . . at least a certain minimum final grade no matter how poorly they perform on the other evaluative components of the course, though they still must complete those other components in order to pass the course.”⁹³ This approach encourages engagement throughout the semester, though less frequently. But the flip side is that completion does not insure against poor performance; the grade could be lowered below the “insurance” level if there were deficiencies based on other evaluative metrics.

Consider also Paul Wangerin’s 1993 article on alternative assessment in large doctrinal classes. Wangerin described a common feature of assessment in which an exam sets a “base grade,” and the instructor adjusts upward for fine performance in some metric. He reported his colleague Donald Beschle’s approach, in which students hand in short written submissions for the chance at an upward deviation. In this system, Beschle designed questions to be answered quickly and reviewed quickly. Most “crucial” to the scheme was that “no attempt” was made “to find fine distinctions” in student work; instead, Beschle used a four-level point system that permitted an initial assessment about degree of competence “without endlessly agonizing over the grades” at the margins.⁹⁴ Note, however, that this system didn’t align student agency and the incentive to study. Because the upward adjustment is not available to everyone, with only about “twenty percent of the students” receiving one, Wangerin concluded that because the other students perceive they are “unlikely to obtain an upgrade, the incentive to study strenuously on an interim basis is lost.”⁹⁵

III. Specifications Grading

Recall some of the lessons of contemporary learning theory and principles of adult learning. This research has shown that adults learn best when they are given the opportunity to take control of their own learning, when they can see its relevance, and when it is problem-based and experiential.⁹⁶ That grade insurance and specifications grading offer these features help align this approach with what contemporary learning theory suggests instructors do.

Burman, *supra* note 23.

92 Donaldson, *supra* note 1, at 424.

93 *Id.*

94 Wangerin, *supra* note 23, at 57 (“[M]ost teachers spend a large percentage of their overall grading time agonizing over the specific grades that they give [which] slows the grading and makes the whole process a dreaded experience. This is eliminated in Beschle’s system.”).

95 *Id.* at 59.

96 *See supra* Section II.A.

Giving students the opportunity to choose how they will learn the material may make their learning more effective.

As we'll see below, if implemented in a grade-insurance-style "specifications grading" approach, low-stakes formative assessments allow students to set their own learning objectives and self-sort by the amount of effort to achieve them. This part introduces specifications grading, then deploys autoethnographic methods to detail how I have implemented grade insurance in my doctrinal classes.

A. *Specifications grading as a potential solution*

Linda Nilson first framed and popularized this assessment approach in a book called *Specifications Grading*.⁹⁷ The main pitch is that instructors do not assign grades to individual work based on a spectrum of competency. Rather, instructors assess individual work based on whether it is completed to a given level of minimum competency.⁹⁸ For Nilson (and in my classes), that level is what the instructor considers B-level work, and expectations are clearly set out in advance.⁹⁹ In this model, "students receive credit toward their final grade based on the number of [assignments completed], and the specific [assignments] they complete at a satisfactory level by given due dates."¹⁰⁰

Educators in disciplines across the university have experimented with or adopted the model, generating a significant amount of literature on its use in assessment.¹⁰¹ This research suggests it can be an effective way to improve

97 See generally NILSON, *supra* note 20.

98 See *id.* at 56.

99 For pass-fail grading to be workable for the students and instructors, clear specifications must be given so students know what is expected of them and instructors have a rubric or standard of competency against which to judge their work. *Id.* at 57. The specifications for assignments do not need to be complex. Instead, specifications can instead be simple, easy to understand, easy to remember, and applicable for every assignment of the category. See *id.* at 58 (noting examples of specifications that include "the work must do what the directions state and be complete, must provide answers to all the questions, it must be at least a given number words, it must show a good faith effort, or all the problems must be at least set up and attempted").

100 NILSON, *supra* note 20, at 11 ("In other words, students earn higher grades by jumping more hurdles that show evidence of more learning, greater amount or breadth of knowledge or greater number of skills or jumping higher hurdles that show evidence of more advanced learning, or both.").

101 See, e.g., Junior Prof, *Why Specifications Grading Deserves an A*, INSIDE HIGHER ED (July 26, 2022), <https://www.insidehighered.com/advice/2022/07/27/specifications-grading-benefits-both-students-and-instructors-opinion>; Kate J. McKnelly, Michael A. Morris & Stephen A. Mang, *Redesigning a "Writing for Chemists" Course Using Specifications Grading*, 98 J. CHEM. EDUC. 1201 (2021); Dan S. Myers, *Designing Specifications Grading Systems*, 37 J. COMPUTING SCIS. COLLS., Oct. 2021, at 91; William J. Howitz, Kate J. McKnelly & Renée D. Link, *Developing and Implementing a Specifications Grading System in an Organic Chemistry Laboratory Course*, 98 J. CHEM. EDUC. 385 (2021); Peter A. Jones, *Implementing Specifications Grading in MPA Courses: A Potential Strategy for Better Work-Life Balance*, 26 J. PUB. AFFS. EDUC. 531 (2020); Sylvia Carlisle, *Simple Specifications Grading*, 30 PRIMUS 926 (2020); Paula Leslie & Erin Lundblom, *Specifications*

student learning and grades.¹⁰² The primary benefits of specifications grading, Nilson argues, are from encouraging deeper learning, and greater motivation, in several ways.¹⁰³

To begin, participating students are relatively freed from anxiety about final-exam performance, enabling them to engage with the material on its own terms. In addition, students have opportunities to demonstrate their mastery of course material by drawing upon different skills and learning objectives. Students demonstrate this through homework answers to the assigned problems that will be discussed in class. Additionally, because students focus on projects keyed to specific learning objectives, they may be better equipped to apply their knowledge in practice.¹⁰⁴

Specifications grading may also provide greater flexibility for instructors and students alike. Instructors can tailor their courses to meet specific learning objectives while also encouraging a sort of entrepreneurship as to the learning process, allowing students to select into the level of achievement that corresponds transparently with the grade they want to achieve. This autonomy can be especially beneficial for students who may not perform well under pressure or who need additional time or support to master course material.

The specifications grading method, in a law school class, may also result in students' engaging with course materials on a deeper level. Students are expected to perform competently, repeatedly, over the course of the semester, engaging with material across various doctrinal domains. This requires deep and sustained engagement with a broader range of material than a student might expect to engage with at the same level of depth during a three-hour issue-spotter exam or while preparing for finals.

Despite these benefits, there are some drawbacks associated with specifications grading as well. For example, some critics of low-stakes formative assessment might object that the approach does not adequately prepare students for the rigors of practice, since it does not replicate the high-stakes environment of a bar exam or court hearing.¹⁰⁵ There are many practices in which lawyers have a high-stakes, one-shot interaction like this. But in many

Grading: What It Is, and Lessons Learned, 41 SEMINARS SPEECH & LANGUAGE 298 (2020); Bethany Blackstone & Elizabeth Oldmixon, *Specifications Grading in Political Science*, 15 J. POL. SCI. EDUC. 191 (2019); Sarah G. Prescott, *Will Instructors Save Time Using a Specifications Grading System?*, 16 J. MICROBIOLOGY & BIOLOGY EDUC. 298 (2015).

102 See, e.g., Blackstone & Oldmixon, *supra* note 101; Jones, *supra* note 101.

103 According to Nilson, five major channels through which students find educational motivation are all present in specifications grading frameworks. NILSON, *supra* note 20 at 106-08.

104 By providing an incentive for students to try their hand at complex and cognitively taxing skills, like proposing specific changes to contractual language, students may achieve learning outcomes of greater complexity on Bloom's taxonomy of skills.

105 See Kissam, *supra* note 58, at 438 n.9, 453 (discussing how some believe that time pressure in exams is needed to replicate the pressure of practicing law).

types of practice, there are also opportunities for collaboration, revision, and growth. By making space for students to build skills in ways that are lower stakes and not time constrained, specifications-grading-style approaches may help simulate or prepare students for nonlitigation practices.

B. Grade insurance: Specifications grading in the law school classroom

What I call “grade insurance” is a way of assessing law students that implements the specifications grading framework. Students can choose how to be graded, typically from among bundles of options that may include a final exam, written homework, and projects or problem sets, as discussed below. Final course grades are determined by the highest score they achieve on any of the bundles. This is a *kind* of “specifications grading” because it involves the completion of one or more bundles of work and agency for students in deciding which bundles to complete.¹⁰⁶

I have used some form of grade insurance in Business Organizations, Corporate Finance, and Securities Regulation. The key feature is that it involves setting clear expectations for students ahead of time about what kind of work and how much effort it takes to get a certain grade.¹⁰⁷ Setting aside for now the final-exam bundle, students are told that a *minimum* course grade is associated with submitting a certain number of materials for credit, graded pass-fail. Higher grades come with submitting more material, for with volume comes demonstration of progress toward learning objectives.

Let me illustrate how grade insurance works with the example of Business Organizations, a large doctrinal class I have taught at Nebraska and Chicago-Kent, with enrollments ranging from around fifty to around ninety. Grade insurance tends to work best with casebook materials that have many good exercises, problems, and post-reading questions, as well-designed prompts can be easier to work with than starting from scratch.¹⁰⁸ Students’ nightly

106 I say it is a “kind” of specifications grading, perhaps a “hybrid” kind, because a final exam “bundle” typically will not be graded “pass-fail” in law school. I describe how I approach a final exam in Section III.B.2 below. Still, how a message is framed can have important implications for how audiences perceive new information and update their prior beliefs in response. For evidence with respect to the framing of grading policies, see Kelsey P. Moore & Adam S. Richards, *The Effects of Instructor Credibility, Grade Incentives, and Framing of a Technology Policy on Students’ Intent to Comply and Motivation to Learn*, 70 COMM’N STUD. 394 (2019). Grade insurance may imply agency, while specifications grading may imply authority. Cf. Joseph L. Chesebro & Matthew M. Martin, *Message Framing in the Classroom: The Relationship Between Message Frames and Student Perceptions of Instructor Power*, 27 COMM’N RES. REPS. 159 (May 2010). “Grade insurance,” more than “hybrid specifications grading,” promotes the vibe I want to encourage in my classroom.

