

# Let's Talk About Grading, Maybe: Using Transparency About the Grading Process to Aid in Student Learning

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## ABSTRACT

Talking about grades and grading in law school can feel as taboo, if not more, than talking about sex. Among law faculty, there is often no training and no discussions about how to grade other than being asked to moderate final grades to meet a curve. Students often seek information from each other or online sources where numerous blogs provide them with advice on how to talk to professors about grades, how not to disclose grades to others, and other advice about dealing with grades. What is not as forthcoming for many students is how exactly their professors evaluate their work product. But without discussions about grading practices among faculty and students, are law schools missing an opportunity to use grading discussions as part of their assessment efforts?

Much like the hit song *Let's Talk About Sex* encourages its audiences to talk about sex as a means of emotional intelligence, law schools can talk about grading as an educational tool. This Article will discuss the history and meaning of grades to demonstrate how grading has evolved and can evolve. It will also discuss the processes professors use to grade and how to guide faculty to develop a shared understanding of grading standards. Finally, it will discuss how professors can engage students in grading conversations so that they can learn how to self-regulate and engage in the professional standards of the legal profession more effectively.

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#### INTRODUCTION

Conversations between law school professors and students, and even conversations among faculty, regarding the grading process can, at times, feel as taboo, awkward, or difficult as discussions about sex. The 1991 hit song, *Let's Talk About Sex* by Salt-N-Pepa pushed the taboo topic of talking about sex into mainstream consciousness.<sup>1</sup> Part of the chorus of the song is as follows:

Let's talk about sex, baby  
 Let's talk about you and me  
 Let's talk about all the good things  
 And the bad things that may be  
 Let's talk about sex . . . .<sup>2</sup>

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1. See Christopher R. Weingarten, *Salt-N-Pepa: Our Life in 15 Songs*, ROLLING STONE (Sept. 5, 2017), <https://www.rollingstone.com/music/music-lists/salt-n-pepa-our-life-in-15-songs-111537> [<https://perma.cc/96KU-S9VG>].

2. *Let's Talk About Sex*, LYRICS, <https://www.lyrics.com/lyric/1022383/Salt-N-Pepa/Let%27s+Talk+About+Sex> [<https://perma.cc/EMX9-MC BJ>].

While the song was about getting people to converse about sex rather than about having sex, it was still considered controversial.<sup>3</sup> The song brought “emotional intelligence” to sex.<sup>4</sup> Salt explained in an interview that the song was “about communication and talking about a subject that nobody wants to talk about.”<sup>5</sup> And, the song emerged when public awareness about issues around sex—like AIDS and HIV—needed to be raised.<sup>6</sup> Because conversations about sex are so important, the song was remade as a public service announcement about AIDS.<sup>7</sup>

Today, students and faculty are more likely to have a conversation about sex than they are to have a conversation about the nature of grading in legal education.<sup>8</sup> As a result, “grading is one of the least transparent aspects of the law school experience.”<sup>9</sup> Conversations about grades and grading more often occur between students, and because professors generally do not discuss or have limited discussion regarding grading, myths prevail about grading in law school.<sup>10</sup> Now that law schools are facing their own crisis in the form of declining bar passage and new educational standards, conversations about grading can aid in a law school’s efforts in raising bar passage and compliance with the standards.

In many ways, *Let’s Talk About Sex* mirrors the type of conversation we should have regarding grading: talking about it as a way of enlightening all parties (students and faculty), talking about it from the perspective of professor (expert) and the student (novice), talking about the excitement of “high” grades and the reality of receiving “low” grades, and talking about how professional judgment and the curve plays a role in grading.

In essence, law schools, and particularly individual professors, should develop a process for communicating about grading more transparently. The benefits to improving communication about grading are numerous and include, among others, improving students’ abilities to self-regulate, which is a key skill for law students entering the self-regulated profession of law practice. Self-regulation is the ability to engage in a

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3. See Weingarten, *supra* note 1.

4. Claire Lobenfeld, *Salt-N-Pepa, Very Necessary*, PITCHFORK (June 11, 2017), <https://pitchfork.com/reviews/albums/23309-very-necessary> [<https://perma.cc/GKB7-82G5>].

5. Weingarten, *supra* note 1.

6. See Lobenfeld, *supra* note 4.

7. Weingarten, *supra* note 1.

8. See, e.g., Cary Franklin, *Law 318 – Law, Gender, and Sexuality*, UCLA LAW, <https://curriculum.law.ucla.edu/Guide/Course/82> [<https://perma.cc/5C7X-2Q6H>].

9. Beau Baez, *Law School Exam Grading: How Law Professors Grade Exams*, LEARN LAW BETTER (Nov. 7, 2015), <https://learnlawbetter.com/law-school-exam-grading-understanding-how-law-professors-grade-exams> [<https://perma.cc/B9D6-75KU>].

10. See Daniel Keating, *Ten Myths About Law School Grading*, 76 WASH. U. L. Q. 171, 171 (1998).

process that allows learners to be self-aware, self-motivative, and able to exercise behavioral skills to use knowledge effectively.<sup>11</sup>

Many law schools are already engaging in conversations and reforms related to other aspects of legal education, such as curriculum reform and teaching practices.<sup>12</sup> In recent years, more has been said about learning theory and assessment practices, but much less on grading.<sup>13</sup> Some of what may be driving the conversation on legal education generally is that law schools, like other institutions of higher education, are required to publish learning outcomes, perform formative and summative assessments to measure and evaluate students' learning, and evaluate these outcomes and assessments to determine if competencies are met.<sup>14</sup> In creating these standards, the ABA Section on Legal Education included guided principles like, "The focus on outcomes should shift the emphasis from what is being taught to what is being learned by students."<sup>15</sup>

When other accreditation boards have required the use of learning outcomes and assessment at the undergraduate level, the benefits produced clear assessment criteria that provided students with better guidance, made grading and feedback less subjective, and created evidence of contributions to student learning.<sup>16</sup> To some degree, the ABA Standards mimic this idea; for example, in one of the guiding principles, it states that while teaching students to think like a lawyer is a central point of legal education, "schools should measure how successful their students are in

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11. See Maryellen Weimer, *What it Means to Be a Self-Regulated Learner*, FACULTY FOCUS (July 30, 2010), [www.facultyfocus.com/articles/teaching-and-learning/what-it-means-to-be-a-self-regulated-learner](http://www.facultyfocus.com/articles/teaching-and-learning/what-it-means-to-be-a-self-regulated-learner) [https://perma.cc/4UA3-65YR]; see Barry J. Zimmerman, *Becoming a Self-Regulated Learner: An Overview*, 41 THEORY INTO PRAC. 64, 66 (2002).

12. See Amanda L. Sholtis, *Say What?: A How-To Guide on Providing Formative Assessment to Law Students Through Live Critique*, 49 STETSON L. REV. 1, 1–2 (2019) (discussing the criticism and changes to legal education over time).

13. See Kevin Schoepp, Maurice Danaher & Ashley Ater Kranov, *An Effective Rubric Norming Process*, 23 PRAC. ASSESSMENT, RSCH., & EVALUATION 1, 1 (2018) (noting the growth of grading discussions around rubrics; it similarly parallels the growth of grading discussions in legal education); cf. Deborah L. Borman, *De-Grading Assessment: Rejecting Rubrics in Favor of Authentic Analysis*, 41 SEATTLE U. L. REV. 713, 715–16 (2018) (demonstrating how legal education is advancing issues related to grading in recent years).

14. See generally AM. BAR ASS'N, STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–2021 ch. 3, at 17–25, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf) [https://perma.cc/F27L-CP6R] (providing Rules 302, 314, and 315).

15. Guidance Memorandum from the Managing Director of the Am. Bar Ass'n 1, 3 (June 2015) [hereinafter Guidance Memorandum] [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2015\\_learning\\_outcomes\\_guidance.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_learning_outcomes_guidance.authcheckdam.pdf) [https://perma.cc/77CT-PDXB].

16. See Sue Bloxham, Pete Boyd & Susan Orr, *Mark My Words: The Role of Assessment Criteria in UK Higher Education Grading Practices*, 36 STUD. HIGHER EDUC. 655, 656 (2011).

mastering that skill and in bridging the gap between it and other lawyering skills.”<sup>17</sup>

As a result of the ABA standards, law schools are having broad conversations about assessment, and these conversations will likely move from general assessment topics, such as drafting learning outcomes and assessment criteria, to grading practices.<sup>18</sup> Grading is, in part, an assessment of student work and often provides a form of feedback to the student and the instructor.<sup>19</sup> And while law school effectiveness is often assessed by utilizing a standard test (e.g., the bar exam) and surveys, grades yield information about our institutions too.<sup>20</sup> Further, *how* we grade underpins the assessment process.<sup>21</sup>

This Article will focus on processes to improve communication about grades and grading between professors and students and among faculty members. This Article begins by exploring the history of grades because, even before one can discuss grades, one must be aware of how grades and grading have evolved. Then, this article discusses how professors grade and how they can develop conversations among faculties to share grading practices. In much the same way as a judge goes through a decision-making process to come to a decision, professors go through a process to evaluate an exam or a paper to provide a grade. That process includes the “standards framework” that is often used in the grading process. Thus, this Article will explore what the standards framework is and how it can be discussed among colleagues to increase awareness of the shared and differing standards frameworks that professors use. Finally, this Article discusses the need to discuss grading with students to better assist them in developing their ability to self-assess using the same frameworks. Because being an attorney involves a great deal of self-assessment, discussing the grading process is an important means of assisting students in becoming better at self-assessment and developing a framework for practice.

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17. Guidance Memorandum, *supra* note 15, at 3.

18. See Margaret Price, *Assessment Standards: The Role of Communities of Practice and the Scholarship of Assessment*, 30 ASSESSMENT & EVALUATION HIGHER EDUC. 215, 215 (2005).

19. See BARBARA E. FASSLER WALVOORD & VIRGINIA JOHNSON ANDERSON, EFFECTIVE GRADING: A TOOL FOR LEARNING AND ASSESSMENT IN COLLEGE 1 (2010) (discussing how grading encompasses an actual grade but also gives student feedback and includes the planning and work teachers do).

20. *Id.* at 4.

21. See Margaret Price, Berry O'Donovan, Chris Rust & Jude Carroll, *Assessment Standards: A Manifesto for Change 2* (Apr. 18, 2008) (unpublished manuscript) (on file with author).

## I. LET'S TALK ABOUT THE MEANING OF GRADES

Grades are such a fixture in modern day culture that it can be easy to “perceive grades as both fixed and inevitable—without origin or evolution.”<sup>22</sup> But it is important to remember that grades over time have not always used the same system (e.g., A–F), or had the same purpose or impact.<sup>23</sup> And even in modern day, some law schools have changed their grading practices, which illustrates that while many consider grading systems as fixed, they can actually be changed and challenged.<sup>24</sup> Thus, in evaluating our conversations about grades with students and among faculty, it is important to start by asking where grades came from before discussing the meaning of grades and how one grades.

*A. History of Grading*

The American system of grades has evolved over a very short period of time. In the earliest history of American grades, grades were used for pedagogical purposes and linked to awards given based on competition.<sup>25</sup> Because education at this time was a privilege and compulsory education did not exist, grades served an internal purpose and were used to communicate between the school and the students’ families.<sup>26</sup>

Around 1646, Harvard gave the first grades in America on its exit exams.<sup>27</sup> However, the first official records of a grading system came from Yale in 1785, which consisted of a four-level system.<sup>28</sup> As the number of institutions grew, in part because of mass schooling, grades went from being local and internal, to becoming a form of external communication to those outside of the institution and beyond the individual and their

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22. Jack Schneider & Ethan Hutt, *Making the Grade: A History of the A–F Marking Scheme*, 46 J. CURRICULUM STUD. 201, 202 (2014).

23. *Id.*

24. See Andy Guess, *Stanford Law Drops Letter Grades*, INSIDE HIGHER ED (June 2, 2008), <https://www.insidehighered.com/news/2008/06/02/stanford-law-drops-letter-grades> [<https://perma.cc/J5ZV-WRS2>] (discussing Stanford Law’s changes to its grading system); Debra Cassens Weiss, *Several Top Law Schools Adopt Pass-Fail Grading Plans After Going Online*, AMER. BAR ASS’N J. (Mar. 19, 2020), <https://www.abajournal.com/news/article/several-top-law-schools-adopt-pass-fail-grading-plans-after-going-online> [<https://perma.cc/BA3R-DTCU>] (discussing the temporary change to pass-fail some law schools adopted as a result of remote learning during the beginning of the COVID-19 pandemic).

25. See Schneider & Hutt, *supra* note 22, at 202.

26. *Id.*

27. See Jeffrey Schinske & Kimberly Tanner, *Teaching More by Grading Less (or Differently)*, 13 CBE—LIFE SCIS. EDUC. 159, 159 (2014).

28. *Id.*

family.<sup>29</sup> Grades began to signal achievement in early 1800.<sup>30</sup> For example, in 1837, some Harvard professors began grading on a 100 point system, while William and Mary categorized students using attendance and conduct.<sup>31</sup>

Grades became a norm by the end of the Civil War, for not just higher education but also primary and secondary education.<sup>32</sup> But grading systems were not consistent among institutions.<sup>33</sup> Institutions used various grading systems—letters, percentiles, and other systems.<sup>34</sup> The A–F scale present in many institutions today began to emerge from Harvard according to records in 1883 with a student receiving a “B”; Mount Holyoke had an A–E scale in 1884 that corresponded with a percentile range with “E” being failing.<sup>35</sup> In 1898, Mount Holyoke added the “F” and adjusted the percentages to the other letters.<sup>36</sup> Harvard also implemented the A–E system by 1890 because of a reliability issue found with the 100-point scale.<sup>37</sup>

Grades during this period underwent reform towards standardization because increasing mobility meant that education needed a uniform and scaled approach to measure performance and communicate meaning externally.<sup>38</sup> As a result of standardization, a change occurred as to when one received a grade.<sup>39</sup> Instead of getting grades from exit exams or from evaluation after years of study, students received grades based on individual courses with a credit allotted.<sup>40</sup> In an effort to maintain an honor system or a ranking system, the honors system began using summa cum laude, magna cum laude, and cum laude; this system allowed grades to create distinctions among students.<sup>41</sup>

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29. See Schneider & Hutt, *supra* note 22, at 202; Schinske & Tanner, *supra* note 27, at 160 (addressing the changes created by mass education).