107 All of this requires clear expectations with students at the outset. See also *supra* notes 99–03. From the syllabus to coverage of the high points in the first and second classes to a pre-class video, transparency is the key. What is this different kind of grading system? What are the expectations on length, on correctness, on deadlines, and the like? See generally Sophie M. Sparrow, *Describing the Ball: Improving Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1 (2004).

108 For the casebook used in this course, see WILLIAM SJOSTROM, BUSINESS ORGANIZATIONS: A

homework assignments involved a combination of reading and the exercises from the book, for which they would be responsible if called upon in class. As a matter of course delivery, I used a combination of lecture and “soft Socratic,”¹⁰⁹ mostly working through the hypotheticals and exercises that students have been assigned.

The specifications grading approach begins with clear expectations in the syllabus and the first class: Students can choose how to be graded, either solely based on their performance on the final exam, solely based upon their performance in written homework, or based on the higher of the two. Figure 1, adapted from my Business Organizations syllabus for spring 2024, explains how this works. Each row reflects the work in each bundle that is needed to get a particular grade; students receive the higher of the scores they achieve.

TRANSACTIONAL APPROACH (3d ed. 2019).

109 See Abigail Loftus DeBlasis & Elizabeth Adamo Usman, *Unrealized Potential: How Shifting the Focus to Student Learning Outcomes Could Reduce Law Student Distress*, 95 U. DET. MERCY L. REV. 179, 189 (2018) (describing “soft Socratic” as a method in which “students are still put ‘on the spot’ to answer questions in front of their classmates,” with the ambition of creating a “sufficiently rigorous” but “welcoming atmosphere”) (quoting Jacqueline Lipton, *Just Call me “Soft Socratic,”* THE FAC. LOUNGE (Nov. 14, 2009), <http://www.thefacultylounge.org/2009/11/just-call-me-soft-socratic.html>.)

Grade	Bundle 1		Bundle 2	
	Homework	Participation	Final-exam score (after adjustment)	Participation
A	<i>Not available in Bundle 1</i>		<i>f(x) parameters set so A ($\geq 93\%$) and A- ($\geq 90\%$) grades are assigned to top performers proportional to recommended curve</i>	✓
A-				
B+	≥ 22 of 25	✓	$\geq 85\%$	✓
B	≥ 20 of 25	✓	$\geq 80\%$	✓
B-	≥ 18 of 25	✓	$\geq 75\%$	✓
C+	≥ 15 of 25	✓	$\geq 70\%$	✓
C	≥ 11 of 25	✓	$\geq 65\%$	✓
C-	≥ 8 of 25	✓	$\geq 60\%$	✓
D+	≥ 6 of 25	✓	$\geq 55\%$	✓
D	≥ 3 of 25	✓	$\geq 50\%$	✓
F	< 3 of 25	—	$< 50\%$	—

Figure 1: Grading Bundles

1. Bundle 1: Grade insurance

The baseline metric for student achievement is a nightly written homework assignment. This enforces compliance against the soft expectation to prepare assigned hypotheticals. Importantly in a class like Business Organizations, Corporate Finance, or Securities Regulation, it permits students to engage in higher-level analysis and engagement with assigned contractual, regulatory, and other materials that are often heavily technical and complex. For these kinds of materials, having useful Socratic dialogue without advance preparation can be challenging. Left to decode novel, complex text in real time with our peers' eyes on us, many law students reasonably struggle with detecting nuance. (Many law professors too!)

One goal of written homework assignments across the skill set is to encourage routine, everyday practice of on-the-fly legal analysis and writing. Stakeholders in contact with recent law school graduates, like judges and other employers, have for years raised concerns about practice readiness,¹¹⁰ and in this respect every bit of varied practice helps. As a substantive matter some problems are attention checks; more frequently, they ask students to transfer what they have learned (such as about agency authority) to a new factual scenario, or to suggest edits to an LLC operating agreement, or to prepare to counsel a client incorporating a startup. This offers students an opportunity to practice important skills in the work of lawyers.¹¹¹

Each assignment includes an option to submit written answers through a learning management system. Assignments are set up so answers can't be submitted after the deadline, reflecting a syllabus rule that students most want to challenge and that I enforce most strictly as a result.¹¹² Submissions are graded against a rubric, shared with students, that focuses on good-faith engagement with the problem rather than strict correctness.

Remember that the benefit of specifications grading for students and faculty alike is in requiring a competent submission for the assignment—something around B-level work.¹¹³ However, having a competent submission that will receive credit does not mean that a student simply submits an assignment that is passing on the whole. Instead, a key feature of “specifications grading” is that there is no partial credit; the entire assignment is credited or not. So in a multiquestion assignment, students must answer such that all responses would receive a passing grade.¹¹⁴

Like Goldilocks testing the proverbial bears' porridge for temperature, I encourage them to write an answer that is not too long (treatise-like), not too short (leaving the reader to ask “where's the rest?”), but “just right.” Students should aim for an answer that a reasonable supervising attorney or client in

110 See, e.g., Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562, 582 (2015) (collecting reports of “critical challenges from various stakeholders” about law schools turning out insufficiently “practice-ready lawyers”).

111 See, e.g., Parker, *supra* note 69, at 566–67 (noting that under one approach to law school writing, “[t]o produce effective legal writing, students need to learn what effective legal writing is, and they need to write in the discipline—a lot—to really understand how it functions”).

112 See *supra* note 181.

113 On competence, see Judith Welch Wegner, *Contemplating Competence: Three Meditations*, 50 VAL. U. L. REV. 675 (2016).

114 Suppose for a two-hour Business Organizations class I've asked students to prepare reading and submit answers to about six or seven questions (a few sentences each), for between four and six hours of out-of-class work for the week's class. If students know they have to complete the whole assignment, and there is no partial credit, it heightens expectations. Instead of submitting an assignment with five well-answered responses and two that are highly unsatisfactory, students have to engage all in a satisfactory manner. They have to engage with harder (or more time-consuming) problems instead of simply skipping them or putting nominal effort into only the easy problems for partial credit.

the legal market might expect to receive from a law student at that level. Given appropriate illustrations, most students will perform to expectations. In my experience, the bulk of individualized assessment spent offering feedback and in-person advising is focused on the marginal students who are at or near the cutoff, such as because they have a mix of really great problem answers and one or two that were basically not addressed at all. Much of the effort comes in shepherding these students, encouraging them to keep up the good work and avoid losing motivation.¹¹⁵

Instructors also have many degrees of freedom in structuring assessments.¹¹⁶ An instructor might allow students to resubmit an assignment that was not given credit or permit late submissions, though I do not. Instructors likewise might vary in how many resubmissions to accept or limit them to certain times of the semester. Instead, I calibrate the numeric thresholds to account for some amount of unsatisfactory performance or “didn’t read the syllabus” misses in the first weeks before students get enough feedback from me to change course.

In the classes in which I have offered grade insurance, most students participate in some form or another. Students may prefer to sort themselves into the amount of work for which they have ambition and time to complete. That counsels in favor of multiple options, instead of just one. Once you know how many easy-to-grade assignments students have successfully completed, it’s straightforward to compute minimum grades at the end of the year.

Bundle 1 grade insurance is only one part of the equation. It is optional, and students don’t have to do it. The default expectation is that students will have to take the final exam and make a firm commitment before finals period starts to opt out and rely on just bundle 1 grade insurance.

2. Bundle 2: Projects and problem sets

In some classes, like Corporate Finance, I have offered other bundles besides homework and a final exam. For instance, several times in Corporate Finance I have offered a bundle of projects in the form of valuation problem sets, group projects about counseling a client about a preferred stock term sheet, and exercises revising a promissory note and redlining a contract from opposing counsel. These are graded satisfactory or not, and highest marks are available only to those who complete all the projects in addition to the homework.

115 Motivation is already a problem in traditional grading schemes, and removing the partial credit safety net might increase student performance. See NILSON, *supra* note 20, at 10, 47. From an assessment validity perspective, a related trouble is with preventing the *shepherd* from losing motivation. Cf. *infra* Section IV.B. In a large class for which I can have teaching assistants who have capacity and authority to review student work, they first review student submissions, flag them for compliance against the rubric’s expectations, and offer suggested comments. Then I come in to audit that work, review student submissions, assign grades, release or revise proposed comments, and do other cleanup assessment work. Doing this against a pass-fail rubric leaves the bulk of instructor time to the hard cases. (Or, wait, am I not the shepherd but the *sheepdog*?)

116 NILSON, *supra* note 20, at 72.

Bill Fisher introduced me to using real transactional documents procured from local lawyers. On his model, I engaged local counsel in Nebraska to prepare form deal documents and realistic scenarios for what a partner might expect of a first-year associate in revising a draft promissory note. This developed my sense of where to draw the line of “competence,” as my practice background was not in corporate finance but rather for the most part in an administrative and regulatory practice in securities law.

As for the group project, I have modeled this around a business school case study about a startup founder facing a decision about how to negotiate a Series A venture capital financing.¹¹⁷ I use Joan MacLeod Heminway’s model of a group oral midterm, asking students to play the role of associates advising me as the partner about negotiating points on the deal.¹¹⁸

3. Bundle 3: The high-stakes final exam

Grade insurance allows faculty to shift assessment time to earlier in the semester. All of that effort is relatively wasted if faculty must then construct other new assessments every year and undertake assessment labor after final exams are over. Accordingly, a traditional issue-spotter final exam seems inconsistent with the major benefits of grade insurance from a faculty perspective. For that reason, in *Business Associations*, the final exam involves fifty multiple-choice problems, in the style of the Uniform Bar Examination (UBE) questions.¹¹⁹ While the exam mostly focuses on testing domain knowledge, it also helps students practice the skill of approaching UBE-style multiple-choice questions. I set aside time in the semester to explicitly teach students how these questions are constructed and offer strategies for answering them.

In my experience, about half of students who participate in grade insurance decide to sit out the final exam. Very few take only the exam and do not participate in grade insurance, typically under 10%. Students who opt for the exam likewise do so with clear expectations, knowing how their relative performance on the final exam will translate into a score that is no lower than their grade insurance score. This may give students the sense that they are in control of the outcome. That distinguishes it from many curved or issue-spotter exams in which students have some control over their performance and the outcome but are ultimately at mercy of how other students perform and judgment calls by the instructor.

117 See, e.g., Susan Chaplinsky, *OptiGuard, Inc.: Series A-Round Term Sheet*, Darden Case No. UVA-F-1798 (Aug. 4, 2017), <https://ssrn.com/abstract=3010600>.

118 Joan MacLeod Heminway, *Teaching Business Associations with Group Oral Midterms: Benefits and Drawbacks*, 59 ST. LOUIS U. L.J. 863 (2014).

119 It is hard to write fifty multiple-choice problems that are valid assessments each year, which raises the stakes of test integrity. See Howard J. Gensler, *Valid Objective Test Construction*, 60 ST. JOHN’S L. REV. 288 (1986). Multiple-choice problems must be tested, bad distractors eliminated or revised, stems altered, etc., based on classical test theory (item difficulty and item discrimination) or item-response theory—and all of this done for both actual test questions and practice questions. For discussion of multiple-choice assessments, see Greg Sergienko, *New Modes of Assessment*, 38 SAN DIEGO L. REV. 463, 491 (2001).

4. Reflections on specifications grading in law school

My experience with grade insurance suggests important possibilities and limitations with this approach.

To begin with positives, students anecdotally like the autonomy and transparency about expectations that grade insurance offers. They report the benefits from hedging their downside risk on the final, as well as from engaging deeply with the material throughout the semester. From an adult learning perspective, too, grade insurance helps students engage in critical self-reflection as we work through different approaches to answers and problems in class, where they can see how their answer differs from others'. Setting expectations for students early and often helps students work to self-regulate how they are approaching their written submissions and engaging in the co-creation of their education.

An additional benefit from a student perspective is that the additional work that goes into grade insurance assessments translates into *more certainty over achievement of a higher grade*. In practice, as almost all students participate in grade insurance to some extent, instructors may end up doling out a lot of fairly high grades.¹²⁰ In my experience, where there is an option to skip the final exam, typically about half of students are happy to do so and walk away with a B or B+ for submitting passable nightly homework throughout the semester.¹²¹

Specifications grading calls for students to complete more assignments, harder ones, or both for higher grades—and for setting clear expectations about how to sort into clear level of effort based on level of ambition. I try to calibrate the numbers to where the cutoffs should ultimately reflect achievement of learning outcomes. But if students have demonstrably achieved what I clearly expect for a B+, it is not grade inflation to assign them a grade commensurate with their achievement of those learning objectives. It does tie the issue of grade inflation together with the framing and assessment of learning outcomes, but that is another matter.¹²²

Where a school's resources permit, relying on teaching assistants allows delegation of some of the more time-intensive rubric-screening tasks.¹²³ It does not solve entirely the problem of difficult assessment but rather pushes it to the margins. As long as students are really doing quality work—and most will—instructors largely do not have to worry about the quality of the median assignment. That is because assignments are graded based on good-

¹²⁰ I am now unburdened by a mandatory curve or median, so this autonomy works in context. See *infra* Section II.C.1.

¹²¹ Those who sit for the final include the students who have simply hedged poor performance and students who have not participated in bundle 1 grade insurance.

¹²² See *infra* Section II.C.1.

¹²³ Duhart, *supra* note 42, at 513–14, 523 n.118; Christopher, *supra* note 6, at 58 (“If the assessment is sufficiently straightforward, teaching assistants can provide feedback directly to students. Teaching assistants can also be used to screen student work product, passing along to the professor only those papers that need attention.”).

faith engagement and progress toward achievement of learning outcomes, not solely on correctness or competency. The achievement comes in quantity over time.

The main difficulty, then, is with the student whose submissions are on the margin. Assessing this sort of performance is no less emotionally or intellectually laborious than trying to parse fine gradations. But grade insurance may help minimize the volume of this kind of parsing. As achievement comes in quantity, students reveal high-dimensional, high-resolution data about their performance over time.

On a given assignment, the concern is whether a student on the margin is engaging with the problem. Reasonable instructors could come out on different sides of that line. My own view is that grade insurance is for those who want to put in the work, and there is a fairly coarse line between a student who puts in the work and a student who fires off a quick draft minutes before the deadline. There remain some line-drawing problems, but because the threshold is lower, the overall method of assessment is easier to carry out.

The flip side is that with early intervention, instructors can be clear to students about what they are looking for—and what students need to do to perform consistent with instructors' expectations after early failed attempts. Typically, the problem is that students do not engage: failing to answer the call of the question; omitting key legal analysis; or not identifying the legal, policy, or economic principles applicable to the problem. Some write too little. Others write too much and say nothing. Direct, early formative feedback of this kind will tend to be a sweet enough carrot for students to turn around their approach.

For professors, where to draw the line on a particular grade insurance assignment is both easier and less critical than where to do so on an exam.¹²⁴ There is a smaller amount of information and it is more targeted in each answer. There is also only one line to draw—competent or not—rather than the parsing of fine gradations of achievement. This creates a finer-grained resolution of students' achievement, because it permits them to show achievement across time, in various contexts, after opportunities to correct course, and in enough volume to permit differentiation and sorting.

C. Objections to grade insurance

Before turning to implications of grade insurance for students, faculty, schools, and the like, this subpart addresses four objections related to (1) the concern that grade insurance results in grade inflation, (2) the legacy of contract grading, (3) the risk that generative artificial intelligence (like ChatGPT) poses for academic integrity in this assessment method, and (4) the promises and drawbacks of gamifying educational experiences.

124 See also *infra* notes 130, 174–78.

1. Grade inflation and the mandatory curve

Grade insurance raises long-standing concerns about grade inflation. Cross-sectional evidence shows that grades have risen over time.¹²⁵ Faculty, administrators, and others have long bemoaned this trend. So a natural objection to grade insurance and specifications grading is that it results in higher grades—a sure sign of grade inflation.¹²⁶ If students have a clear path under grade insurance to receiving an A in the class, shouldn't we expect most students—if not all of them—to aim for that level of achievement? Perhaps those of us who ended up as faculty were intrinsically motivated to do so. But in my view, there are three reasonable grounds to think that grade insurance does not result in grade *inflation*.¹²⁷

The first grounds for thinking so is definitional. Grade inflation “describe[s] an upward shift in the grade point average (GPA) of students over an extended period of time.”¹²⁸ In its critical use, there is also typically a sense in which the upward shift is unmerited.¹²⁹ But that does not encompass practices of awarding high grades commensurate with high achievement of learning outcomes. If grades are appropriately calibrated to reflect achievement of learning outcomes, and students are demonstrating achievement of those outcomes, then students ought to get the benefit of that achievement.¹³⁰

125 Stuart Rojstaczer & Christopher Healy, *Where A is Ordinary: The Evolution of American College and University Grading, 1940–2009*, 114 *TCHRS. COLL. REC.* 1 (2012). As Nilson has pointed out, “problems of grade inflation and sinking academic performance standards . . . developed out of various changes in the academy and the broader society.” NILSON, *supra* note 20, at 6.

126 NILSON, *supra* note 20, at 73 (“If students know what they have to do to get an A, won’t all of them aim for and get an A in the course, creating even more grade inflation than we already have? As a result, won’t administrators raise their eyebrows at higher average course GPAs and accuse faculty of pandering to student pressure for higher grades?”).

127 See, e.g., *id.* at 75. I don’t purport to answer this question for all instructors in all situations and for all time.

128 Louis Goldman, *The Betrayal of the Gatekeepers: Grade Inflation*, 37 *J. GEN. EDUC.* 97, 98 (1985).

129 Perhaps against my expectations, students tell me that the overall requirements of grade insurance and my final exams in particular give me a reputation as a hard grader.

130 This does raise the stakes of calibrating the thresholds for competency-based award of credit at a high-enough level. Of course, faculty remain in control; we can adjust the threshold for getting credit on a particular assignment. Instructors, not the students, set the course expectations and what is a passing assignment. NILSON, *supra* note 20, at 75. As such, they do not have to reward performances below what they expect, and if they feel the course’s grades are too high (possibly because that is what administration told them or the instructor feels the work put in by the students does not deserve the grades they are getting) then the instructor has the ability to raise the expectations the next term the course is taught. *Id.* You want to be able to have students demonstrate achievement of learning outcomes, not just going through the ropes. With this in mind, there are two main ways an instructor may heighten the standards from one term to the next. First, an instructor may simply increase the number of assignments (creating “more hurdles”) to obtain certain grades, resulting in more work for the students, which makes it less likely a large number will shoot for, or obtain, high grades. Second, the professor may make “higher hurdles.” This requires students to “demonstrate[e] higher order cognitive skills, higher levels of cognitive development or

Second, not all will reach for the brass ring.¹³¹ Though perhaps more so than the typical college student, the typical law student may not have ambition to match the effort to get top grades in *every* law school class. The time demand for an A- or above in grade insurance can be calibrated relatively high. So a few students will have an ambition for only above passing; in my experience, upwards of 90% of students put in for a B+, with about half of the class resting on their grade insurance achievement and another half opting for the final-exam bundle. Half of my students are happy to take a surefire B+ and skip the final, opting to skip the effort needed to get a top score on a hard final once already having a B+.¹³² We have competing interests and demands on our time and attention. In deciding between options, most of us are satisficers; happiness is learning to settle.¹³³ This optionality allows students to get some certainty over their studies by time-shifting earlier in the semester, allowing them to manage the work-leisure tradeoff a bit more humanely during finals period.¹³⁴

Third, there is the matter of rigor and preparing students for the difficulties of practice. An important part of identity development among law students is appreciating that the easy solution may not suffice to achieve a client's interests. Struggle is therefore an important part of learning the skills necessary to succeed in law school and legal practice.¹³⁵ But anecdotal evidence suggests that grade insurance does not make law school easier.