30. See D. Royce Sadler, *Grade Integrity and the Representation of Academic Achievement*, 34 STUD. HIGHER EDUC. 807, 807 (2009).

31. Schinske & Tanner, *supra* note 27, at 160.

32. Schneider & Hutt, *supra* note 22, at 207; *but cf.* Schinske & Tanner, *supra* note 27, at 160 (arguing grades were not widespread in the 1890s).

33. See Schneider & Hutt, *supra* note 22, at 207.

34. *Id.*

35. Schinske & Tanner, *supra* note 27, at 160.

36. *Id.*

37. *Id.*

38. See, e.g., Schneider & Hutt, *supra* note 22, at 208; JOE FELDMAN, GRADING FOR EQUITY: WHAT IT IS, WHY IT MATTERS, AND HOW IT CAN TRANSFORM SCHOOLS AND CLASSROOMS 23 (2019) (evaluating K-12 education’s changes from one-room schools to large schools growing from urban growth).

39. Schneider & Hutt, *supra* note 22, at 208.

40. *Id.*

41. See *id.* at 209.

By the early 1900s, more schools adopted practices, such as assigning grades to individual courses, recording grades, and conforming their grading system to other institutions.<sup>42</sup> During this point in time, the 100-point scale and percentiles were the most common grading system.<sup>43</sup> Reforms to grading were instituted to take the now more standardized grading systems and create grades with the same meaning.<sup>44</sup> Because grades were associated with levels of achievement resulting in job opportunities or awards, reformers equated their value to cash and argued a lack of uniformity meant that some would be rewarded or penalized unfairly.<sup>45</sup> Others, however, argued grades should be abandoned because they disincentivized students to learn for the purpose of learning and instead created an education that was grade driven.<sup>46</sup> In the end, grades would remain, as they had extrinsic value and were too important to the development of a national educational system.<sup>47</sup>

To reach more objectivity in grading, curving appeared in primary education in the early twentieth century.<sup>48</sup> The concept of grading on a curve emerged from research in the twentieth century, which indicated that levels of aptitude were distributed on a normal curve.<sup>49</sup> Thus, some argued that a classroom may represent the population, so grades should also be distributed on a curve.<sup>50</sup> The consistency across classrooms made the adoption of a curve appealing, and throughout the twentieth century, grading on a curve increased.<sup>51</sup> Some of the issues raised with the curve included concerns that a given classroom might not match the general population and arguments that aptitude differs from achievements in a classroom.<sup>52</sup>

By the 1940s, grades were based primarily on an A–F system (with other systems still in use).<sup>53</sup> The A–F scale was generally aligned with the numerical scale (e.g., an A representing achievement between 90 and 100).<sup>54</sup> The 4.0 scale also emerged during this period and was widely used.<sup>55</sup> Moving to a standardized system was slow because there was no

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42. *Id.* at 210–11.

43. Schinske & Tanner, *supra* note 27, at 160.

44. Schneider & Hutt, *supra* note 22, at 201.

45. *See id.*

46. *See id.* at 211–12.

47. *Id.* at 212.

48. *Id.* at 212–13.

49. Schinske & Tanner, *supra* note 27, at 162.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 160.

54. Schneider & Hutt, *supra* note 22, at 215.

55. *Id.*

central body to force standardization; for example, Yale adopted four different systems between 1967–1981, with the fourth being the A–F system with pluses and minuses.<sup>56</sup>

The result of a standardized system of grading throughout higher education has had several unintended results, such as grade inflation, students learning to “game the system” by selecting courses and instructors to earn a grade with the least effort, and in some institutions, removal of autonomy of the instructor in the awarding of grades.<sup>57</sup>

For law schools, critics have urged for changes in grading for some of the same reasons.<sup>58</sup> In 2008, Stanford dropped a traditional F to A+ system for one that awards honors, pass, restricted credit, and no credit.<sup>59</sup> In adopting this system, proponents argued a simpler system was needed to reduce the number of increments and remedy the unbalanced curving influenced by students’ course selections.<sup>60</sup> And while the other schools that have adopted similar grading systems are also elite institutions like Harvard and Yale, these changes signal that other law schools should also consider evaluating their grading systems to ensure they are consistent with their objectives, whether pedagogical or communicative.<sup>61</sup>

Additionally, some of the grading practices adopted by law schools are recent adoptions when compared to the history of grades. Grade nominalization and mandatory grade distributions was not widely used in 1976 where a survey revealed only 9% of 102 responding law schools indicated they used a grade nominalization policy.<sup>62</sup> By 1997, a published survey revealed that of 116 responding law schools, 84% indicated the use of a grade nominalization policy.<sup>63</sup>

### *B. What Is Grading?*

In evaluating our grading systems, it is important to clarify what grades and grading actually signify. And as will be explored below, there is some debate about what a grade actually signifies. What is less controversial is that grading often includes not only the final letter or

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56. *Id.*

57. *Id.* at 215–16.

58. Guess, *supra* note 24.

59. *Id.*

60. *Id.*

61. Brian Leiter, *Harvard Law School to Adopt Pass-Fail Grading System Like Yale and Stanford*, L. PROFESSOR BLOGS NETWORK (Sept. 26, 2008), <https://leiterlawschool.typepad.com/leiter/2008/09/harvard-law-sch.html> [<https://perma.cc/GFJ2-SK4C>]; e.g., HARVARD L. SCH., HARVARD LAW SCHOOL HANDBOOK OF ACADEMIC POLICIES 2021–2022, at 34, [https://hls.harvard.edu/content/uploads/2021/09/HLS\\_HAP.pdf](https://hls.harvard.edu/content/uploads/2021/09/HLS_HAP.pdf) [<https://perma.cc/2735-RPJF>].

62. 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, 820 (1997).

63. *Id.* at 836.

numerical grades but also any markings by a professor to a student's work regardless of whether a number or letter is assigned.<sup>64</sup>

In higher education, many agree that to an extent, grades provide a form of feedback.<sup>65</sup> The feedback may be evaluative or descriptive: evaluative feedback rates the student's work, while descriptive feedback tells the student how to improve.<sup>66</sup> Feedback is also social because it may be interpreted differently depending on the audience, and what is considered feedback may not be agreed upon.<sup>67</sup> As a result, when students read feedback sometimes they may not understand how to use it for future improvement.<sup>68</sup> Further, when it comes to descriptive, written feedback, students may not read it.<sup>69</sup> While grades (i.e., a score) tend not to be given orally, feedback may be given orally, and studies show that students may not even recognize it as feedback in the same way they would recognize written feedback.<sup>70</sup>

Further complicating matters is that if a grade (i.e., a score) and written comments are together, the grade outshines the comment.<sup>71</sup> One can often sense this is the case where students are told their assignment is available with feedback, but the student does not pick up the assignment.<sup>72</sup> Grades can also negatively impact students' use of the feedback.<sup>73</sup>

Additionally, grades can be formative or summative.<sup>74</sup> Formative grades are those that often have no actual grade or points allotted but are usually markings or oral feedback designed to assist the student by identifying their strengths and weaknesses and indicating focal points to improve.<sup>75</sup> On the other hand, summative grades are those grades that "evaluate student learning at the end of an instructional unit."<sup>76</sup> Summative grades, particularly final grades, do very little in motivating student learning even though professors expend a great deal of effort into grading; instead, final grades simply enhance a student's interest in not receiving a bad grade.<sup>77</sup> To simulate interest in learning, one might be better served

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64. See Schinske & Tanner, *supra* note 27, at 160–61 (noting comments are often made in the process of grading and that written comments are a form of grading).

65. See *id.* at 161.

66. *Id.*

67. David Carless, *Differing Perceptions in the Feedback Process*, 31 *STUD. IN HIGHER EDUC.* 223, 223 (2006).

68. Schinske & Tanner, *supra* note 27, at 161.

69. *Id.*

70. Carless, *supra* note 67, at 223.

71. See Schinske & Tanner, *supra* note 27, at 161; see also Carless, *supra* note 67, at 220.

72. Carless, *supra* note 67, at 220.

73. *Id.* at 221.

74. Sadler, *supra* note 30, at 808.

75. See Borman, *supra* note 13, at 732.

76. *Id.*

77. See Schinske & Tanner, *supra* note 27, at 161.

by providing formative grades without a score or creating a grading system that rewards effort.<sup>78</sup>

Moreover, there is some disagreement about what a final grade actually means.<sup>79</sup> In other words, within an institution or among varying institutions, what does it mean to receive an “A” or any other grade? And understanding what a grade means is incredibly important because the integrity of grades at the course level extends to the soundness of one’s degree at the institutional level.<sup>80</sup> Except in the context of grade inflation, grades are often presumptively viewed as having integrity when viewed by employers, institutions, educators, students, and other communities.<sup>81</sup> Grades have an extrinsic and intrinsic value.<sup>82</sup> The extrinsic value is that grades allow one to make decisions or draw conclusions about grades, while the intrinsic value is “how well [the] grade represents what it is supposed to represent.”<sup>83</sup> The intrinsic value is the center of integrity.<sup>84</sup>

The questions regarding what grades actually represent are long-standing.<sup>85</sup> Around World War I, in the United States, grades were perceived outside of institutions as symbols of ability and achievement, even while educators were questioning their pedagogical purpose and whether they aided learning.<sup>86</sup>

Today, there is a debate regarding what grades actually represent.<sup>87</sup> One argument is that final grades are “a symbolic representation of the level of achievement attained by a student.”<sup>88</sup> Those holding this view argue that grading on a curve is norm-referenced grading whereby students are graded based on comparisons with their peers.<sup>89</sup> Thus, a curve is incompatible with grades demonstrating levels of achievement because norm-referenced grading eliminates the association of grades to learning

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78. *Id.* at 161–62.

79. *See id.* at 160 (addressing the debate around grading from arguments that it is harmful, to “a façade of coherence,” to abandonment of grading systems to other mechanisms).

80. Sadler, *supra* note 30, at 807.

81. *See id.* at 808; *see also* Joe Feldman, *Improved Grading Makes Classrooms More Equitable*, INSIDE HIGHER ED (Jan. 27, 2020), <https://www.insidehighered.com/views/2020/01/27/advice-how-make-grading-more-equitable-opinion> [<https://perma.cc/L44H-LRM9>] (arguing that while employers and other institutions view grades as having integrity, “it might shock them to know how much grading practices reflect the idiosyncratic preferences of individual faculty members”).

82. Sadler, *supra* note 30, at 808.

83. *Id.*

84. *Id.*

85. *See* Schneider & Hutt, *supra* note 22, at 201.

86. *Id.* at 210.

87. Schinske & Tanner, *supra* note 27, at 160.

88. Sadler, *supra* note 30, at 807; *see also* Feldman, *supra* note 81 (some holding this view argue that applying an achievement-based grading scale would exclude awarding part of the grade for participation or homework, which are not generally tied to achievement).

89. Schinske & Tanner, *supra* note 27, at 162.

and does not indicate a student's mastery or lack of mastery of content.<sup>90</sup> Specifically, there is no way to determine if those who fail today are in another year the C's of the class.<sup>91</sup> In law school, arguably, "grade nominalization is not about competency" but "about fair competition."<sup>92</sup>

Another argument is that today's grading systems have two purposes: pedagogical and systematic practice.<sup>93</sup> Pedagogically, grades serve an internal purpose, which is to promote learning and communicate performance in a course to students.<sup>94</sup> Conversely, systematic practice allows institutions to communicate to the outside world about the qualifications of students for employment, continued education, and other purposes.<sup>95</sup> But we may accept it does not do the pedagogical part as well.<sup>96</sup> Some have argued that the result of this two-purposed system is that some instructors who fear the amplification of one grade from their course have begun to narrow the scope of their grades by choosing not to administer certain grades (i.e., Ds or Fs).<sup>97</sup> Indeed, some argue that the system will eventually change again and the new system will need to address how to create a workable system that acknowledges the two functions.<sup>98</sup>

Thus, in our efforts to communicate better about grading with our students and among our peers, we must first determine among our institutions what our grades actually signify; otherwise, how can we communicate grading processes if we do not know what it is we are communicating when we assign a grade.

## II. LET'S TALK ABOUT THE ACT OF GRADING AND TRANSPARENCY AMONG FACULTY

Grading is quite complex. Consider the first engagement with a student's written work: reading and then understanding.<sup>99</sup> Some have assumptions about the act of reading, treating the text itself as fixed, which contributes to an ability to grade consistently. However, many theories about reading assert that it is a "constructive process," by which a reader

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90. *Id.*

91. *Id.*

92. See 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, 786 (1997) (arguing grading debates around normalization are not about competency but about fairness of competition).