Aside from these three responses to the grade inflation critique, the practical challenge for many readers may be meeting grade curve requirements.¹³⁶ Recall

higher levels of problem solving thought in a piece of written work," to obtain a satisfactory grade for their assignment. Either of these means of heightening standards would likely correspond to lower grades, as fewer students were able, or had the desire, to be at the top. *Id.* at 25.

131 Cf. SNEAKERS (Universal Pictures 1992) (Robert Redford as Martin Bishop: "This is the brass ring. Haven't you got any bigger thoughts?").

132 See NILSON, *supra* note 20, at 75.

133 See Barry Schwartz, Andrew Ward, John Monterosso, Sonja Lyubomirsky, Katherine White & Darrin R. Lehman, *Maximizing Versus Satisficing: Happiness is a Matter of Choice*, 83 J. PERSONALITY & SOC. PSYCH. 1178 (2002).

134 See *supra* text accompanying note 121.

135 "Far be it from me to advocate law school being easy." Johnson, *supra* note 13, at 46 ("Should law students struggle? Yes, I agree with that But there is nonetheless a matter of choosing your battles [S]tudents should struggle to apply old doctrine to new factual contexts; they should struggle to form persuasive legal arguments; they should struggle to write clear, concise analyses of complex subject matter."); see also Christopher, *supra* note 6, at 40.

136 I think one could structure grade insurance so the "promised" grade would be the mandatory median grade, and students would probably still take the deal (though perhaps more would opt just for the exam bundle). I am less sure about a mandatory mean. In the one context in which I faced a mandatory average score—a remote section of Securities Regulation at Rutgers—I made short weekly submissions on the LMS a fraction of the overall score, with no optionality or insurance component.

from Part II.B.5 that in both Donaldson's and Beschle's grade insurance systems students couldn't get certainty over whether their effort would translate to an actual minimum grade, because it ultimately depended on where they ended up on the curve. In my experience, grade insurance can be most successfully implemented in environments in which the instructor is not constrained by a mandatory curve. I assign many B+ grades but adhere to the recommended curve for A's and A-'s. At many schools, grade distributions are designed to prevent significant and unjustified variation among courses, which has been the subject of a large scholarly debate about the desirability of grade normalization.¹³⁷ If the grade normalization debate is about "equalizing and standardizing the pot of grade wealth that each teacher allocates,"¹³⁸ the normative question in my view is about the ways in which variation is unjustified.

Grade insurance contributes to this debate by suggesting ways of implementing more humane modes of assessment overall while attending more to the right tail of the curve than to its entire distribution.¹³⁹ In this respect, grade insurance may have its most notable effects not on mean or median scores but on the higher statistical moments like variance and skewness. For instance, a typical class might have its grades roughly normally distributed,

¹³⁷ See, e.g., Kissam, *supra* note 58, at 489–90 (noting that “grades . . . are not determined by reference to external standards . . . but instead . . . by the relationships between the ‘points’ earned” across all the students’ work). For entries in the debate, see Joshua M. Silverstein, *A Case for Grade Inflation in Legal Education*, 47 U.S.F. L. REV. 487 (2013); Joshua M. Silverstein, *In Defense of Mandatory Curves*, 34 U. ARK. LITTLE ROCK L. REV. 253 (2012); Deborah Waire Post, *Power and the Morality of Grading—A Case Study and a Few Critical Thoughts on Grade Normalization*, 65 UMKC L. REV. 777 (1997); Robert C. Downs & Nancy Levit, *If It Can't Be Lake Woebegone . . . A Nationwide Survey of Law School Grading and Grade Normalization Practices*, 65 UMKC L. REV. 819 (1997).

¹³⁸ Silverstein, *supra* note 137, at 512.

¹³⁹ Compare Business Organizations at Chicago-Kent, for which there is a recommended but not required curve. Almost all students participate and get a minimum grade of B+ or B. About half the class takes the exam, raising questions about how to allocate A and A- grades (as well as grades for those who did not do grade insurance). As I told students in my spring 2024 section, I adjust all raw scores upward so that the top scores receive A's (exam score $\geq 93\%$) and A-'s ($\geq 90\%$) in the same individual and cumulative proportions as recommended by the school's curve, which can be summed up as “no more than 30% A or A-.” Everyone's exam bundle grades are adjusted relative to that goal. How much a student's exam grade is adjusted up depends on how the top-scoring students performed, and where the student fell relatively among the grade distribution. Noninsured grades below A- are assigned based on where the adjusted grades fall on the usual point cutoffs (so an adjusted 84% would be a B). I assign adjusted scores with the formula $f(x)=100^{(1-a)} * x^a$, where x is the exam score out of 100, and $0 < a < 1$. This “root function curve” or “Texas curve” applies no adjustment to students with a score of 0 or 50 and gives a bigger boost to students with lower scores. Once raw exam scores are in, I select a value of a so the top-performing students' upward-adjusted exam scores fall in proportion to the curve's targets described above. The most common form in education assigns $a=1/2$, which here would be $f(x)=10\sqrt{x}$. See David Richeson, *How to Curve an Exam and Assign Grades*, DIVISION BY ZERO (Dec. 22, 2008), <https://divisbyzero.com/2008/12/22/how-to-curve-an-exam-and-assign-grades/>.

while a grade insurance class might have grades with a lower degree of variance and some skewness around the “insurance” grade.¹⁴⁰

2. Grading contracts

Another prospective concern is that grade insurance is too much like contract grading, an older approach to assessment that has come under significant scrutiny over the years. Contract grading is an alternative method that arose in the 1960s as an alternative to traditional grading methods.¹⁴¹ Contract grading is a privately ordered arrangement “whereby the instructor defines the performance required for each grade, the student defines the performance level to which he will work, and signs a contract in which the instructor is committed to awarding this predetermined grade if the student attains the appropriate performance level.”¹⁴² Some instructors may also consider participation or attendance, or guarantee a minimum grade while reserving the highest grades for top performers.¹⁴³ In addition, some critical pedagogy scholars have suggested an extension known as “labor-based grading contracts,” which focuses on process over product.¹⁴⁴

140 Statistical data compiled in connection with my committee service at Nebraska, examining the distribution of grades awarded in each class between 2015 and 2022, permits this kind of comparison of my grading patterns with my colleagues’. My grade distributions were “left-” or “negative-” skewed relative to my colleagues’ distributions: about the same proportion of A’s and A-’s, a higher proportion of B+’s, lower B’s, and much lower below that—just as you might expect grade insurance to produce. See James Fallows Tierney, Supplemental Report on Learning Outcomes, University of Nebraska College of Law (May 12, 2023) (unpublished manuscript) (on file with author); cf. Silverstein, *supra* note 137 (arguing that law schools should focus on grades in the range down to B-, but that below this the effect in promoting rigor is outweighed by job-market costs to students).

141 See HUGH TAYLOR, *CONTRACTS GRADING* 5-6 (1980); Clarice Stasz, *Contract Menu Grading*, 4 *TEACHING SOCIO.* 49 (1976).

142 TAYLOR, *supra* note 141, at 6 (quoting Ann Harvey, *Student Contracts—a Break in the Grading Game.*, 12 *EDUC. CAN.* 40, 42 (1972)). For example, an instructor may set forth a list of assignments at the beginning of a term and guarantee students a particular grade for completing a certain number of assignments (or particular assignments, in addition to other optional assignments). *Id.* at 7. Another way an instructor may choose to format contract grading is to assign a certain amount of points to each assignment (possibly based on difficulty or the amount of time required to complete the assignment) and aggregate points at the end of a term, with particular point totals corresponding to different grades. *Id.* at 7-8. An instructor may also require that the student achieve minimum grades (on a traditional A through F scale) for each assignment in order for the student to receive the desired end-of-term grade. Cathy Spidell & William H. Thelin, *Not Ready To Let Go: A Study of Resistance to Grading Contracts*, 34 *COMPOSITION STUD.* 35, 60 (2006).

143 See, e.g., Erica J. Marti, *The Return of Labor-Based Grading Contracts*, 2022 UNLV BEST TEACHING PRACTICES EXPO 17, https://digitalscholarship.unlv.edu/btp_expo/172 (participation or attendance); Diane Kelly-Riley & Carl Whithaus, *Editors Introduction: JWA Special Issue on Contract Grading*, 13 *J. WRITING ASSESSMENT*, no. 2, 2020, at 1, 1 (minimum grade).