93. Schneider & Hutt, *supra* note 22, at 219.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Victoria Crisp, *Exploring the Nature of Examiner Thinking During the Process of Examination Marking*, 38 CAMBRIDGE J. EDUC. 247, 250 (2008).

uses schema based on their experiences to extract meaning from a text.<sup>100</sup> Thus, it is possible that two readings might result in two different but accurate readings of the same text.<sup>101</sup> During the initial read, the grader is reacting to cues and identifying important information in the written work and forming opinions about where it may fit within a grade category or banding (e.g., top, middle, or bottom).<sup>102</sup> The grader is also judging the quality and quantity of the cues.<sup>103</sup> Then the grader moves to reasoning to support the initial banding and refining that banding before making a final decision.<sup>104</sup> The grader is engaged in making the final decision through an evaluation that is flexible and not based on a predetermined formula or set of criteria.<sup>105</sup> The focus of Part II will be on grading practices related to the use of written and unwritten criteria and standards in making judgments and final evaluations of student work.

In the law school context, professors typically use one of two explicit approaches to grading.<sup>106</sup> These two approaches are criterion-based grading and norm-based grading.<sup>107</sup> One approach is using an answer key or other criteria to subdivide an essay into discrete points whereby the student may be allotted credit for an appropriate response.<sup>108</sup> This method utilizes criterion-based grading and focuses on measuring the student's mastery of defined content.<sup>109</sup> The second approach is to read a student's essay without an answer key to determine, based on the whole essay, if the student's response conforms to the professor's internalized standard.<sup>110</sup> This approach also often uses norms or a curve to scale achievement, such that students compete against each other.<sup>111</sup> In evaluating the two

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100. See *id.* (asserting that there is also an argument that grading includes dual processing: automatic and reasoned).

101. *Id.*

102. Bloxham, Boyd & Orr, *supra* note 16, at 662; Crisp, *supra* note 99, at 250.

103. Crisp, *supra* note 99, at 250.

104. Bloxham, Boyd & Orr, *supra* note 16, at 662.

105. Crisp, *supra* note 99, at 261 (one theory is that the final evaluation involves "clustering information into smaller chunks and then making an overall evaluation by weighting and combining the cues"). The theory was not clearly proven by Crisp's study. *Id.*

106. Linda R. Crane, *Grading Law School Examinations: Making a Case for Objective Exams to Cure What Ails "Objectified" Exams*, 34 NEW ENG. L. REV. 785, 788 (2000).

107. Stanford C. Ericksen, *Testing and Grading, Tomorrow's Teaching and Learning*, STAN. UNIV.: TOMORROW'S PROFESSOR (2008), <https://tomprof.stanford.edu/posting/938> [<https://perma.cc/U4GN-Y5EJ>].

108. Crane, *supra* note 106, at 788.

109. Ericksen, *supra* note 107; see also Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 444-45 (1989) (arguing grading with written criteria is the result of a push for more objectivity in grading).

110. Crane, *supra* note 106, at 789; see also Kissam, *supra* note 109, at 446 (describing holistic grading as an "Aristotelian model" of grading whereby a professor reviews student work in the same way someone might critically evaluate "works of art, social practices, and legal authorities").

111. Ericksen, *supra* note 107.

approaches, most advocate for the use of the first because the second appears more subjective.<sup>112</sup> However, it is arguable that those who find the second more subjective are assuming that the application of an answer key or written criteria eliminates the use of one's judgment in the process.<sup>113</sup> Those who argue for the second typically assume that written criteria, like an answer key or rubric, are narrowly used to award points based solely on the written criteria and exclude consideration of the subtleties of legal writing.<sup>114</sup> This debate arises because of the limited research regarding actual grading practices.<sup>115</sup>

Importantly, research related to actual grading practices has found that even in using written criteria to evaluate work, most graders use a holistic determination to determine a final grade.<sup>116</sup> Thus, regardless if a professor is using written criteria or not using written criteria, most are doing holistic grading.<sup>117</sup> In fact, the research shows that where written criteria is used, it is used to refine decisions, and rather than using criteria as they go along, professors most often used it at the end to support a holistic decision.<sup>118</sup> Researchers posit that written criteria may be used in this way because when criteria is created to assess a complex activity, using it to refine decisions at the end may be the only way to effectively apply it.<sup>119</sup> Further, the criteria's purpose may be better suited for creating consistency by serving as a check on the assessor's judgment.<sup>120</sup> For other graders who do consult the criteria during review rather than at the end, it is used as a means of determining if an aspect is included but was not used to determine the quality of the work.<sup>121</sup> The study reveals how written criteria is used counter to what students—and even some other faculty—may believe because many believe criteria is used to analyze the work and weigh the individual pieces of criteria.<sup>122</sup> Thus, it is important, as professors, as we open conversations about grading, that we begin to evaluate how we utilize tools so we can better communicate how grading occurs and open the dialogue about what really occurs. In navigating

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112. See Crane, *supra* note 106, at 789.

113. See *id.* at 806 (arguing that essay examinations should be eliminated because the questions are unreliable).

114. Borman, *supra* note 13, at 713–14.

115. See Kissam, *supra* note 109, at 445. *But see generally* Ruthann Robson, *The Zen of Grading*, 36 AKRON L. REV. 303, 310 (2003) (contributing to the literature by describing her process for grading and centering it on Zen principles).

116. Bloxham, Boyd & Orr, *supra* note 16, at 662.

117. See *id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 662–63.

122. *Id.* at 663.

written criteria, a grader will often need to rely on other reference points. One reference point is to use norm referencing where other students' work contributes to the understanding of the written criteria; it is important to note that this occurs even where norm referencing is not required.<sup>123</sup> Written criteria becomes meaningful in grading when the grader uses her personal standard, which is created and recreated over time through practice and community practices.<sup>124</sup>

Indeed, even absent the use of written criteria, professors each have "individual standards framework[], that is, the unique grasp of academic standards that each teacher uses in grading student work."<sup>125</sup> Criteria and standards are differing terms: criteria "signal the qualities" one assesses, like the quality of a rule statement, while standards "indicate[] level of achievement" (i.e., is this assignment passing).<sup>126</sup> "[C]riteria a[re] likely to be specific to a given assignment, whereas *standards* might apply across all work at the relevant level."<sup>127</sup> The process they use to interpret a work often involves clear rationales regarding the work, which might include an expectation of the work or an exploration of writing style.<sup>128</sup> Criteria use is important to the grading process; but, when used alone, it leaves standards undefined and implied, and standards are more important because standards help students to differentiate any work based on quality.<sup>129</sup>

However, it is sometimes difficult for graders to convey standards because standards are tacit.<sup>130</sup> Experts in any field can identify quality work when they see it even if they cannot define it formally.<sup>131</sup> The more the grader becomes an expert, the more their judgment of students' work becomes intuitive, and thus, difficult to explain.<sup>132</sup> Additionally, individual professors have their individual standards, influenced by "their values, specialist knowledge, engagement with student work, history[,] and

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123. *Id.* at 666.

124. *Id.* at 666–67.

125. Sue Bloxham, *Building 'Standards' Frameworks: The Role of Guidance and Feedback in Supporting the Achievement of Learners*, in RECONCEPTUALISING FEEDBACK IN HIGHER EDUCATION: DEVELOPING DIALOGUE WITH STUDENTS 64, 64 (Stephen Merry, Margaret Price, David Carless & Maddalena Taras eds., Routledge, Taylor & Francis Grp. 1st ed. 2013) [hereinafter *Building 'Standards' Frameworks*].

126. *Id.*

127. Bloxham, Boyd & Orr, *supra* note 16, at 656.

128. *Id.* at 664.

129. D. Royce Sadler, *Interpretations of Criteria-Based Assessment and Grading in Higher Education*, 30 ASSESSMENT & EVALUATION HIGHER EDUC. 175, 190 (2005) [hereinafter *Interpretations of Criteria-Based Assessment*].

130. *Building 'Standards' Frameworks*, *supra* note 125, at 66.

131. Sadler, *supra* note 30, at 820.

132. *Building 'Standards' Frameworks*, *supra* note 125, at 66.

previous experience.”<sup>133</sup> Yet, while there is an individual standard used by an individual professor, because they are experts in the law, there is also an understanding of the standards of their discipline.<sup>134</sup> The standards of a discipline that instructors use are learned over time through informal processes.<sup>135</sup>

#### *A. Grading Conversations for Faculty Development*

The reality is that law professors receive very little training about how to create and grade assessments.<sup>136</sup> Instead, law professors typically learn these things by trial and error or by adopting methods from respected colleagues.<sup>137</sup> Where there is no conversation about the act of grading, a professor will adopt grading frameworks based on their personal standards, which are crafted based on experience in the discipline of law, how they were graded as a student, and past interaction with student work.<sup>138</sup> However, because these “personal standards” are often tacit they may not be supported by the community if expressed.<sup>139</sup> Thus, a law school can aid professors in adopting stronger grading practices by opening up conversations about grading. Indeed, to make tacit standards more transparent at both the institutional and course level, faculty need to share their standards through processes like group grading.<sup>140</sup>

In higher education, discussions about the “beliefs, values, and purposes” of faculty grading are rarely had.<sup>141</sup> Because “[t]he grades we give students and the decisions we make about whether they pass or fail coursework and examinations are at the heart of our academic standards,”<sup>142</sup> faculties need to develop a clear understanding of grading practices within the walls of its institution. It is often assumed that professors are using the same system of reference even though that system is not explicitly discussed and so not open to challenge or debate.<sup>143</sup> And in law schools, where legally trained professors are engaged in the process

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133. *Id.* at 67.

134. *See id.* at 67.

135. *Id.* at 66.

136. Crane, *supra* note 106, at 801.

137. *Id.* at 805; *see generally* Feldman, *supra* note 81 (stating that most professors do not receive training and many mimic their grading after those that graded them and align with their own individual beliefs about how students learn).

138. *Interpretations of Criteria-Based Assessment*, *supra* note 129, at 190.

139. *Id.* at 191.

140. *Id.* at 192.

141. Bloxham, Boyd & Orr, *supra* note 16, at 656 (quoting Ginette Delandshere, *Implicit Theories, Unexamined Assumptions and the Status Quo of Educational Assessment*, 8 ASSESSMENT ED. 113, 121).

142. *Id.* at 655.

143. *Id.* at 656.

of grading, it may be assumed that we value the same kinds of reasoning in our grading; for example, giving high scores to students who display the best of “thinking like a lawyer.” But each individual could conceivably have varying beliefs of what shows the best of thinking like a lawyer. Thus, to make our grading practices more explicit with our students for purposes of learning, we also need to discuss grading with our peers. It is also important to evaluate if our shared grading practices are equitable.<sup>144</sup> We should evaluate if using long-standing grading practices reward the privileged while punishing those who are not.<sup>145</sup>

Providing reliability in grading is at the heart of the rationale of why many law schools have adopted the use of moderation tools like curved grading and anonymous grading.<sup>146</sup> Yet, those measures alone are a poor substitute for engaging in “dialogue about what we really value as assessors, individually and as communities of practice.”<sup>147</sup> Instead, we adhere to curves and blind grading to avoid personal bias in favor of objectivity, but with little or no attempts to develop communities of practice that systematically challenge our internal standards to better refine what type of work is valued in one’s institution.<sup>148</sup> It also leaves unexamined “[t]he structures, cultures and processes of academe[, which] are assumed to be neutral in their impact on chances of success.”<sup>149</sup> Thus, rather than attempting to just collectively write grading standards, faculty should also discuss standards to build shared understanding and consistency.<sup>150</sup>

While many believe that standards or rubrics are sufficient because they are explicit statements of assessment, how they are applied may differ.<sup>151</sup> This is not to suggest there is no shared understanding, as members of an institution often share an understanding of how to classify student performance based on similar experiences in the field of law and shared frameworks that arise from being a member of the community.<sup>152</sup> That consistency does not mean that there will be consensus but that there

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144. Joe Feldman, *Beyond Standards-Based Grading: Why Equity Must Be Part of Grading Reform*, THE PHI DELTA KAPPAN, May 2019, at 52, 53 (2019) (arguing that some grading practices “inadvertently perpetuate achievement and opportunity gaps”).

145. *Id.* at 53–54.

146. See Suellen Shay, *The Assessment of Complex Tasks: A Double Reading*, 30 STUD. HIGHER EDUC. 663, 676 (2005) (arguing that heavy reliance on moderation tools inhibit an academic institution’s ability to dialogue about assessment practices).

147. *Id.*

148. *Id.*

149. Marie Stowell, *Equity, Justice and Standards: Assessment Decision Making in Higher Education*, 29 ASSESSMENT & EVALUATION HIGHER EDUC. 495, 506 (2004).

150. Bloxham, Boyd & Orr, *supra* note 16, at 668.

151. See Price, O’Donovan, Rust & Carroll, *supra* note 21.

152. See Shay, *supra* note 146, at 667–68.

will be enough of a shared framework or standards to be able to create consensus.<sup>153</sup> This means the consensus might be agreement on a standard (e.g., what makes a passing essay) even though there may be disagreement on whether a specific student work demonstrates the standard (e.g., did the student performance demonstrate the ability to write a passing essay). Differences exist because of varying access to resources like specialized knowledge.<sup>154</sup> Differences between professors' grades should not be considered errors because they are unavoidable given the differing values, perspectives, and experiences each brings to grading.<sup>155</sup> By striving for consensus, we can better develop internal standards and norms to evaluate student work based on the values of one's institutions.<sup>156</sup>

Moreover, it is also important to consider the impact that a lack of instruction regarding the grading process may have on new faculty joining one's institution or the academy. When new faculty join an institution, arguably, there is an informal opportunity to learn, which includes learning from experience and also learning from those around.<sup>157</sup> When learning to assess, there is a social aspect that requires one to observe, copy, and imitate.<sup>158</sup> Looking at social practice theory, there is a habitus, which for the individual are the strategies underlying the actions performed in a given field.<sup>159</sup> A class habitus may be formed over time where practices are synchronized without coordination by individuals in the same field and system of acting.<sup>160</sup> This requires some regular communication to develop a shared understanding.<sup>161</sup> For new faculty, the degree to which they may adopt new strategies that differ from more established faculty depends on the newcomer's capital, as older members resist change that "threaten their monopoly of the capital."<sup>162</sup> According to situated learning theory, which looks at the relationship of the individual to a community of practice, the more the newcomer participates, the more settled her trajectory in the group becomes (unless the individual exerts agency and chooses a different trajectory).<sup>163</sup> In academia, discourse may form around two

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153. *Id.* at 668.