144 Labor-based grading contract systems focus more on the effort and engagement students put into their work than on the quality of the end product. For instance, students might be assessed on the number of drafts written, thoroughness of engagement with peer review, or regularity in class participation. Asao Inoue, a radical composition instructor known for

Contract grading has some of the same benefits as grade insurance. But assessment scholars have identified several criticisms of contract grading.¹⁴⁵ To begin, because it is not the standard grading mechanism in many classrooms, students may feel anxious and uncertain about how a grading contract will be implemented.¹⁴⁶ There may also be equity concerns: Because grading contracts are individually tailored, students may feel that this approach allows other students to receive grades that they otherwise would not have been capable of.¹⁴⁷ A final concern relates to the extent of private ordering over grading contracts: Students may treat contracts as less negotiable than they may in fact be, resulting in a contract that is effectively an adhesion contract even if it could have been negotiated.¹⁴⁸ This may leave students unhappy with a

scholarship work on this grading system, argues that labor-based grading contracts can promote inclusivity, equity, and social justice in education. The starting point for Inoue's critique is the role traditional grading plays in perpetuating inequality and bias, especially against students from marginalized and minoritized backgrounds, who may be at a disadvantage if they do not use in their daily lives the particular (typically Eurocentric) form of English that is typically valued in college writing courses. The idea is that by focusing on process, not end product, instructors can reduce the risk of bias associated with evaluating the product. See generally ASAO B. INOUE, LABOR-BASED GRADING CONTRACTS: BUILDING EQUITY AND INCLUSION IN THE COMPASSIONATE WRITING CLASSROOM (2019); see also, e.g., Kathleen Kryger & Griffin X. Zimmerman, *Neurodivergence and Intersectionality in Labor-Based Grading Contracts*, 13 J. WRITING ASSESSMENT, no. 2, 2020, at 1. While the radical underpinnings of this grading model present an interesting alternative to traditional grading systems and may be promising in college writing courses, the traditionalism of the legal profession and the sticky expectations of legal readers means that application of this assessment practice in the law school classroom is unlikely to be viable in the short term.

- 145 See, e.g., Virginia M. Schwarz, (De)Norming Classroom Merit: Grading Contracts as an Assessment Genre (Aug. 3, 2020) (Ph.D. dissertation, University of Wisconsin-Madison), <https://www.proquest.com/docview/2441241897?pq-origsite=gscholar&fromopenview=true>; Michelle Cowan, *A Legacy of Grading Contracts for Composition*, 13 J. WRITING ASSESSMENT, no. 2, 2020, at 1, 2-3, 8 (noting that grading contracts may focus on completion rather than quality, and that quality of work is divorced from final grades).
- 146 See, e.g., Spidell & Thelin, *supra* note 142, at 40-41 (noting that students may also feel as though they “never knew where they stood . . . in terms of their grades,” even if there are ample avenues for them to determine whether they are on track for their desired grade). Some may also dislike shifting some responsibility for education from instructor to student. *Id.* at 42; see also *infra* note 173.
- 147 See, e.g., Spidell & Thelin, *supra* note 142, at 44. This perception comes from high performing students feeling that students who contract for a higher grade are putting in disproportionately more work than students who have contracted for a lower grade. The higher-performing students feel as though people who contract for lower grades are allowed to essentially coast to their grade and in some cases just pass the class because the contract is in place. This is compounded by the fact students feel the contracts make receiving a top grade in a class more difficult than it otherwise would be, even if the grade distribution falls within an institution's typical grade distribution. *Id.* at 44-45, 48-49.
- 148 Grading contracts may well be negotiable as to requirements and expectations, even to such an extent that students have more bargaining power than they typically would have elsewhere in their education. Yet students may underconsume this aspect of the assessment approach, so a contract that might have been presented to them as a first draft—a starting point for negotiations—may well be what the student ends up with. See *id.* at 45-46. Even

contract that they had the power to change.¹⁴⁹ These and other criticisms—especially surrounding grade inflation—have led many instructors to shy away from the approach.

Grade insurance (and specifications grading more broadly) is not contract grading, however. That's so even though the one borrows and employs from the other the offer of a specific grade in exchange for performance commensurate with a predetermined target of competency.¹⁵⁰ Nilson suggests that features of specifications grading blunt some of the more enduring criticisms of grading contracts. For instance, unlike in a grading contract, under grade insurance the student doesn't have to precommit to pursuing a particular grade, and the instructor may well have no idea about the student's ambition.¹⁵¹ And the grade insurance arrangement is not negotiated: Instructors have unilateral authority to create the menu of assignments to be completed and the quality that justifies satisfactory completion.¹⁵² Specifications grading may also raise academic standards relative to grading contracts, as assignments must surpass the instructor's chosen level of quality to receive credit.¹⁵³

3. Generative AI

Many observers are optimistic about the potential for generative artificial intelligence (AI) like ChatGPT to transform aspects of the practice of law like drafting legal documents.¹⁵⁴ It also suggests possibilities for formative assessment in legal education, such as providing interactive spaces where students engage with AI to produce, analyze, and revise legal texts like demand letters, simple agreements, and the like.

From an instructional perspective, students' increasing reliance on AI also presents at least three clear challenges in maintaining pedagogical integrity

though they know they are not completely happy with the contract, they may lack the knowledge or imagination to negotiate something better for them and their fellow students. *Id.* at 47. On the terms that will be offered, compare Russell B. Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (noting a contract drafter's incentive to select drafter-favoring terms when they are not salient to the opposite party), with James Fallows Tierney, *Contract Design in the Shadow of Regulation*, 98 NEB. L. REV. 874 (2020) (drafter may select nonsalient contract terms favorable to *opposite party* if they are salient to a regulator concerned with contract term quality).

149 See Spidell & Thelin, *supra* note 142, at 47.

150 See NILSON, *supra* note 20, at 74.

151 See *id.* (noting that the student knows the grade being pursued and that satisfactory completion of the prescribed work will result in receiving the grade).

152 See *id.* (observing that instructors then grade the assignments pass-fail based on whether or not the student's submission complied with the instructor's standards).

153 See *id.*

154 I would thank ChatGPT for useful comments on these points, but even GPT-4's comments were not that nuanced.

and assessment validity.¹⁵⁵ First, AI could be misused to complete assessments, undermining the validity of formative feedback and the learning process. It may well be impossible to police, and efforts to do so will continue to push in the direction of more surveillance and scrutiny for how students engage with their work product. Second, and related, there are many problems with the misuse of AI, like lawyers filing AI-generated court briefs with nonexistent citations, that are partly a problem of professional ethics and partly a problem of the need for critical AI literacy.¹⁵⁶ Generative large language models like ChatGPT do not “know” facts about the world that can be queried in the way that a natural-language search engine might; instead, they generate plausible-sounding text based on statistical what’s-the-likely-next-word models of language.¹⁵⁷ This illustrates the limits of their usefulness. Finally, many educators are reasonably skeptical of technological developments that promise to replace our and our students’ labor.¹⁵⁸

The unlikelihood that AI will go away raises the stakes for incorporating instruction on engagement with AI—emphasizing the role of human supervision, domain expertise, and ethics.¹⁵⁹ Contemporary and critical approaches to learning theory might encourage us to consider the implications of AI reliance on student learning and the practice of law. To address the

155 See Jonathan H. Choi, Kristin E. Hickman, Amy B. Monahan & Daniel Schwarcz, *ChatGPT Goes to Law School*, 71 J. LEGAL EDUC. 387, 396 (2022) (“In an era in which remote exam administration has become the norm and absent restrictions on ChatGPT’s use, this could hypothetically result in a struggling law student using ChatGPT to earn a J.D. that does not reflect her abilities or readiness to practice law.”).

156 For one example of lawyer misconduct in filing ChatGPT-drafted briefs, see *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023); see also Roy Strom, *Fake ChatGPT Cases Cost Lawyers \$5,000 Plus Embarrassment*, BLOOMBERG LAW (June 22, 2023), <https://news.bloomberglaw.com/business-and-practice/fake-chatgpt-cases-costs-lawyers-5-000-plus-embarrassment>; Benjamin Weiser, *Here’s What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES (May 27, 2023), <https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html>.

157 An LLM takes a sequence of words and “predict[s] the likely possibilities for the word which comes next” based on training data. “For instance, given the input ‘It’s time to go to the _____,’ GPT might predict that some likely choices for the next word are ‘store,’ ‘office,’ or ‘movies.’” Steve Newman, *An Intuitive Explanation of Large Language Models*, AM I STRONGER YET (Apr. 25, 2023), <https://amistrongeryet.substack.com/p/large-language-models-explained>.

158 See, e.g., BRIAN MERCHANT, BLOOD IN THE MACHINE: THE ORIGINS OF THE REBELLION AGAINST BIG TECH 316, 406-12 (2023) (arguing from history that “automation and workplace technology often don’t result in less work, but more diffuse, precarious, and lower-paying or less-protected work”).

159 Key components of legal education include the development of critical thinking, legal analysis, or ethical judgment skills. Students could learn to scrutinize AI outputs, discerning validity and reliability. Formative assessments could involve evaluating AI-produced legal arguments, allowing students to work on critical reading and appraisal skills. See, e.g., *Teaching with ChatGPT: Assignment Design Tips & Ideas*, MONTCLAIR ST. UNIV.: OFF. FOR FAC. EXCELLENCE, <https://www.montclair.edu/faculty-excellence/teaching-resources/clear-course-design/practical-responses-to-chat-gpt/teaching-with-chatgpt-assignment-design-tips-ideas/>.

concerns described above about assessment integrity, for instance, instructors might ask students to outline their AI interaction process—showcasing their thought process, judgment, and final decision-making.¹⁶⁰

Grade insurance specifically may offer a partial solution. It reduces an individual homework assignment's weight and thus the marginal benefit of trying to land in the left tail of the grade distribution by cheating. Scores can also be calibrated by drawing on principles of deterrence under which people are concerned with likelihood of detection and enforcement, and thus with the expectation value of being sanctioned.¹⁶¹ Student submissions copy-pasted from ChatGPT can sometimes be detected from its signature outputs,¹⁶² but more nuanced use of generative AI may well be undetectable. I have experimented with deterring the most flagrant misuse of generative AI by increasing the sanctions conditional on detection. For instance, my syllabus policy on generative AI says students receive a negative point for submitting characteristically AI-generated work. Receiving -1 instead of 1 means not only do students miss the point for that class's homework, they also have another class's credit offset, too. This may not be optimal, but so far it means fewer obviously AI-generated homework answers. The stakes are high for finding a balance between assessment integrity and the other virtues discussed in this article.

4. Grade insurance and the gamification of education

The concept of gamification has come under increasing attention for its potential to increase engagement and motivation, both of which are essential to learning. The optimistic take is that gamified learning, when combined with formative assessment and grade insurance, could create a transformative educational experience.¹⁶³ Gamified learning, with its elements of challenge, competition, and reward, can potentially motivate students to engage deeply

160 See, e.g., Jonathan Cardoso-Silva, *How Should We Use AI in Higher Education?*, LSE PLAYER (June 14, 2023), <https://www2.lse.ac.uk/lse-player?id=12ee122f-d7c3-4201-96d0-9b9d21dc35d5>.

161 See, e.g., James Fallows Tierney, *Reconsidering Securities Industry Bars*, 29 STAN. J.L. BUS. & FIN. 134, 182 (2024) (“We weight future states of the world by their likelihood, so this theory suggests that the expected future cost of a sanction should exceed expected benefits if deterrence is to be successful.”).

162 Cf. Josie Tutty, *Four Telltale Signs ChatGPT Wrote Your Opinion Piece*, MUMBRELLA (Dec. 12, 2023), <https://mumbrella.com.au/four-telltale-signs-chatgpt-wrote-your-opinion-piece-805201>.

163 See Jihoon Kim & Darla M. Castelli, *Effects of Gamification on Behavioral Change in Education: A Meta-Analysis*, 18 INT’L J. ENV’T RSCH. & PUB. HEALTH 2550 (2021) (reporting meta-analysis evidence “that short-term over long-term gamified interventions might be a promising way to initiate changes in learner’s behaviors and improve learning outcomes,” and that “effects were higher with adults in higher education . . . than K-12 students”); see also, e.g., Gregory Garvey, *Ungrading, Grading Contracts, Gamification, and Game-Based Learning*, in ACTIVE LEARNING (Delfin Ortega-Sánchez ed., 2022); Jarrod Kelly, *Level Up: Using Gamification to Improve Student Evaluation and Motivation* (Feb. 4, 2020) (working paper), <https://doi.org/10.33774/apsa-2020-ocxhs>; Daniel M. Ferguson, *The Gamification of Legal Education: Why Games Transcend the Langdellian Model and How They Can Revolutionize Law School*, 19 CHAPMAN L. REV. 629 (2016).

with course material. By offering incentives—whether these are points, badges, or increased grades—gamified assessments can stimulate students’ participation and investment in their learning. The difficulty is that it is hard to design and implement tools that increase intrinsic motivation rather than simply incentivize performance. If the primary focus is on earning points, learning may become instrumentalized, with students merely striving to win rather than engage with the material.¹⁶⁴

My own view, informed by my doctrinal scholarship on the use of gamified technologies in stock trading apps for ordinary people, is that we should be cautious about gamifying formative assessments for its own sake.¹⁶⁵ Critical and adult-oriented learning approaches might encourage us to look beyond the surface appeal of games to think about the kinds of learning experiences being created. How are students being encouraged to think, question, and engage? Are these experiences promoting an understanding of legal practice that is transformative, or are they merely reproducing existing power structures? Are students ultimately reaching the same kind of learning outcomes as in other classes, but—to quote one student—now with busywork?

Taken together, this means there’s an instructional design challenge in making learning an intrinsically rewarding experience rather than a means to earn points. Ideally, rather than the points toward a B+, the reward of grade insurance will be the better learning experience along with the peace of mind that comes with hedging against a costly loss on the final.

IV. Implications for Androgogy and Achievement of Learning Outcomes

This final part discusses implications of grade insurance for students, faculty, schools, legal practice, and critical approaches to legal education.

A. Implications for students

Grade insurance has many benefits that make it an attractive option for law students as adult learners. Because adult learners may be more motivated and may learn better when given the opportunity to demonstrate their knowledge in a challenging but low-stakes environment, grade insurance’s benefits are mainly related to giving law students more control over their learning. As this subpart discusses, grade insurance is designed to (1) give students agency over their education, (2) give them a safety net to hedge against poor performance, (3) encourage sustained engagement with the course material throughout the semester, and (4) promote self-efficacy in learning.

¹⁶⁴ See, e.g., James Fallows Tierney, *Investment Games*, 72 DUKE L.J. 353, 407 (2022) (“Superficial gamification, focusing primarily on easy-to-implement extrinsic rewards and incentives, does not build engagement and motivation in the long term; those effects tend to dissipate once the extrinsic rewards are taken away.”).

¹⁶⁵ See *id.* at 407 n.215 (“Replicating that same kind of intrinsic motivation in the educational context is not a matter of adding badges and notifications to facilitate disclosure but building disclosure and information into a framework that provides a kind of intrinsic challenge, offers feedback, and encourages support and growth.”).

First, grade insurance promotes student agency. It allows students to tailor their coursework to their preferred approaches to learning, to their level of ambition, and to the other aspects of their lives. This type of environment can lead to deeper learning, as learners are able to explore the material in a way that is most meaningful to them. It also gives them flexibility to decide how much to invest in the course, along with certainty over the course grade to expect for going along with a chosen amount of effort. Some may prefer to submit nightly homework and skip a final exam. Students with other commitments through the semester can opt simply to take the final, focusing efforts on preparing for that. Or, if they know they will be satisfied with a B or B+, students can time-shift their efforts earlier in the semester and skip the final exam. This flexibility may reduce stress and anxiety, as students are not forced to conform to a single assessment method.¹⁶⁶ It allows for a more individualized and differentiated approach to learning, as students would be able to progress at their own pace and focus on the areas that they find most challenging.

Second, grade insurance is literally a kind of insurance: It provides students a safety net in case of poor performance on the final exam.¹⁶⁷ From a within-class perspective, students who have done well through the semester and submitted the required amount of work can still secure a high grade, even if they do poorly on the final.¹⁶⁸ That many of the “bundles” of work are graded pass-fail may also reduce stress and anxiety about grading, which can be a major barrier to learning. So from the student perspective, grade insurance may be beneficial primarily through the channel of reducing grade anxiety and toxic hustle culture in law schools. If students know that they have a safety net in place in case they do not do well on the final exam, they will be less likely to feel overwhelmed. And more generally, when people are less worried about the downside risk of some uncertain future event, they may be cognitively freed to focus on other things.¹⁶⁹ This, too, may promote learning.

Third, grade insurance encourages students to be engaged with the material throughout the semester. Students who know their minimum grade will be based on satisfactory completion of assignment bundles will be

166 This degree of agency is a function of variance in difficulty among assignments (or bundles of assignments). Students may be able to challenge themselves by attempting harder assignments or instead focus more on the basics by completing easier assignments. Either way, they can be confident that they can achieve a minimum grade commensurate with how much they have chosen to challenge themselves.

167 From a cross-class perspective, some students already do this by diversifying their upper-level courses—taking a clinic, a simulation course, and a variety of doctrinal classes.

168 Furthermore, the choice among bundles ensures that students will get credit for the work they do complete, whether it is the exam or the homework. This can help motivate students to put in the effort, as they know they will not be penalized for not completing both.

169 See, e.g., Michael W. Eysenck, Nazanin Derakshan, Rita Santos & Manuel G Calvo, *Anxiety and Cognitive Performance: Attentional Control Theory*, 7 *EMOTION* 336 (2007); Jerrell C. Cassady & Ronald E. Johnson, *Cognitive Test Anxiety and Academic Performance*, 27 *CONTEMP. EDUC. PSYCH.* 270 (2002).

deterred from waiting until the last minute and cramming; they may put more sustained effort into the class throughout the semester.¹⁷⁰ From an assessment perspective, students who show sustained engagement through the semester also have more frequent opportunities to demonstrate their learning. Under the right circumstances, a greater degree of feedback may help self-aware students identify where they need to improve. As a related matter, anecdotal evidence suggests that when students have had stronger-than-usual incentives to prepare before class, they are better positioned to engage with class as self-reflective participants and not merely passive observers.

Fourth, and relatedly, grade insurance promotes a kind of self-regulated learning environment based around self-efficacy. This is the notion that outcomes are determined by student engagement and effort.¹⁷¹ Studies have suggested that self-efficacy is a leading indicator of performance in postsecondary education, as well as a top motivational factor for students.¹⁷² Students who can clearly see effort translating to certainty over receiving a particular grade thus are not only more likely to be motivated, but more likely to reach for higher levels of achievement. Aware that achievement of a certain grade is determined in part by a high level of sustained effort, students see the “carrot” in front of them and are motivated to reach that goal.

I end with some cautionary notes. One ambition of grade insurance is to reduce unnecessary obstacles to learning, like anxiety over the assessment process. Yet the volume of work may have an unintended effect of making some students more anxious. According to one student who experienced grade insurance and helped with this article, students put in “a significant amount of work” because there may be a grade promised for completing specifications, “*but the work still has to be done.*”¹⁷³ These concerns should not be discounted. So

170 Without a grade component for class participation, there is no guarantee that homework means paying attention in class. Some students will continue to engage in class because they are preparing for the final or because they are intrinsically motivated to do so. Others, confident in the knowledge that out-of-class homework will secure them a minimum grade, may reallocate their in-class time (or skip class entirely) to prepare for other commitments to which they do not have “grade insurance.”