154. *Id.* at 664–65. Studies among foreign institutions have found that even where double grading is used involving direct teachers, other teachers in the department, and teachers outside the department, there are variations among grades and the rationale for those grades. *Id.* at 665.

155. *Id.*

156. *Id.* at 676.

157. Jeff Jawitz, *Learning in the Academic Workplace: The Harmonization of the Collective and the Individual Habitus*, 34 *STUD. HIGHER EDUC.* 601, 601 (2009).

158. *Id.* at 602.

159. *Id.*

160. *Id.*

161. Price, *supra* note 18, at 223.

162. Jawitz, *supra* note 157, at 603.

163. *Id.*

models: “learn by doing” and “help is available—all one has to do is ask.”<sup>164</sup>

As a professional school, law schools have new faculty who traditionally arrive after earning a juris doctorate and practicing law (although many may have also engaged in research before arriving to an academic post).<sup>165</sup> Thus, for many law professors, the ability to judge quality work is aligned with one’s ability to judge quality reasoning found in practice.<sup>166</sup> And the result is “[t]he view of assessment as an ‘objective’ search for the ‘right mark.’”<sup>167</sup> Further, in many law schools, grading is “an individual and private activity, to be conducted independently and in an ‘unbiased’ way.”<sup>168</sup> As a result, in many law schools, there is virtually no conversation about grading or feedback given to professors about the way they grade.<sup>169</sup> Where there is some feedback or conversations about grading, it may be confined to certain groups of law teachers rather than being broadly available. For example, feedback may be given to adjuncts if their grading means are unusual. Additionally, there may be conversations about grading among professors who teach a course where grading is standardized (e.g., a skills course). Thus, widespread discussions about an institution’s grading norms are important in aiding new faculty in adjusting to those norms.<sup>170</sup> When faculty engage in discussions with their colleagues about grading, it allows faculty to help others learn and enhances their own learning.<sup>171</sup>

Further, understanding the process and basis for an individual law professor’s grading is important because it makes law professors better equipped to bring all students into understanding the values of their institution.<sup>172</sup> Without the ability to explicitly share the standards underlying assessment judgments, it appears that the evaluation of the student work has no bearing separate from the professor, the course, and the students in the course.<sup>173</sup> This directly undermines the objectives of most law schools in teaching students to think like a lawyer because

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164. *Id.* at 604.

165. See generally *Law Teaching 101*, COLUM. L. SCH., <https://www.law.columbia.edu/careers/academic-careers/careers-law-teaching/law-teaching-101> [perma.cc/6QBQ-KRUP].

166. Jawitz, *supra* note 157, at 608 (similar to Jawitz’s observation in Department B where the ability to judge good writing is tied to ability to judge good research).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 613.

171. Kim Watty, Mark Freeman, Bryan Howieson, Phil Hancock, Brendan O’Connell, Paul de Lange & Anne Abraham, *Social Moderation, Assessment and Assuring Standards for Accounting Graduates*, 39 ASSESSMENT & EVALUATION HIGHER EDUC. 461, 465 (2014).

172. See Stowell, *supra* note 149, at 496.

173. See *Interpretations of Criteria-Based Assessment*, *supra* note 129, at 192.

students cannot clearly see how they are evaluated transcends one course. Further, it is important that we recognize that the decision-making processes we utilize underpin assessment practices.<sup>174</sup> The practices we use implicitly and through tacit understanding have a great impact on the ability of our students to achieve.<sup>175</sup> Therefore, law school professors may achieve equity in grading by consistently applying verifiable criteria.<sup>176</sup> In other words, law school professors may achieve equity by explaining to students what we are looking for when grading. Working with our colleagues can aid one in determining one's tacit understandings so that they can better express criteria and standards to students.

### B. Grading Conversations to Define Grades

In beginning faculty development related to grading, the starting place is to create a consensus on what grades should mean in a given institution.<sup>177</sup> By doing so, faculties will understand the concept of grading standards more fully.<sup>178</sup> In discussing grades, it is possible that peers within an institution may disagree about the purpose of grades: some may want to recognize the effort of students, others find value in motivating students, and others may want consistency.<sup>179</sup> It is not enough to only discuss grading practices (e.g., how to scale grades, how many grades to report, or how to merge grades), but we must start with the fundamental purpose of grading to make any reforms and open transparent discussions.<sup>180</sup> Ask: "What meaning do we want our grades to convey and [w]ho is (are) the primary intended audience(s) for this message?"<sup>181</sup> Additionally, do we believe grades are about what students earn or what they learn?<sup>182</sup> In these conversations, one must deal with faculty's "beliefs and long-standing habits and experience, not only about grading but also about learning, effort . . . ."<sup>183</sup> Thus, it is critical that the conversations

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174. Stowell, *supra* note 149, at 496.

175. *See id.*

176. *Id.* at 502 (discussing existing measures of equity in assessment like the use of mitigation in circumstances of sickness, bereavement, and the like, which are often factor when determining if a student can take an assessment; thus, there are other places where we recognize the need to alter our approach to assessment).

177. Susan M. Brookhart, *Starting the Conversation About Grading*, EDUC. LEADERSHIP, Nov. 2011, at 10, 10 (2011).

178. *See Interpretations of Criteria-Based Assessment*, *supra* note 129, at 191 (arguing that one challenge of university moving to standard-based grading requires "coming to grips with the concept of a standard").

179. Brookhart, *supra* note 177, at 10.

180. *See id.* at 12.

181. *Id.*

182. *Id.*

183. *Id.*

about grades include honesty to enable trying new models and using the conversations to inform long-standing beliefs.<sup>184</sup>

There are a number of methods faculty may employ to begin and extend their conversations about grading. This article will describe four. The first two are ways that faculty may begin their conversations collectively. The first involves using a series of statements and asking faculty to vote with a discussion that follows.<sup>185</sup> The second is to use a panel of grading experts to explore varying grading practices.<sup>186</sup> A third option is to create a learning community centered on grading.<sup>187</sup> Finally, the fourth option is to use mentoring relationships to help transfer understanding of grading practices.<sup>188</sup>

To begin grading conversations using a voting exercise, place faculty into groups and have each person agree or disagree with each of these statements and respond in an electronic or written poll (participants can signify their agreement by X and signify their disagreement by Y)<sup>189</sup>:

- Grades should represent the achievement of learning outcomes.<sup>190</sup>
- The primary audience for grades is the student. The secondary audiences are faculty, administrators, and employers.<sup>191</sup>
- Grades should reflect the individual effort but not group or collaborative effort.<sup>192</sup>
- Grades should motivate students to learn.<sup>193</sup>

Once the individuals have been polled, they can be placed in groups to debate the assertions and support the conclusions with reasoning while also discussing any opposing arguments.<sup>194</sup> Then the entire faculty discuss what they learned.<sup>195</sup> Faculty may also discuss if current grading policies reflect the assertions they support or oppose; for example, if a class has a required mean or curve, discussing if that is consistent or inconsistent with views related to grades representing the achievement of learning outcomes.

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184. *Id.*

185. *See id.* at 13 (discussing four different frameworks, but in thinking through some that might be useful in the law school context, those listed above appear most appropriate).

186. *Id.* at 13–14.

187. Feldman, *supra* note 81.

188. *See* Jawitz, *supra* note 157, at 613.

189. Brookhart, *supra* note 177, at 13.

190. *Id.* at 14.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 13

195. *Id.*

When faculties discuss their individual actions in grading, a different set of questions might be used. Rather than voting on these questions, they can be used to create a dialogue about delving deeper into what our grading practices should measure, to then determine how to build assessments or grading practices that actually match those values. The objective is to develop clearer standards: “a qualifying threshold for each standard, and of agreed-upon standards that are shared across a relevant community.”<sup>196</sup>

- “How do we discover what we really value?
- How do we negotiate differences and shifts in what we value?
- How do we represent what we have agreed to value?
- What difference do our answers to these questions make?”<sup>197</sup>

Conversations about grading can also be stimulated by using a panel.<sup>198</sup> With a panel, faculty members (inside or outside the building) are selected based on their use of standards-based grading or other grading schemes.<sup>199</sup> Panelists then briefly describe their grading strategies and findings.<sup>200</sup> Then, the audience may ask questions to learn more about the panelists grading practices.<sup>201</sup> For example, panelists may discuss how they learned about the standards-based grading or other grading schemes, why faculty may adopt them, how one might talk to students about grading schemes (and their responses), and an outside panelist might discuss if their institution has a committee or group that focuses on standards-based grading or other grading schemes.<sup>202</sup>

Starting these conversations will likely lead to conversations and development around learning: teaching and learning strategies, assessment plans, and development opportunities.<sup>203</sup> In particular, because grading is aligned with learning, it requires reevaluation of teaching strategies to help students move through levels of achievement.<sup>204</sup> But these conversations can also be ongoing through other steps like using learning communities or mentoring.

Law schools can develop learning communities, whereby participants share their experiences in a repetitive cycle.<sup>205</sup> For example, a

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196. *Interpretations of Criteria-Based Assessment*, *supra* note 129, at 189.

197. Shay, *supra* note 146.

198. Brookhart, *supra* note 177, at 13.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 14.

204. *Id.*

205. Feldman, *supra* note 81; *See also* Andrea Susnir Funk, THE ART OF ASSESSMENT: MAKING OUTCOMES ASSESSMENT ACCESSIBLE, SUSTAINABLE, AND MEANINGFUL 92–93 (2017) (discussing various ways to engage faculty generally about assessment, giving the example of teaching luncheons

professor adopts a new grading practice or policy during a semester, observes changes in how students perform, shares the results with colleagues, and does the same each semester so the faculty can collectively build more cohesive grading practices.<sup>206</sup> These practices can open conversations about what we want law school grades to actually measure and help us ensure we are grading in a way that recognizes excellence and equity.<sup>207</sup> Additionally, it will impact how we engage with our students as we look for ways to accurately measure their learning and give faculty more comfort in their grading practices.<sup>208</sup>

Law schools can also rethink how they traditionally use mentorship for junior faculty to include sharing knowledge about grading practices to develop better grading processes.<sup>209</sup> One way is to adopt discussions between junior academics (e.g., visiting assistant professors or first-year professors) and senior academics. Senior academics can offer instruction about identifying when a student has satisfied a standard, and when they have not, across courses once taught by the senior academics that are now taught by the junior academic.<sup>210</sup> It is important to note that in having these conversations, there may be some disparity between the two, as differing experiences, values, and knowledge can lead to variability.<sup>211</sup> The goal of this mentorship would be to exchange knowledge and to be able to pinpoint why those differences exist and how that may impact their interpretations.<sup>212</sup>

While it is important for law schools to develop mechanisms for exploring what grades mean and to evaluate collective grading practices, it is also important for law schools to engage in activities that allow law faculty to understand the differences in their grading practices. By participating in activities that allow them to make grading decisions in a

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which would be designed to make assessment treated similarly to other scholarship). The same could be done in regard to the specific practice of grading.

206. Feldman, *supra* note 81.

207. *Id.*

208. *Id.*

209. Watty, Freeman, Howieson, Hancock, O'Connell, de Lange & Abraham, *supra* note 171, at 468–69.

210. *See* Jawitz, *supra* note 157, at 607 (explaining how those instructors that began as tutors learned how to grade by working through the process and through the lecturers who moderated those gradings so that the tutor learned significantly from the conversations; Jawitz describes a process of grading honors papers with both a senior and junior reader that created a “detection avoidance” system, that may be somewhat problematic for law schools).

211. Sue Bloxham, Birgit den-Outer, Jane Hudson & Margaret Price, *Let's Stop the Pretence of Consistent Marking: Exploring Multiple Limitations of Assessment Criteria*, 41 *ASSESSMENT & EVALUATION HIGHER EDUC.* 466, 466 (2016).

212. *See* Watty, Freeman, Howieson, Hancock, O'Connell, de Lange & Abraham, *supra* note 171, at 471 (noting that in the group context consensus is unlikely to occur, and perfect consensus is not the goal because of the subjectivity that exists in grading).

group setting, professors can determine what is important and identify the variations that may exist between professors and why.

### C. Grading Conversations for Social Moderation

Collective grading is important to all faculty, full-time and adjunct, because it gives fullness to the work of expanding conversations and the shared exchange of values-related grading.<sup>213</sup> Generally, collective grading means a grade on a piece of work is put forth and argued until consensus is reached (or at least until non-consenting parties can articulate reasons why consensus does not exist).<sup>214</sup> Collective grading can help individuals form a habitus in the midst of the collective.<sup>215</sup> One purpose of engaging in collective grading is to build a shared understanding of what we are labeling as student proficiency.<sup>216</sup> Additionally, collective grading can be used to engage in a culture of assessment and data collection.<sup>217</sup> While it could be used to increase reliability amongst colleagues, it can also be a means of understanding the assessment of different variables.<sup>218</sup>

Law schools engage in this type of collaboration or calibration; for example, it may occur when attempting to calibrate adjuncts for a course or in measuring if students have met a school's learning outcomes. The framework for collaboration exists in the training bar exam graders receive where reliability is important.<sup>219</sup> Law schools may mirror their grading collaboration based on the bar examiners' training. For example, around February and July, the National Conference of Bar Examiners (NCBE) will gather bar graders across the country to engage in grading sessions.<sup>220</sup> Workshops are held for a few days with a few hundred attendees, in person, by call, or by on-demand video.<sup>221</sup> Some plenary sessions are held where members of the NCBE provide presentations about "high-stakes testing principles and grading fundamentals."<sup>222</sup> Then there are hands-on sessions where attendees review the questions and model answers and then

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213. Jawitz, *supra* note 157, at 612.