171 See NILSON, *supra* note 20, at 106–08; see also, e.g., George M. Slavich & Philip G. Zimbardo, *Transformational Teaching: Theoretical Underpinnings, Basic Principles, and Core Methods*, 24 *EDUC. PSYCH. REV.* 560, 578 (2010) (describing the role of self-efficacy in motivation); DUANE F. SHELL, DAVID W. BROOKS, GUY TRAININ, KATHLEEN M. WILSON, DOUGLAS F. KAUFFMAN & LYNNE M. HERR, *THE UNIFIED LEARNING MODEL: HOW MOTIVATIONAL, COGNITIVE, AND NEURO-BIOLOGICAL SCIENCES INFORM BEST TEACHING PRACTICES* 126 (2010).

172 See Ernesto Panadero, Anders Jonsson & Juan Botella, *Effects of Self-Assessment on Self-Regulated Learning and Self-Efficacy: Four Meta-Analyses*, 22 *EDUC. RSCH. REV.* 74, 78 (2017).

173 Those students who opt for the homework and final exam bundles put in more time than they do in other classes for the payoff that their grade will be no lower than a B+. Some students appreciate the optionality; other students, perhaps believing that they would land in the right tail of the curve anyway, may perceive no material benefit for the additional work put in.

far, the overall anxiety relieved through grade insurance seems to outweigh these effects.

B. Implications for faculty

This subsection considers implications for faculty, including the difficulty and effort associated with traditional grading practices, student preparedness, and trade-offs for faculty time.

To begin, there is a great deal of evidence about the unreliability of assessment practices across time and graders. Instructors (and other people who must assess performance) are better at parsing coarse rather than fine gradations.¹⁷⁴ That teachers may be worse at parsing fine gradations in performance has implications for the thoughtful design of rubrics by individual instructors,¹⁷⁵ as well as for the kinds of assessments law schools are encouraging in the first place.

Perhaps related, grading is emotionally laborious and time-intensive for instructors. In most law school classes, student ability will typically be distributed where there may be some clear outliers at either end, and for the rest of the class, distinctions in performance may be subtle enough that teachers “agonize over the borderline grades.”¹⁷⁶ Perhaps for these reasons, grading is often cited as the most stressful and time-consuming aspect of teaching.¹⁷⁷ Shifting one’s assessment time earlier into the semester, where it can be done in higher volume and more coarsely grained, frees up time that would be spent grading final exams.¹⁷⁸ While I have not rigorously audited

174 Adriana C. Streifer & Michael S. Palmer, *Is Specifications Grading Right for Me? A Readiness Assessment to Help Instructors Decide*, 71 COLL. TEACHING 244 (2023). People have difficulty processing large amounts of information. See Kevin Lane Keller & Richard Staelin, *Effects of Quality and Quantity of Information on Decision Effectiveness*, 14 J. CONSUMER RSCH. 200 (1987). When asked to make fine distinctions among a large number of students, teachers are likely to make errors. Sue Bloxham, Birgit den-Outer, Jane Hudson & Margaret Price, *Let’s Stop the Pretence of Consistent Marking: Exploring the Multiple Limitations of Assessment Criteria*, 41 ASSESSMENT & EVALUATION HIGHER EDUC. 466 (2016); cf. Beth R. Crisp, *Is It Worth the Effort? How Feedback Influences Students’ Subsequent Submission of Assessable Work*, 32 ASSESSMENT & EVALUATION HIGHER EDUC. 571 (2007). Reliability of teachers’ ratings decreases as the number of students increases, possibly because of cognitive load and boredom effects. See, e.g., Sinan Erturk, Wijnand A.P. van Tilburg & Eric R. Igou, *Off the Mark: Repetitive Marking Undermines Essay Evaluations Due to Boredom*, 46 MOTIVATION & EMOTION 264 (2022); cf. Joseph Klein & Liat Pat El, *Impairment of Teacher Efficiency During Extended Sessions of Test Correction*, 26 EUR. J. TCHR. EDUC. 379 (2003) (observing serial position effects on grades awarded).

175 See, e.g., Ulaş Kayapınar, *Measuring Essay Assessment: Intra-Rater and Inter-Rater Reliability*, 14 EURASIAN J. EDUC. RSCH. 113 (2014); see also Duhart, *supra* note 52, at 538 (“[A] strong rubric can allow instructors to use teaching assistants to evaluate written work product.”).

176 Wangerin, *supra* note 23, at 57 n.7 (“[T]eachers realize that in most situations no statistically significant reason exists for giving papers with slightly different numerical scores completely different grades.”).

177 Ruthann Robson, *The Zen of Grading*, 36 AKRON L. REV. 303 (2002).

178 Aligning assignments with learning objectives, and awarding credit/no credit based on the student’s demonstration of the expected level of competency, may reduce the amount of

my time, my experience has been that spreading assessment labor across the semester is more manageable on balance than doing it in a sprint at the end of the finals period.

Specifications grading may offer a way to achieve all this.¹⁷⁹ Assessing student achievement of learning outcomes at the graduate or professional level can be challenging, but by utilizing a variety of assessment methods and providing timely feedback, instructors can ensure that all students are given a fair chance to demonstrate their knowledge and abilities. By asking for competence but denying partial credit for an unsatisfactory answer, it gives students an incentive to “aspir[e] for excellence” rather than settle for partial credit.¹⁸⁰ Further, since each assignment counts for less, students likely will care less about each one, leading to fewer protests about grades.¹⁸¹ The high-stakes nature of assignments is what has traditionally led to students in conflict with faculty over grades.¹⁸² Removing the student’s feelings that each assignment matters a lot (e.g., their reason for protest) makes it less likely protests will occur and more likely instructors can avoid needless conflict

assessment *work*, which may ultimately better than the same amount of time spent laboring over grading a stack of seventy-five final exams. On this point, the specifications grading framework is sometimes pitched as reducing faculty *time*, but the evidence here is mixed. For instance, Kathy Shields and co-authors note that they did not experience a decrease in grading workload; however, time spent on grading was more meaningful, and the outcomes were less likely to elicit student complaint. Kathy Shields, Kyle Denlinger & Meghan Webb, *Not Missing the Point(s): Applying Specifications Grading to Credit-Bearing Information Literacy Classes*, in *THE GROUNDED INSTRUCTION LIBRARIAN: PARTICIPATING IN THE SCHOLARSHIP OF TEACHING AND LEARNING* 87, 91-92 (Melissa N. Mallon et al. eds., 2019); cf. Paul T. Wangerin, “Alternative” Grading in Large Section Law School Classes, 6 U. FLA. J.L. & PUB. POL’Y 53, 56 n.4 (1993) (discussing how subjective grading methods take significantly more time than objective grading methods). Whether grade insurance reduces time will depend on the assignments and bundles selected. Nightly homework, especially in a large class, may not result in appreciably less faculty assessment time. But it does have benefits: (1) time-shifting assessment time earlier in the semester; and (2) reducing the cognitive and emotional labor from parsing fine gradations in performance, which faculty are bad at anyway. See *infra* notes 174-77.

179 One difficulty is in implementing the approach to promote a constructive mindset among students about the grading approach and not having them see it as valueless busywork. Grade insurance is unlike assessment in other classes, and faculty may find themselves spending effort justifying it and explaining why it is being used. See NILSON, *supra* note 20, at 113. In my experience, students come on board after I explain how specifications grading fits within adult learning theories and that this method gives students control over their final grade through a series of low-stakes pass-fail assignments instead of a high-stakes final.

180 *Id.* at 10 (“[A]llocating partial credit for less than satisfactory work discourages students from aspiring to achieve excellence. In fact, it lowers the marginal utility of moving beyond a minimum investment of time and effort.”).

181 The most common grade complaint I receive is from students who have not met one of the syllabus requirements for getting credit for homework, like “turning it in by the deadline.” These have a lower nuisance cost than substantive complaints that an answer should have received more points.

182 See *id.* at 8; *supra* notes 66-68.

with their students. In my experience, the students who otherwise would be appearing at office hours because of grade anxiety spend their time writing homework instead.

Potential drawbacks to this approach are also worth mentioning. One obvious cost is that it can be more time-consuming for instructors to create and grade assignments. When using a specifications grading approach, instructors need to take the time to develop assignments and assessments linked to learning outcomes.¹⁸³ Instructors also need to review these assessments, and potentially comment, more frequently than they are used to. The experience of managing grade insurance in a large class (like Business Organizations) can also be significantly more burdensome than for a smaller upper-level class (like Corporate Finance).¹⁸⁴ Finally, there is the matter of the other “bundles”: if it includes a final exam, all of the time spent in grade insurance will not relieve the instructor of creating and implementing a final-exam assessment.

C. Implications for schools

This part suggests that grade insurance has two important sets of implications for law schools, related to institutional assessment of learning outcomes and to the NextGen bar exam.

1. Learning outcomes

The American Bar Association is the accreditation authority for most American law schools, and in that role it prescribes learning standards for law schools. Under these standards, schools are supposed to adopt and implement systems of institutional assessment to measure the extent to which their students are achieving learning objectives or outcomes.¹⁸⁵ ABA Standard 302 imposes four minimum learning outcomes for students.¹⁸⁶ Schools are

183 Specifications grading is particularly suited to casebook materials that include ready-made problems, exercises, and post-case questions with full, competent model answers in a teacher’s manual.

184 There is also the matter of how much the instructor or teaching assistant goes in depth in reviewing the answer. While a smaller class might allow an instructor alone to comment individually on each student’s homework submission, that quickly becomes unmanageable with a class larger than maybe twenty with an assignment every week. In Business Organizations, I have sometimes had teaching assistants first review against a rubric I have prepared, triaging the questions I should focus on with the greatest attention, and suggesting comments as appropriate. When available, TA capacity can be combined with audits, spot-checks, and ultimate review for assignment of grades.

185 See, e.g., LORI E. SHAW & VICTORIA L. VANZANDT, *STUDENT LEARNING OUTCOMES AND LAW SCHOOL ASSESSMENT: A PRACTICAL GUIDE TO MEASURING INSTITUTIONAL EFFECTIVENESS* 22-29 (2015).

186 See STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. Standard 302 (AM BAR ASS’N 2024-2025). These include (1) “[k]nowledge and understanding of substantive and procedural law,” (2) “[l]egal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context,” (3) “[e]xercise of proper professional and ethical responsibilities to clients and the legal system,” and (4) “[o]ther professional skills needed for competent and ethical participation as a member of the legal profession.” *Id.*

also required to assess student performance toward achievement of learning objectives or outcomes.

Adopting grade insurance, or specifications grading more broadly, may be one option for a law school to meet the ABA's standards of assessment. By giving students the freedom to choose their level of effort, including effort that gives the instructor greater clarity on the student's performance across the semester, faculty may be able to *assess better*.¹⁸⁷ We can allow for a more holistic view of academic performance and achievement of learning outcomes. Rather than rely on a single high-stakes final exam, we can use multiple assessments throughout the course to track student progress, assess against skills taxonomies or other measures of interest, and ensure that we are meeting the expectation that our teaching promotes learning.

From an outcomes perspective, not only do frequent low-stakes assessments relieve pressure on high-stakes summative assessments, they also may promote the kind of iterative educational relationship that drives improvement toward learning outcome achievement.¹⁸⁸ By offering a range of assignments that span multiple difficulty levels, students are given an opportunity to engage in self-reflection, to consume formative feedback from the instructors, to identify their strengths and weaknesses in the course material, and to make a plan to improve.

In addition, this method of assessment may promote a more equitable learning environment. Depending on how the assignments and bundles are designed, a grade insurance approach may give opportunities for students of different backgrounds and skills to demonstrate their mastery of the material. By having the flexibility to choose their level of effort, students are able to work at a pace that is comfortable for them. This aims to be sensitive to how the coursework fits within their other life priorities and promotes autonomy about arranging one's education in the way that works best for them.

The one caveat from an institutional perspective relates to the political economy of faculty time. Grade insurance does not run on autopilot and can be time-intensive to implement once designed—to say nothing of how much time it takes to redesign a course on a grade insurance model. It makes most obvious sense in the context of a law school that expects a great deal of investment in teaching time relative to other faculty commitments.¹⁸⁹ And even then, there are trade-offs in how that teaching time used.

187 Warren, *supra* note 87; see also Kissam, *supra* note 58, at 496 (suggesting “more flexible grading patterns” for classes “in which significant writing exercises are used,” with the implication that greater volume of assessments would mean “faculty members no longer would be required to impose as many low grades”).

188 See MUNRO, *supra* note 9, at 11 (“[A]ssessment is more than just tests and testing. Rather, it is an approach to legal education that fosters more active teaching and learning.”). On the construction of learning outcomes, see Grose, *supra* note 9, at 341-48, and Shaw & VanZandt, *supra* note 185, at 7-13.

189 All law schools value teaching or at least claim to do so. By this I mean only that some law schools make research a greater component of a faculty's time apportionment than others

2. NextGen bar exam

The bar exam is another matter for which grade insurance is potentially relevant to law schools. In a short matter of years, a newly redesigned “NextGen” bar exam is set to be implemented across a number of states.¹⁹⁰ One key feature will be a documents library of sorts. Test-takers will be asked to go outside of what they memorized for the exam and respond to questions based solely on the material in that library. This gives the examiners an opportunity to review how future lawyers take information that they find, use it, and apply it to different client fact patterns and needs.

Grade insurance may allow students to practice these skills on a smaller, lower-stakes stage that is often lacking in legal instruction. When homework in a doctrinal course focuses on problems and exercises, such as analyzing how contract language affects a client’s rights, students may be better able to take what they have learned and apply it to a variety of fact patterns and situations. This may extend beyond the traditional questions—judging who would prevail—to counseling clients and discussing how conflicts could be avoided, topics that are often left untested through traditional issue-spotter prompts but are likely to figure more prominently in the NextGen bar.

D. Implications for the legal profession

Implementing a grade insurance system may also be beneficial for students down the road when they are dealing with clients. The traditional law school examination methods may appropriately approximate of some legal work, but not every law school graduate will spend their days writing predictive memos or briefs to courts. Some attorneys might focus their day-to-day activities on helping clients with smaller issues or transaction matters. These are issues and skills that are rarely tested in a law school setting.

Grade insurance can expose students to these valuable skills. For example, daily assignments may include approximating sending an e-mail to a client that is asking for advice before acting on an issue. Another question may involve analyzing a targeted legal issue for a client who has already taken an action. Yet another problem may involve students analyzing a contract to try to make it a better for deal for one of the parties. There are many more possible examples of situations and skills that can be taught with smaller assignments that are missing from a vast majority of law school classrooms. These are all skills clients expect attorneys to possess, yet many new attorneys go into practice having little experience outside of writing memos and briefs or sorting through convoluted fact patterns on exams. A different mode of teaching and evaluation can give students low-stakes opportunities to develop and practice these skills, pairing them in context with substantive content.

The audiences for lawyerly work product are widely varying but usually have one thing in common: They have hired a lawyer because they lack the

that may demand more in terms of teaching competence and time.

190 NEXTGEN BAR EXAM, <https://nextgenbarexam.ncbex.org/> (last visited Sept. 15, 2024).

capacity or time to do the legal work themselves. “Lawyers achieve outcomes for their clients by integrating research, analysis, and writing with a practical understanding of relevant law.”¹⁹¹ Because the role of a lawyer will rarely be to provide a full regurgitation of the research process and outputs, a lawyer has to be judicious and show discretion in what information to communicate. The “intended reader” of lawyerly work product “is likely to be busy” and will want something that “conforms to her expectations.”¹⁹² No amount of final-exam outline dumping will adequately prepare a student to be able to communicate effectively with a fully responsive work product that is respectful of its audience’s time. The more opportunities students have for writing, the better prepared they will be to produce this kind of work for clients—and in the process maybe also achieve learning outcomes about effective communication.

E. Implications for androgogy and critical praxis

Grade insurance might even be thought of as a way to democratize assessment in legal education. It may align with Paulo Freire’s theory of “critical pedagogy,” which foregrounds education as a practice of freedom rather than one of domination.¹⁹³ Freire argues that traditional pedagogy, characterized by a banking model of education, is oppressive, fostering passivity and impeding the development of critical consciousness in students.¹⁹⁴ Conversely, critical pedagogy promotes dialogue, problem-posing, and cooperation, thereby eliciting the “co-creation” of knowledge.¹⁹⁵

The introduction of formative assessment and specifications grading in legal education moves the field toward this direction. Offering students opportunities for continual assessment and feedback throughout the semester effectively humanizes the educational process. More importantly, it recognizes that students, with their diverse capacities, are not mere vessels to be filled but co-creators in the learning process. It empowers students to assume control of their learning and challenge the hegemony of grades as the determinant of legal acumen and achievement. Grade insurance may well serve as an equalizer, providing a safety net for those with diverse learning abilities and backgrounds.

While grade insurance can help to alleviate some academic pressures, it is not, by itself, transformative. It is an administrative solution within an existing system.¹⁹⁶ But when combined with formative assessment and feedback that

191 Anthony Johnstone, *Integrating Mini-Briefs and Mini-Moots into Lectures and Seminars*, in *LAWYERING SKILLS IN THE DOCTRINAL CLASSROOM* 137 (Tammy Pettinato Oltz ed., 2021).

192 Parker, *supra* note 69, at 581.

193 See FREIRE, *supra* note 41, at 89-90, 93.

194 See *id.* at 72-76.

195 See Lina Kaminskiene, Vilma Žydžiūnaitė, Vaida Jurgilė & Tetiana Ponomarenko, *Co-Creation of Learning: A Concept Analysis*, 9 *EUR. J. CONTEMP. EDUC.* 337, 340-43 (2020).

196 Cf. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM: A CRITICAL EDITION* 26-28 (2004).

engages students in critical reflection, grade insurance can be part of a more comprehensive approach. In such a model, locking in a grade can be seen not as a paternalistic act, but as a way of enabling students to focus on the learning process and engage in critical dialogue by giving students the choice of reducing their grade anxiety.

V. Conclusion

High-stakes assessment is among the worst parts of law school. It is practically hard for faculty and promotes undue anxiety for students. What's more, high-volume assessment of low-stakes student written work will also be hard until we solve the difficult practical and ethical problems with using computer-assisted or algorithmic assessment tools.¹⁹⁷

In a doctrinal class typically characterized by a final exam, grade insurance might give students more leeway to “co-create” their education by exercising agency over the work they complete and by allowing students to experiment with answering more kinds of questions or problems than might be offered in a single final exam. From an assessment perspective, it also offers a higher-dimension look at students' achievement, allowing students to show how they have achieved learning objectives using different skills or in different contexts. Grade insurance is not a panacea, but it offers illustrations about how law faculty can use assessment methods that match the learning outcomes we desire and promote the educational theories many instructors think should underpin law school androgogy.

197 Elana Zeide, *Robot Teaching, Pedagogy, and Policy*, in *THE OXFORD HANDBOOK OF ETHICS OF AI* (Markus D. Dubber et al. eds., 2020); cf. Zack Brown (@LuminanceBloom), TWITTER (Dec. 7, 2022, 3:07 PM), <https://twitter.com/LuminanceBloom/status/1600598003391266816> (“ZIZEK: that AI will be the death of learning & so on; to this, I say NO! My student brings me their essay, which has been written by AI, & I plug it into my grading AI, & we are free! While the ‘learning’ happens, our superego satisfied, we are free now to learn whatever we want”) (parody of Slovenian philosopher Slavoj Žižek).