214. *Id.*

215. *Id.*

216. Erin A. Crisp, *Calibration: Are You Seeing What I'm Seeing?*, ASS'N FOR ASSESSMENT LEARNING HIGHER EDUC. INTERSECTION, Winter 2017, at 7, 8 (2017).

217. *Id.*

218. *Id.*

219. See *February 2019 MEE/MPT Grading Workshop*, BAR EXAM'R (2019), <https://thebarexaminer.org/article/spring-2019/february-2019-mee-mpt-grading-workshop/> [perma.cc/8T59-C55Y] (describing the process and purpose of semiannual grading workshops for bar examiners).

220. *Id.*

221. *Id.*

222. *Id.*

begin to evaluate several applicant answers.<sup>223</sup> The grading sessions are facilitated by persons from committees that draft the questions.<sup>224</sup> Graders may be called on to explain the grades they provided.<sup>225</sup> Based on the conversations, adjustments may be made to grading materials or weighting.<sup>226</sup>

In adapting this practice to law schools, there are a few considerations that should be made. One is how often and when faculty might engage in this process. Suppose the goal is to develop more conscious grading practices. In that case, it may make sense to organize grading sessions near when grading is most likely to occur.<sup>227</sup> For some law schools, that may mean twice a year: around fall finals and around spring finals. For some other schools, with more frequent assessments, like mid-terms, it might be at the mid-point of the year. If a goal is simply to raise awareness of grading practices, it may be far less frequent, particularly if there are other means to discuss assessment and grading practices (e.g., if there is mentoring, a community of practice in place, or other workshops centered on assessment practices). Further, another consideration is to determine who facilitates. Law schools may use internal persons to facilitate a grading or calibration session, or they may ask for an external person to lead those sessions.

An additional consideration is the purpose of leading a grading session. One purpose is to solidify what each professor is doing in judging students' work and to build a shared understanding of what judgments are important to all and how different grading judgments may be valuable depending on the professors' objectives or purposes. In addition, because so much of the grading process is tacit, this exercise can serve to make tacit processes more transparent so that they can be expressed and evaluated, particularly because "[t]acit knowledge is experienced rather than defined."<sup>228</sup> Another purpose of calibration can be to evaluate programmatic assessments. Finally, it may be important for an institution to have consistency in grading across a course with differing instructors using the same assessment tools and grading schemes. What follows will explore what a faculty may do depending on its purpose.

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223. Judith A. Gunderson, *It's All Relative—MEE and MPT Grading, That Is*, BAR EXAM'R (June 2016), <https://thebarexaminer.ncbex.org/article/june-2016/its-all-relative-mee-and-mpt-grading-that-is-2> [<https://perma.cc/ZDY6-VJ7Z>].

224. BAR EXAM'R, *supra* note 219.

225. *Id.*

226. *Id.*

227. *See, e.g.*, Sonja Olson, *13 Best Practices for Grading Essays and Performance Tests*, BAR EXAM'R, Winter 2019–2020, at 8, 11.

228. David Carless & Kennedy Kam Ho Chan, *Managing Dialogic Use of Exemplars*, 42 ASSESSMENT & EVALUATION HIGHER EDUC. 930, 931 (2016).

### 1. Calibration to Explore Faculty Values in Grading

A law school can develop a clear understanding of the similarities and differences that exist among its professors' grading by collectively applying judgment criteria to student work to see how they may differ in judging students' work.<sup>229</sup> This is an inductive process for developing standards because professors are working to take their judgments of pieces of work and extracting characteristics that demonstrate the standards which are then clarified and stated so that there can be consensus building.<sup>230</sup> One method to collectively grade is to engage in a three-fold process: a preworkshop exercise, a workshop, and a postworkshop exercise.<sup>231</sup> Materials for grading can be anonymous student written work solicited internally or externally and a measuring device (e.g., sample answer, standards, rubric, or answer key).<sup>232</sup> One important consideration is what measuring device to use; if a law school has generated rubrics for evaluating its learning outcomes, a generic rubric may be best for this exercise, or one could use some other global measure to avoid being confined to this one work.<sup>233</sup>

Further, suppose the calibration exercise includes professors of differing expertise areas. In that case, it will be important to create measuring devices that enable all professors the ability to understand the concepts so they can more easily participate in making scoring judgments. Additionally, the grading may focus on one narrow competency skill, for example, focusing on the ability to communicate legal reasoning or some other skill effectively. Each participant would assess work prior to the workshop by providing a score and written comments explaining the score and what could have improved the score.<sup>234</sup> The facilitator should collect the preworkshop scores and feedback and anonymize them to minimize peer influence on scoring.<sup>235</sup> The facilitator will release the anonymized scores and comments before the workshop so participants can reflect on

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229. See Bloxham, den-Outer, Hudson & Price, *supra* note 211, at 467–68.

230. *Interpretations of Criteria-Based Assessment*, *supra* note 129, at 193.

231. Watty, Freeman, Howieson, Hancock, O'Connell, de Lange & Abraham, *supra* note 171, at 470; see also Bloxham, den-Outer, Hudson & Price, *supra* note 211, at 467 (explaining an exercise that involves creating a grid that compares written work by using a similarity versus dissimilar approach to determine underlying criteria for judging work).

232. See Watty, Freeman, Howieson, Hancock, O'Connell, de Lange & Abraham, *supra* note 171, at 470 (soliciting from all participating universities); Bloxham, den-Outer, Hudson & Price, *supra* note 211, at 467 (soliciting five responses that are borderline but giving graders no context).

233. See Watty, Freeman, Howieson, Hancock, O'Connell, de Lange & Abraham, *supra* note 171, at 469–70 (the experiment used national standards to evaluate the written work, which may be more useful in evaluating global concepts).

234. *Id.* at 470.

235. *Id.*

why others rated the work differently or similarly but with an alternative rationale.<sup>236</sup>

The next step in calibration is a face-to-face workshop.<sup>237</sup> The workshop begins with a discussion of the pre-workshop reviews before moving into a review of each piece of student work.<sup>238</sup> Then participants can be broken into smaller groups to discuss the strengths and weaknesses of each piece.<sup>239</sup> The objective of the small group is to help participants build an understanding of their shared standards and values.<sup>240</sup> After the small groups, the large group gathers to discuss the standards—did the student reach competency on a measure—to work toward consensus as to understanding the standards.<sup>241</sup> As professors work toward building consensus, it is important to note different faculty members may value different criteria in a written product even in reference to the same performance criteria.<sup>242</sup> For example, in looking at a student's ability to articulate a rule statement, a professor who is looking at the rule statement from a perspective of engaging students in being practice-ready may require the rule to be fully parsed, justified with sources, and that it recognizes the gray area.<sup>243</sup> However, a professor who is looking at the rule statement from the perspective of being bar exam-ready may require a much more direct and concise statement of the rule.<sup>244</sup> While consensus is an important objective, law school faculties are nuanced, and the perspective from which they view a given work will differ. When articulating values, standards, and criteria, it is important that those differences are recognized and clearly understood. But this exercise, despite the inability to bring complete consensus, is important to “clarify expectations and identify a range of views.”<sup>245</sup>

Finally, participants are asked after the workshop to rate the student work again to see what impact the workshop had on each participant's understanding of the standards.<sup>246</sup> Participants are also asked to reflect on

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236. *Id.*

237. *Id.*; see also Bloxham, den-Outer, Hudson & Price, *supra* note 211, at 467–68 (where participants gathered in person to discuss similarities and differences between a given work and created a grid to determine what was important in grading a work).

238. Watty, Freeman, Howieson, Hancock, O'Connell, de Lange & Abraham, *supra* note 171, at 470.

239. *Id.*

240. *Id.*

241. *Id.*

242. See *id.* at 471 (participants noted that differing perceptions will always create contention and the literature supports the idea that assessors will differ).

243. Zoom call with Kris Franklin (Aug. 7, 2020).

244. *Id.*

245. Watty, Freeman, Howieson, Hancock, O'Connell, de Lange & Abraham, *supra* note 171, at 472.

246. *Id.* at 470.

their understanding of the standards and the overall process used to reach a shared understanding of those standards.<sup>247</sup> These reflections are also collected.<sup>248</sup> The results are kept anonymous and are disseminated.<sup>249</sup>

In engaging faculty in this process, the result is more reflective grading practices that can assist the individual and the institution in learning about what is valued in assessment practices and the standards used to evaluate students.<sup>250</sup>

## 2. Programmatic Assessment

Calibration can also be useful for when law schools are engaged in programmatic assessment, particularly to evaluate learning outcomes under ABA Standard 315.<sup>251</sup> If a rubric is developed, some thought should be given to developing rubrics that can be generally applied regardless of the assignment evaluated.<sup>252</sup> The rubric should reflect the general learning outcomes.<sup>253</sup> Faculty engaged in the programmatic evaluation must be familiar with the criteria/rubric and engaged in a training session to enhance the value of the evaluation.<sup>254</sup> Thus, the negotiation stated above in terms of determining values is fundamental. Some concerns might arise about the time commitment, but the exercise can be done in an hour and a half.<sup>255</sup> The session can also be done virtually or in person.<sup>256</sup> Additionally, the session can be similar to the norming process described below but may be conducted before or after a final score has been given to the sample student work.

## 3. Course-Level Assessment

Finally, where law school classes use the same assessments and rubrics, faculty teaching those courses may participate in norming procedures to ensure reliability and to evaluate student achievement of learning objectives for a course or program.<sup>257</sup> Where it is important that the grading be consistent, “[a]ny attempt to develop shared understandings of the threshold learning standards will require some process of social

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247. *Id.*

248. *Id.*

249. *Id.* at 470–71.

250. *Id.* at 471.

251. *See generally* Crisp, *supra* note 216; *see* AM. BAR ASS’N, *supra* note 14, at 25 (requiring law schools to evaluate programs, outcomes, and assessments to determine competency and improve).

252. Crisp, *supra* note 216, at 9.

253. *Id.*

254. *Id.* at 9.

255. *Id.* at 10.

256. *Id.* at 11.

257. *Id.* at 7–8.

moderation.”<sup>258</sup> These norming sessions are conducted while grading an existing assessment before the grades are finalized or communicated to the students.<sup>259</sup> If using an analytical rubric, whereby each criterion is described under a corresponding level of attainment (e.g., Performance criteria one: performance criteria one is unsatisfactory when [described]; performance criteria is developing when [described]; etc.),<sup>260</sup> one might use a multi-step process.<sup>261</sup>

The first step is to gather the documents to grade without identifying information but label them with a random number and include pagination.<sup>262</sup> Graders should be given several minutes to review the rubric details, and a rubric should be provided for each document; graders should be given time to ask any clarifying questions about the rubric.<sup>263</sup> Then graders should score one document using one learning outcome or performance criteria and make any annotations to the document or rubric to justify the score; time should be limited to twenty minutes.<sup>264</sup>

Next, each grader’s score should be recorded.<sup>265</sup> The scores should be reviewed for deviation.<sup>266</sup> On a six-point scale, a difference of one is acceptable, but discrepancies greater than one should be discussed.<sup>267</sup> During the discussion, the facilitator can lead by expressing why they gave a particular score using evidence to support it so others may contribute similar evidence.<sup>268</sup> When graders change their scores, the data should be updated, and discussion should continue until every grade is within one point of each other.<sup>269</sup> Once that consensus has been reached, the graders return to the same document and score the remaining learning outcomes.<sup>270</sup> Less time may be allocated for each learning outcome at this point (five-ten minutes); once each is completed, each grader’s score for each learning outcome is recorded, and each learning outcome is discussed until consensus is reached.<sup>271</sup> With the first document graded, graders score all

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258. Watty, Freeman, Howieson, Hancock, O’Connell, de Lange & Abraham, *supra* note 171, at 486.

259. Schoepp, Danaher & Kranov, *supra* note 13, at 2.

260. *See id.* at 3 (contrasted with holistic criteria that describes all of the criteria that would satisfy a level of attainment); *see generally* Gunderson, *supra* note 223 (discussing the bar grading six-scale system which is an example of a holistic rubric).

261. *See* Schoepp, Danaher & Kranov, *supra* note 13, at 6.

262. *Id.* at 7.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 8.

271. *Id.*

remaining documents; scores are shared, recorded, and discussed (using evidence in the document) where there is a deviation until consensus is reached.<sup>272</sup> If there is a lack of consensus, then it may mean that part of the rubric is flawed and may need to be reevaluated.<sup>273</sup>

By creating learning communities centered on grading, law schools assist professors in adopting better grading practices.<sup>274</sup> Law schools can create an opportunity for their faculty to learn more about grading practices in a learning community rather than in isolation.<sup>275</sup> In doing so, law schools will find a better understanding among their faculty and an opportunity to negotiate a collective knowledge of grading practices that can better support student learning.<sup>276</sup> Additionally, law schools can consider incorporating a holistic approach to engaging students in assessment so that conversations or engagement with assessment through grading complement each other from course to course and throughout the curriculum.<sup>277</sup> Thus, in the conversation about grades, it is also important to consider how we discuss grades with the students.

### III. LET'S TALK ABOUT TRANSPARENCY IN GRADING WITH STUDENTS

Law students have limited discussions about the grading of assessments with their professors.<sup>278</sup> When students inquire about grading, they often ask about what they need to do to get a certain grade.<sup>279</sup> Professors may be reluctant or resistant to answer due to uncertainty about the students' motives in asking (e.g., seeking answers or doing the work for them).<sup>280</sup> But a different way of looking at this question is to consider if the students are simply asking what is required of them and to get a sense of the standards used to evaluate their work.<sup>281</sup> Improving student learning requires engaging students in understanding the standards so they can fully understand "complex, high-level learning outcomes."<sup>282</sup> Further, because grading decisions often involve the tacit knowledge of an instructor, discussing grading practices can create equal access to standards by disadvantaged groups.<sup>283</sup> In the past, because student populations were

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272. *Id.*

273. *See id.*

274. Crisp, *supra* note 99, at 249.

275. Jawitz, *supra* note 157, at 613.

276. *See id.*

277. David Boud & Nancy Falchikov, *Aligning Assessment with Long-Term Learning*, 31 ASSESSMENT & EVALUATION HIGHER EDUC. 399, 410 (2006).

278. *See* Price, O'Donovan, Rust & Carroll, *supra* note 21, at 1.

279. Price, *supra* note 18, at 224.

280. *See id.*

281. *Id.*

282. Price, O'Donovan, Rust & Carroll, *supra* note 21, at 3.

283. *Building 'Standards' Frameworks*, *supra* note 125, at 66.

more homogenous, students learned a professor's tacit knowledge through interactions.<sup>284</sup> Even today, underrepresented groups may still be disadvantaged because they do not have access to a system built on tacit information.<sup>285</sup>

In engaging students in assessment processes like grading, a dialogue can improve students' ability to detect errors in reasoning (leading to better exams) and provide feedback that students understand, reducing, but not eliminating, the professor's need to write feedback.<sup>286</sup> While there are clear benefits to discussing grading in the classroom, there are reasons why professors may be less inclined to lead a discussion on the topic.

One of the primary reasons why professors may not want to wade into discussions about grading is that they want to avoid the contention that can often arise where students may challenge the process, like what might occur in exam reviews.<sup>287</sup> This hesitation could be due to the professor having past experiences where instead of the student taking responsibility for their learning or lack thereof, they place blame on the professor over the grade they received.<sup>288</sup> Another reason may be that explaining the grading process is complicated. And among the reasons may be beliefs that the grading process is not a teaching tool and does not contribute to students' development into thinking like a lawyer. However, if our goal is to create practice-ready graduates or enhance "thinking like a lawyer," one way to do this is to have conversations about the nature of assessments divorced from the subject matter so students can take the self-monitoring skills that come with learning standards from class to class and into practice.<sup>289</sup>

While there are many methods for professors to engage in conversations regarding the nature of grades, this section will look at three. The first are conversations around any written criteria and feedback given to students to assist students in interpreting them. The second is to look at how to have conversations to help students internalize grading standards after they have received a grade on an assessment or a final grade. The third is to analyze how professors can bring conversations about grading into the classroom by engaging in actual evaluation processes.

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284. *Id.*

285. *Id.*

286. Schienske & Tanner, *supra* note 27, at 159.

287. See Richard Henry Seamon, *Lightening and Enlightening Exam Conferences*, 56 J. LEGAL. EDUC. 122, 123 (2006) (explaining the defensiveness some professors have going into an exam conference as a result of how some students may use them to contest a grade).

288. See Carless, *supra* note 67, at 229–30.

289. See *id.* at 230.

*A. Conversations Around Explicit Criteria & Feedback*

With the encouragement of more assessment practices coming from the ABA, law professors may create more assessments, evaluation tools, or written feedback. Evaluation tools may include rubrics, grading descriptors, answer keys, or model answers.<sup>290</sup> These tools and written feedback are important aspects of learning because they provide written information about the criteria used and what is required for students to reach a particular standard.<sup>291</sup> To make the process of delivering feedback or written evaluative tools time efficient, some professors may simply give students these tools without explanation.<sup>292</sup> In part, this lack of explanation may stem from an assumption that the written evaluative tools or feedback are straightforward enough that students will understand them without the need to elaborate.<sup>293</sup> Consider this, a written evaluative tool may clearly articulate the law for the students, but it will not effectively convey the nuances that arise when a professor is evaluating the quality of a student's articulation of the law. In other words, the student will not know from looking at criteria alone that some imperfect articulation of the rules will be good quality where other imperfect articulations of the rules are poor quality.

In providing explicit criteria and written feedback, it is important to evaluate the impact of these tools if given alone versus if given while having conversations about how to interpret these tools. Indeed, as stated above, the changing demographics in law school are one of the primary reasons conversations about what these tools mean are necessary. More explicitness is needed to ensure all students, rather than just the students who might be accustomed to the standards of law school because of some shared experiences between the professor and some students, understand the standards.<sup>294</sup> Indeed, feedback and explicit criteria are often read through the lens of an individual student's cultural or social background.<sup>295</sup>

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290. See generally Mark Huxham, *Fast and Effective Feedback: Are Model Answers the Answer?*, 32 ASSESSMENT & EVALUATION HIGHER EDUC. 601, 603 (2007) (defining model answers as ideal responses, "which would receive 100% of the marks, generated by the tutor and distributed identically to all students").

291. See Sue Bloxham & Amanda West, *Understanding the Rules of the Game: Marking Peer Assessment as a Medium for Developing Students' Conceptions of Assessment*, 29 ASSESSMENT & EVALUATION HIGHER EDUC. 721, 722 (2004) (stating the drive in transparency in assessment has led to the use of more written information to empower students).

292. See Elizabeth Ruiz Frost, *Feedback Distortion: The Shortcomings of Model Answers as Formative Feedback*, 65 J. OF LEGAL EDUC. 938, 938–39 (2016) (discussing the assumptions made in giving model answers without more).

293. See *id.* (noting the assumption that the student will understand model answers well enough alone to not to warrant any questions).

294. See Bloxham & West, *supra* note 291, at 722.

295. *Id.*

And even if the students understand the standards stated in explicit criteria, they may have difficulty in understanding how to use those standards to create a conforming product.<sup>296</sup>

Further, because there are some standards that faculty employ that cannot be conceptualized explicitly, reliance on fixed criteria alone like those found in rubrics or exemplars (i.e., examples provided by the professor that demonstrates high or low quality<sup>297</sup>) is insufficient.<sup>298</sup> And, giving students rubrics with criteria, does not create full transparency in grading.<sup>299</sup> “We mislead students that there is something fixed, accessible, and rational that they can use to guide their work.”<sup>300</sup> The belief that there are fixed criteria can be even more engrained when rubrics consist of criteria with points allotted for each criterion for a collective score (e.g., points assigned for grammar or structure).<sup>301</sup> Thus, true transparency requires the use of grading tools *and* dialogue.

In guiding students through a dialogue, consider the use of exemplars. When student work is carefully chosen as examples of varying qualities of work, it can be a great tool to demonstrate standards and expectations.<sup>302</sup> Leading students through a dialogue can help them understand that good work can be demonstrated in multiple ways.<sup>303</sup> It can also alleviate professors’ concerns over students interpreting the varying works as model answers and better communicate to students the professor’s tacit knowledge as applied to the work.<sup>304</sup> There are many ways to engage students with exemplars, such as in class, at an optional workshop, or through online content.<sup>305</sup>

In a classroom setting, a four-step process can be used to evaluate exemplars thoroughly.<sup>306</sup> First, the professor can ask students to review the exemplars before class and form conclusions about the quality.<sup>307</sup> Once the students are in class, the students can evaluate the work in pairs or groups.<sup>308</sup> Second, when students gather in pairs or groups, the ability to create a space where students actually learn can be diminished if students

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296. Graham D. Hendry, Nikki Bromberger & Susan Armstrong, *Constructive Guidance and Feedback for Learning: The Usefulness of Exemplars, Marking Sheets and Different Types of Feedback in a First Year Law Subject*, 36 *ASSESSMENT & EVALUATION HIGHER EDUC.* 1, 8 (2011).

297. *See id.* at 1.

298. *See generally* Price, O’Donovan, Rust & Carroll, *supra* note 21.

299. Bloxham, Boyd & Orr, *supra* note 16, at 656.

300. *Id.*

301. Borman, *supra* note 13, at 729.

302. *See* Carless & Chan, *supra* note 228, at 930.

303. *See id.*

304. *Id.* at 932.

305. *Id.* at 931.

306. *Id.* at 939.

307. *Id.*

308. *Id.*

are focused on getting to the “right” score rather than determining if the exemplars demonstrate a standard or quality.<sup>309</sup> To avoid this approach, the professor can create a learning environment that supports the exchange of ideas in a number of ways.<sup>310</sup> For example, the professor can explain the benefits of collaboration which include: greater learning, better performance, and a collaborative working environment when continual use of group-based activities is employed.<sup>311</sup> Third, after working in pairs or groups, students will report their observations while the professor guides the discussion; together, students and the professor will work to create a collective understanding of what constitutes quality work.<sup>312</sup> The professor, to help create this collective understanding, will work to spotlight the varying perspectives of students to help them better identify the quality of an exemplar without focusing on evaluating the exemplar as a whole.<sup>313</sup> To redirect a student into evaluating qualities, the professor might ask questions like, “Why it important for the analysis section of an essay to connect rules or explanations and facts?” and “Which exemplar demonstrates this best and why?”<sup>314</sup> In guiding the discussion, the professor should move beyond simply pointing out weaknesses or strengths, but should focus on deeper learning of qualities by highlighting how it relates to demonstrating learning outcomes or underscoring what features are evidence of a certain quality.<sup>315</sup> Fourth, the professor can ask students to reflect on the exemplars and explain their reasoning about their quality.<sup>316</sup> The goal of this exercise is to engage students in critical thinking about the standards and provide an opportunity for students to see the professor’s thinking about standards.<sup>317</sup>

Because grading may include written feedback, it is important to realize written feedback alone is insufficient for developing an understanding of standards.<sup>318</sup> Feedback on drafts or finished assignments can have multiple purposes, such as to improve the draft or future assignments, explain a grade, show the expertise or authority of the

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309. Jessica To & Yiqi Liu, *Using Peer and Teacher-Student Exemplar Dialogues to Unpack Assessment Standards: Challenges and Possibilities*, 43 *ASSESSMENT & EVALUATION HIGHER EDUC.* 449, 458 (2017).

310. *Id.*

311. *Id.*

312. See Carless & Chan, *supra* note 228, at 939–40.

313. To & Liu, *supra* note 309, at 459.

314. See *id.*

315. Carless & Chan, *supra* note 228, at 940.

316. *Id.* at 939.

317. *Id.*

318. Price, O’Donovan, Rust & Carroll, *supra* note 21, at 3 (arguing “passive receipt of feedback has little effect on future performance”).

instructor, or fulfill part of one's duty as a professor.<sup>319</sup> It is critical that we realize that simply improving our written feedback, or giving more of it, may not be enough to improve student learning because most feedback tells students what to do or not to do.<sup>320</sup> Feedback, in many ways, has operated as a "transmission process" where the professor explains what is good or bad about the work, and the student is expected to take that feedback and improve. However, research now shows that feedback can be difficult for students to understand, and that students must understand the feedback they receive before they can use it to improve.<sup>321</sup> Further, students do not learn best by being told what to do.<sup>322</sup> Students will not learn to use or create knowledge by merely absorbing the information they have been told through feedback.<sup>323</sup> Instead, they need to be able "to interact with information and skills, to make these their own, to incorporate them into their existing knowledge bases and structures, and to 'construct' or build knowledge" to utilize as personally necessary.<sup>324</sup>

Further, professors should consider incorporating communication to rectify students' perceptions of written feedback.<sup>325</sup> Professors need to close the gaps in students' understanding of feedback, particularly because students may not perceive faculty feedback as detailed nor see professor feedback as a means for improving their learning.<sup>326</sup> This perception is particularly striking because professors often view their feedback as detailed and useful for improving students' learning.<sup>327</sup> That said, if students do not perceive feedback in the same way, then professors should consider ways to enhance the feedback they give. A gap may also exist where there are limited comments or if the comments do not provide the student with advice on how to improve.<sup>328</sup> A gap means students may find they are unable to use the feedback for future improvement.<sup>329</sup>

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319. Carless, *supra* note 67, at 220.

320. D. Royce Sadler, *Opening Up Feedback: Teaching Learners to See*, in RECONCEPTUALIZING FEEDBACK IN HIGHER EDUCATION: DEVELOPING DIALOGUE WITH STUDENTS 54, 55 (2013).

321. 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, 200-01 (2006).

322. Sadler, *supra* note 320, at 55.

323. *Id.* at 56.

324. *Id.*

325. Carless, *supra* note 67, at 230.

326. *See id.* at 224 (finding that 38.4% of instructors and only 10.6% of students thought the instructor gave detailed feedback while 37.8% of students thought feedback was rarely followed by an act to improve student learning compared to 16.1% of instructors).

327. *Id.*

328. *Id.* at 225.

329. *Id.*

One way to bridge the gap that may exist between a professor's feedback and a student's ability to interpret it is to provide an opportunity for individual consultation or to spend class time explaining general feedback.<sup>330</sup> For example, after a professor has returned students' work with their comments, the professor might use class time to explain common strengths and weaknesses of the students' performances.<sup>331</sup> In giving general feedback, the professor can explain how they evaluated the work to determine those strengths and weaknesses and state what their written comments mean and how to use those comments to improve.<sup>332</sup> For instance, if a professor writes on a student's paper, "Expand your analysis on this section of the paper," the professor might verbally explain to students that the purpose of that comment is to signal that the student did not utilize enough facts to explain how the rule was or was not met. To demonstrate how students might use that comment to improve, the professor might explain that students should use the rule to guide their analysis and explain how each rule part is or is not satisfied under the facts, illustrating that students should be using actual facts (e.g., quoted language, actual dollar amounts, and dates) rather than generalizing important parts of the hypothetical. Engaging with general feedback can aid student motivation because students realize they were not the only student who made a certain error and can feel confident in what they did well, which makes them feel more assured in being able to fix errors without the burden of feeling like they have failed.<sup>333</sup>

While we should not abandon giving written feedback or providing explicit criteria, we should consider adding other forms of communication to convey the standards we use in evaluating students' work.<sup>334</sup> To encourage students' understanding of standards used in grading, like most important competencies, students "require rehearsal and practice throughout a [legal] program[]." <sup>335</sup> Thus, students must "engage as interactive partners in a learning community, relinquishing the passive role of 'the instructed' within processes controlled by academic experts."<sup>336</sup> Further, "[g]iven the centrality of assessment to learning, students need to learn about assessment in the same way that they engage with subject content."<sup>337</sup> Bringing assessment discussions into the classroom also

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330. *Id.* at 226.

331. Hendry, Bromberger & Armstrong, *supra* note 296, at 3.

332. Carless, *supra* note 67, at 231.

333. Hendry, Bromberger & Armstrong, *supra* note 296, at 6.

334. *See generally* Price, O'Donovan, Rust & Carroll, *supra* note 21.

335. *Id.* at 3.

336. *Id.* at 3-4

337. Carless, *supra* note 67, at 230.

makes the professor's assumptions and expectations clear.<sup>338</sup> And, assessment practices are far too important to assume students understand because students depend on the grades we allocate for their academic and professional success.<sup>339</sup>

### *B. Conversations About the Grades Earned*

The professor's ability to determine a grade for a student's work or collection of work creates a power distribution in favor of the professor, which can negatively impact the student's ability to learn from any associated feedback with the grade.<sup>340</sup> Further, given the competitiveness of law school, receiving fixed grades on one's transcript can have a dramatic impact on students who do not receive the "good grades."<sup>341</sup> Students who were once engaged in the classroom discussion now talk less, seem less confident, and look as if they are weighed down by their grades.<sup>342</sup> Because of these dynamics, if we want students to be able to grow as learners and adjust to standards, it is important that we engage students in how to cope and utilize grades and feedback to improve.<sup>343</sup> This conversation should be designed to remind students that grades are awarded on some criteria and standards because understanding the criteria and standards can be used to improve in other courses, particularly where the criteria and standards go beyond the subject matter.<sup>344</sup> Moreover, this conversation should clarify that "low grades do not imply a rejection of the student, and hard work does not guarantee a high mark."<sup>345</sup> Learning the standards tied to thinking like a lawyer requires a process that requires some to take risks with their learning that involves a degree of frustration and failure.<sup>346</sup> And receiving a low grade or the threat of a low grade can cause students to give up on the process to reach mastery.<sup>347</sup>

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338. *See id.*

339. *Id.* at 231.

340. *Id.* at 229.

341. LawProfBlawg, *You Are Not Your Grades*, ABOVE THE L. (Jan. 9, 2018), <https://abovethelaw.com/2018/01/you-are-not-your-grades/> [<https://perma.cc/ZHT6-N9JJ>].

342. *Id.*

343. *See generally* Douglas Stone & Shelia Heen, *Difficult Conversations 2.0: Thanks for the Feedback!*, ROTMAN MGMT., Spring 2014, at 71, 71 (arguing how the receiver of the feedback can improve how they receive); Sammy M. Mansour, *Fostering Receptiveness to Feedback*, 98 MICH. B. J. 48, Aug. 2019, at 48 (arguing receiving feedback is a skill that should be taught in the legal profession).

344. Carless, *supra* note 67, at 231.

345. *Id.*

346. *See* Elizabeth Kitchen, Summer H. King, Diane F. Robison, Richard R. Sudweeks, William S. Bradshaw & John D. Bell, *Rethinking Exams and Letter Grades: How Much Can Teachers Delegate to Students?*, 5 CBE—LIFE SCIS. EDUC. 270, 270 (2006) (arguing that acquiring analytical skills is challenging and involves failure and discouragement) [hereinafter *Rethinking Exams*].

347. *Id.* at 271.

Given the delicacies related to grades that are definite and cannot be changed, some care must be taken in discussing grades. One complication in discussing grades is students' perceptions of the grades they anticipate they may earn. For example, a survey conducted on law students during orientation of their first year<sup>348</sup> asked "whether their first-year law school grades would be 'better than,' 'about the same as,' or 'worse than' their grades in college."<sup>349</sup> Most said their grades would be the same or similar while only 14% indicated they would be worse.<sup>350</sup> On a survey at the end of the year, (where most students took both surveys)<sup>351</sup> the survey asked "whether their first-year law school grades were 'better than,' 'about the same as,' or 'worse than' their grades in college."<sup>352</sup> And most stated their grades were worse than their college grades, while less than 17% said they were better than their college grades.<sup>353</sup> Particularly troubling is that the study suggested that students with lower grades were more dissatisfied with their grades *and* less likely to believe the grades they received were a reflection of the quality of their work.<sup>354</sup> Given this disparity of expectations and grades earned, professors can soften the divide by talking to students about what may contribute to that gap. Further, in the first year, not surprisingly, most students indicated earning good grades was important.<sup>355</sup> This mindset also likely means that many law students are for the first time receiving "low" grades and may feel as if they have failed even if they have not received any failing grades.<sup>356</sup> Thus, for professors who teach first-year students, talking about grades is important especially for first-semester first-year law students.<sup>357</sup>

In discussing grades, one must first recognize the emotion involved between professors and students related to grades.<sup>358</sup> This high degree of emotion is apparent in exam conferences and is likely to arise when one begins to discuss grading/grades in the context of a class. There will be students who are unhappy with their grades or the process used to

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348. Emily Zimmerman, *Do Grades Matter?*, 35 SEATTLE U. L. REV. 305, 322 (2012).

349. *Id.* at 329.

350. *Id.*

351. *Id.* at 323.

352. *Id.* at 329.

353. *Id.* at 329–30.

354. *Id.* at 360.

355. *Id.* at 345.

356. Kaci Bishop, *Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resilience*, 70 ARK. L. REV. 959, 978 (2018).

357. See Grant H. Morris, *Preparing Law Students for Disappointing Exam Results: Lessons from Casey at the Bat*, 45 SAN DIEGO L. REV. 441, 451–52 (2008) (discussing the negative impact poor grades have on students and how it is evident after first-year students receive their grades).

358. See Seamon, *supra* note 287.

determine their grades, which can make the professor feel defensive.<sup>359</sup> Yet, there are benefits to having grade discussions with students.

One benefit to discussing grades, especially final grades, is that the process allows students to understand what they did wrong and empowers them to improve and feel less stressed about grades they may view as arbitrary.<sup>360</sup> As mentioned earlier, one of the great debates about assigned grades (e.g., a letter grade) is the difficulty of determining what the grade earned means.<sup>361</sup> Where there is curved grading, the grade alone does not tell the student about their level of mastery of the subject-matter or the criteria the professor used.<sup>362</sup> Thus, the professor in discussing grades, can provide meaning where students perceive there is none and provide students with a better understanding of the standards used in their grading.<sup>363</sup> And depending on how the professor structures a discussion of grades, students can better learn the substantive material and understand the writing or analytical process better for future exams and ultimately for practice.<sup>364</sup>

Further, when professors talk with students about their grades or the grading process, it positively impacts the professor's teaching and their grading processes.<sup>365</sup> For one, if the professor is talking to students about grades on a formative assessment and the professor notices trends, that allows the professor to make modifications to her teaching, exam design, or grading process.<sup>366</sup> In discussing their experiences with the exam, students can reveal not only misunderstandings of the substantive law but also a misunderstanding of what they were being asked to do by the question posed or the construction of exam.<sup>367</sup> If students disclose a misunderstanding of what was being asked by the question, some professors may discover their exam made an assumption that students had certain knowledge or life experiences that resulted in the student incorrectly answering the question because of a miscue rather than a flaw in logic or substance.<sup>368</sup>

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359. *Id.*

360. *Id.* at 124.

361. Schinske & Tanner, *supra* note 27, at 160.

362. See Charles B. Sheppard, *The Grading Process: Taking a Multidimensional, "Non-Curved" Approach to the Measurement of a First-Year Law Student's Level of Proficiency*, 30 W. ST. U. L. REV. 177, 179–80 (2003) (discussing how use of curves rather than individual assessment results in grade inflation or grade deflation).

363. See *id.* (discussing how the author's conversations with students often need to be "disabused of the notion that grades are often a product of fate and not industry").

364. See Seamon, *supra* note 287, at 127–28.

365. *Id.* at 128.

366. *Id.* at 129.

367. *Id.*

368. E-mail from Jodi L. Wilson, Associate Dean for Academic Affairs, Cecil C. Humphreys School of Law, to author (Mar. 8, 2022, 16:33 EST) (on file with author).

Additionally, professors can help students become more intrinsically motivated because law school often encourages students to be more extrinsically motivated with its focus on grades, rankings, and job placements.<sup>369</sup> When it comes to law school culture, “[a]t the very least, we can acknowledge that because of this valuation of grades and ranking, law schools send the message to law students that grades reflect their value, ability, and intellect.”<sup>370</sup> And professors can help students deal with feelings of failure, which can create a cycle of negativity and impact their well-being.<sup>371</sup> By bringing grade conversations into the classroom, we can bring students’ focus back on learning the standards of legal thinking so they can focus on readying themselves for the profession.

In order to aid students in learning the standards of legal education, professors should consider how they can help students become motivated to learn in deeper ways. Some students who are frustrated because they studied hard and did not receive the grade they anticipated, may use ineffective coping methods by repeating the same learning strategies; attributing their grade to external factors, such as the professor, the test itself, or some uncontrollable circumstances; or giving up on reaching mastery.<sup>372</sup> Growth mindset can address these issues because it is a mindset that believes that one’s intelligence can be improved, which is in contrast to fixed mindset, a mindset that believes that one’s intelligence is fixed.<sup>373</sup> Law schools encourage a fixed mindset by creating the message that performance on one exam or in-class discussion, demonstrate some are smarter than others.<sup>374</sup> To off-set this mindset, law professors can talk to students about their competencies (and likely their grades) and stimulate students’ motivation and interest in learning by encouraging them to adopt a growth mindset. The professor can remind students that they can improve their grades with hard work.<sup>375</sup> Further, it can give students tools to utilize when they face feelings of failure to see opportunities to learn, setting them up for future success.<sup>376</sup> As noted above, giving feedback with grades can further give students opportunities to learn without feeling confined to a fixed grade and to stimulate learning from failure.<sup>377</sup>

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369. Bishop, *supra* note 356, at 980.

370. *Id.* at 981.

371. *Id.* at 979.

372. *Rethinking Exams*, *supra* note 346, at 271.

373. Carol Dweck, *Carol Dweck Revisits the ‘Growth Mindset,’* EDUC. WEEK (Sept. 22, 2015), <https://www.edweek.org/ew/articles/2015/09/23/carol-dweck-revisits-the-growth-mindset.html?print=1> [<https://perma.cc/JR6Q-WKTA>].

374. Bishop, *supra* note 356, at 983.

375. *Id.* at 984.

376. *Id.* at 990.

377. *See id.* at 985.

In addition, a professor can use part of the final class day of the semester or some other date close to the exam period to have a conversation about grades.<sup>378</sup> In that conversation, a professor can acknowledge the anxiety students have regarding the exam period, discuss the disappointment students may experience with their grades, and encourage them to remain committed to learning.<sup>379</sup> Professors can design reflective questions that allow the students to consider how their response to grades, whether perceived as good or bad, can aid or inhibit their future learning.<sup>380</sup>

To aid students in better understanding the standards the professor used in assessing the student, the professor can utilize a post-exam analysis that is process oriented and standards focused. In this discussion, it is important to consider methods to discuss the process and product that is removed from the discussion of the grades awarded.<sup>381</sup> For example, rather than a conversation centered on “those who earned As” or “who were above the curve,” the conversation might center on how students demonstrated mastery of the standards.<sup>382</sup> The discussion can center on what did or did not satisfy the professors’ standard of judgment.<sup>383</sup> The objective is to link this discussion of the students’ current performance to what they may do in a future performance, even if not within the same substantive context.<sup>384</sup> Further, a professor can also break down exam parts that may require different skills or include differing topic area to help students better see how demonstrating mastery of standards may differ depending on the circumstance. A post-exam analysis can help students understand how their grades resulted from certain missteps.<sup>385</sup> The focus should be on examining the students’ exam-taking process and asking students reflective questions.<sup>386</sup> In this way, the student can learn more about the standards used to grade their exams and begin to adopt those standards to improve future work.<sup>387</sup>

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378. Morris, *supra* note 357, at 461.

379. *Id.*

380. *See generally id.*

381. Carless, *supra* note 67, at 230.

382. *See id.* (arguing feedback without grades is important and that some care is needed not to bruise the egos of poor performing students).

383. Zimmerman, *supra* note 348, at 361.

384. *See* Jaclyn Broadbent, Ernesto Panadero & David Boud, *Implementing Summative Assessment with a Formative Flavour: A Case Study in a Large Class*, 43 *ASSESSMENT & EVALUATION HIGHER EDUC.* 307, 320 (2017).

385. Bishop, *supra* note 356, at 1001.

386. *Id.* at 1002.

387. *See id.*

### C. Conversations with the Evaluation Process

One way to engage students in the rehearsal of assessment is for the professor to “pass the evaluative responsibilities to their students.”<sup>388</sup> To help students develop their understanding of standards requires consistent communication and use of a “shared vocabulary” related to writing and thinking about the law.<sup>389</sup> In creating this open communication, it is important to develop an “environment for observations, questions, clarifications, and responses.”<sup>390</sup>

#### 1. Live Review of Student Work

In developing a student’s ability to understand standards, “ungraded, live review” of current or past students’ work as a collective can help.<sup>391</sup> The professor, in providing this live review, should think critically about what it is they hope to accomplish: a focus on organization, substantive content, issue-spotting, analysis of the facts, rule statements, or some other goal.<sup>392</sup> Depending on how much time a professor has with the students, it may only be enough to cover one or two topics to avoid overwhelming the students.<sup>393</sup> Students may be given two or three examples of student work in conjunction with a rubric or sample answer.<sup>394</sup> In a large class, the professor may consider using examples from past student work or anonymous samples from the current class to avoid any embarrassment the students might have in having their work openly critiqued. The students compare the works against the sample or rubric to evaluate them.<sup>395</sup> Then, the professor leads the class in explaining how they would apply the criteria or “grade” the work.<sup>396</sup> The professor may go line by line or paragraph by paragraph, pausing to give feedback or comments about the work.<sup>397</sup> The professor leads the exchange because students need dialogue from someone with expertise and because students have not yet grasped the standards.<sup>398</sup> Having the professor initially explain the

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388. James H. McMillan & Jessica Hearn, *Student Self-Assessment: The Key to Stronger Student Motivation and Higher Achievement*, 87 EDUC. HORIZONS 40, 44 (2008).

389. Borman, *supra* note 13, at 745.

390. *Id.*

391. *Id.*

392. Sholtis, *supra* note 12, at 11–12.

393. *Id.* at 12.

394. See *Building ‘Standards’ Frameworks*, *supra* note 125, at 71.

395. *Id.*

396. *Id.*; see also Sholtis, *supra* note 12, at 17 (explaining how this might be done in a small group).

397. Sholtis, *supra* note 12, at 21.

398. *Building ‘Standards’ Frameworks*, *supra* note 125, at 70.

standards lessens the gap between some students and the professor in clarifying tacit assumptions made by the professor.<sup>399</sup>

An alternative that allows for more student input is for the professor to explain their expectations as the class reviews examples of student work together. Following an initial live review, the students can then switch their work with other students in the class and apply the professors expectations to each other's work.<sup>400</sup> In grading collectively, the professor may ask students to stop them as they review so that the students are able to clarify what they are hearing in real-time.<sup>401</sup> A professor might choose to record these sessions so that students are able to utilize the process when they are preparing for or working on future assignments.<sup>402</sup> Importantly, the process of live grading should be combined with other methods of student grading so students can adopt the standards to improve future work.

## 2. Simulating the Self-Assessment Cycle

Where there is a standard, the benchmarks and criteria used to evaluate if the standard is met is adaptable to teaching students how to internalize that information and engage in self-assessment.<sup>403</sup> Self-assessment is a cyclical process that includes "self-monitoring, self-evaluation, and identification and implementation of instructional correctives."<sup>404</sup> In this cycle, a person first monitors what is it they are thinking and doing, then evaluates their progress based on standards, and then considers the next steps to improve their performance.<sup>405</sup> Self-assessment is critical for a student's ability to understand feedback from an instructor because a condition of a student being able to use feedback to improve is that the student "already possesses enough explicit and tacit knowledge to understand the full implications of the feedback."<sup>406</sup> For students to learn the standards of law, students must be able to understand accurately quality work and recognize it on sight, judge the quality of their work for strengths and weaknesses, and determine ways to improve the quality of their work.<sup>407</sup> This is indeed what occurs in practice where

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399. *Id.*

400. *Id.* at 71.

401. Sholtis, *supra* note 12, at 21.

402. *See id.* at 15 (stating in small group or individual live reviews, she encourages students to record the session and they report listening to them later).

403. McMillan & Hearn, *supra* note 388, at 41.

404. *Id.*

405. *Id.*

406. *Id.*; *see also* Sadler, *supra* note 320, at 59.

407. Sadler, *supra* note 320, at 54; *see also* Ngar-Fun Liu & David Carless, *Peer Feedback: The Learning Element of Peer Assessment*, 11 *TEACHING HIGHER EDUC.* 279, 280–81 (2007).

learning outcomes are rarely explicitly stated, and the learner in practice must identify for themselves what they must learn based on context to then judge the quality of their work.<sup>408</sup> In developing a student's ability to apply standards to their own work or engage in self-assessment, there are three processes a professor can integrate into their class: goal setting, evaluation, and reflection.<sup>409</sup>

Students learn more when they set goals for themselves, and these goals help them process ways to meet the existing standards.<sup>410</sup> One way to artificially simulate these goals is for the professor to allow students to select goals from a predetermined list.<sup>411</sup> For example, in essay writing, a list of learning goals may include suggestions to create a writing process, develop effective time management, consistently apply a paradigm, synthesize rule statements, or fully develop the analysis by incorporating all relevant facts. A professor may also provide concrete examples for students by giving them rubrics or sample answers.<sup>412</sup> The rubrics provided should avoid references to grades but should focus on proficiency.<sup>413</sup> For instance, if the goal is to improve essay writing, the rubric should focus on how the student can achieve better writing (i.e., the mechanics of writing or the use of rules and application). All of these guides are designed to help students "understand and internalize the steps necessary to meet [their] goals" and create an awareness of the learning process.<sup>414</sup>

Once students have had an opportunity to internalize the goals and standards, then they need an opportunity to practice evaluation.<sup>415</sup> In particular, the focus should be on student self-evaluation so that students can adjust their performance.<sup>416</sup> Giving students an opportunity to self-evaluate and adjust simulates what experts do naturally.<sup>417</sup> As they create a work, experts naturally make adjustments based on their understanding of quality or the standards.<sup>418</sup> Experts recognize their mistakes by recognizing the completeness or weakness of their work.<sup>419</sup> Once they are aware of the weaknesses, they can draw on experience to use different

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408. Boud & Falchikov, *supra* note 277, at 404.

409. McMillan & Hearn, *supra* note 388, at 44.

410. *Id.* at 45.

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. Sadler, *supra* note 320, at 56.

418. *Id.* at 57.

419. *Id.*

tactics.<sup>420</sup> Thus, after the students have performed an activity (e.g., written an essay, answered a multiple-choice question, or met with a client in clinic), the professor should provide an opportunity for the student to self-evaluate and make adjustments before grading.<sup>421</sup> Feedback for the student to evaluate and adjust can be given through a rubric, checklist, or some other form of concrete, objective guidance that helps the student to identify the strengths and weaknesses of that activity and make appropriate adjustments.<sup>422</sup>

Reflection is the final part of a simulated self-assessment process a professor may integrate.<sup>423</sup> During this part of the process, the students are learning to think about what they have learned or what is unclear to create new goals.<sup>424</sup> A professor may simulate this by giving students an opportunity to explain their reflection through conferences, peer collaboration, or written self-reflection.<sup>425</sup> The key here is for the professor to get the students to learn deeply from experience, moving from identifying strengths and weaknesses to learning how to make corrections (i.e., those new learning goals).<sup>426</sup>

### 3. Peer Review

A final way to engage students with grading processes is through peer review exercises. In preparing students for law practice, it is important to consider creating learning experiences that prepare students for a career that requires life-long learning.<sup>427</sup> Working and learning go hand in hand and occur socially.<sup>428</sup> Learning occurs “in work groups, families, and social and community settings through participation.”<sup>429</sup> And “work occurs within communities of practice.”<sup>430</sup> Additionally, peer review helps students become better at self-assessment because peer review provides an opportunity for students to read or hear different perspectives and better identify how to improve their own performance.<sup>431</sup> And self-assessment, as stated above, allows students to understand standards, apply them to their work, and determine if the work has met the

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420. *Id.*

421. McMillan & Hearn, *supra* note 388, at 45.

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.* at 46.

426. *Id.*

427. Boud & Falchikov, *supra* note 277, at 405.

428. *Id.*

429. *Id.*

430. *Id.*

431. Liu & Carless, *supra* note 407, at 281.

standards.<sup>432</sup> Thus, in building our students' ability to learn standards, professors should encourage them to engage in assessment with their peers.<sup>433</sup>

While peer review requires the professor to give up control and confront concerns about student's ability to effectively score their peer's work, the value of what students learn through peer review greatly offsets these concerns.<sup>434</sup> When we reframe assessment to include students and their peers, students can begin to "construct their own knowledge in the light of what works in the world around them."<sup>435</sup> Further, when students engage in peer review, they can begin to see a grader's perspective and understand the judgments that must occur.<sup>436</sup> This perspective moves the student from passively receiving expert judgments to actively participating in the assessment process.<sup>437</sup> Additionally, students are often better at communicating with their peers because of the shared language of novices, who may distill concepts or skills in a way the expert professor cannot.<sup>438</sup> Students also have different perspectives on how to approach a problem and may more easily see deficiencies in their own work by looking at other student's work.<sup>439</sup> And students may feel more motivated talking to a peer, and thus receive negative feedback in a more productive way than when the power dynamic between professor and student is not present.<sup>440</sup>

One common use of peer review is to have students compare their peer's work to published criteria and then give descriptive feedback about what the student can do to improve.<sup>441</sup> Some researchers argue that peer review can be equally effective, if not more effective, if the peer gives feedback rather than a grade.<sup>442</sup> The process should be centered on providing students feedback while also giving students an opportunity to discover standards by learning to evaluate the quality of work.<sup>443</sup> This approach can be done solely by allowing students to review without the professor rechecking the work or it can be done such that the professor evaluates the feedback after.<sup>444</sup>

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432. *Id.*

433. See Boud & Falchikov, *supra* note 277, at 405.

434. Berry O'Donovan, Margaret Price & Chris Rust, *Developing Student Understanding of Assessment Standards: A Nested Hierarchy*, 13 TEACHING HIGHER EDUC. 205, 213 (2008).

435. Boud & Falchikov, *supra* note 277, at 409.

436. *Building 'Standards' Frameworks*, *supra* note 125, at 72.

437. O'Donovan, Price & Rust, *supra* note 434, at 212.

438. Nicol & Macfarlane-Dick, *supra* note 321, at 211.

439. *Id.*

440. *Id.*

441. Nicol & Macfarlane-Dick, *supra* note 321, at 211; Schinske & Tanner, *supra* note 27, at 161.

442. See generally Liu & Carless, *supra* note 407, at 282.

443. Nicol & Macfarlane-Dick, *supra* note 321, at 211.

444. *Id.*

Another option for the use of peer review focuses on the process of learning the standards used in assessing work as the primary consideration and treats providing feedback as a secondary concern.<sup>445</sup> Students can be asked to bring three copies of a short work product with them to class with no name listed on the work.<sup>446</sup> On the first review, students place one copy of their work into a pile and the papers are randomly distributed to students; the professor also places her work into the pile and distributes a student's work to herself.<sup>447</sup> First, without the use of criteria, the professor asks students to judge the quality of the work in front of them by considering their reactions to the work and how they perceive it as a whole.<sup>448</sup> To avoid clouding students' judgments as to a fixed number or grading scale, the professor asks students to create a fixed line with low quality on the left and high quality on the right.<sup>449</sup> Second, the professor asks students to place an X on the scale and to justify their rating in fifty words or less describing the quality and content of the work honestly and without regard to praising the work.<sup>450</sup> Third, the professor asks the students to advise the writer on how to improve.<sup>451</sup> Fourth, the professor asks students to consider if the work actually addressed the issue.<sup>452</sup> Note this fourth step occurs as the last step in the first round to allow students to think more broadly about the first three steps and discover that a common problem in assessing the quality of a work is when a work product does not conform to the task.<sup>453</sup> This step becomes the first step on the subsequent reviews of the remaining two papers students bring to class.<sup>454</sup> A class-wide discussion is then conducted to discuss what criteria the students used, terms they used to describe the work, and how judgments and rationales differed depending on the individual characteristics of the work.<sup>455</sup> To assist the students who might not have a strong rating system, the professor includes their own work as part of the discussion so all students become aware of what high quality work looks like.<sup>456</sup> Thus, through peer review, students are able to evaluate the works of the other students as a way to more strongly learn the standards used in grading processes.

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445. *Sadler, supra* note 320, at 62.

446. *Id.* at 59.

447. *Id.* at 60.

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.* at 61.

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.*

Engaging students in the grading process is an important component to aiding students in learning the standards necessary to meet law schools' goal for students to think like a lawyer and become self-regulated to enter the profession. To achieve these goals, transparency in grading must move beyond simply providing feedback or descriptive devices because it requires professors to actively engage students in the process of grading.

#### CONCLUSION

Grading is an important function of the assessment process; yet, it remains one of the least discussed aspects of the process. As a result of this lack of discussion, most professors learn to grade by trial and error and sometimes do it without a clear understanding of the processes they use to evaluate student work. Additionally, some students learn about the grading process through some shared understanding with their professors while other students are left out. Because the processes used in grading are important for learning, more institutions should engage professors in discussing the grading processes to understand the standards professors use more clearly in evaluating student work. And students should be brought into the grading process, so they can truly understand the standards that underlie professional judgment. While this Article has addressed several ways in which to simulate these processes, more research is needed to explain how and what law schools are doing to illuminate the grading processes as a learning opportunity for both professors and students.