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THE CARE AND FEEDING OF ANXIOUS TAX LAW STUDENTS

Samuel A. Donaldson *

When you think about it, it makes sense that tax scares people. Taxation relates to money and personal finance, both major sources of stress in life.¹ Tax laws are complex and dynamic,² so the inherent uncertainty and change only adds to the stress. On top of that, stressful life experiences all have significant tax consequences, including marriage,³ death,⁴ divorce,⁵ buying

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¹ In a 2015 report, the American Psychological Association revealed that “Money is a somewhat or very significant source of stress for the majority of Americans (64 percent) but even more so for parents (77 percent), Millennials (75 percent) and Gen Xers (76 percent).” AM. PSYCH. ASS’N, STRESS IN AMERICA: PAYING WITH OUR HEALTH 5 (2015), <https://www.apa.org/news/press/releases/stress/2014/stress-report.pdf>; see also Scott Van Voorhis, *Personal Finances Are a Top Source of Stress for Americans*, THE STREET (Dec. 29, 2019, 2:45 PM), <https://www.thestreet.com/personal-finance/personal-finances-are-a-top-source-of-stress-for-americans-14795237>.

² Not that this is a bad thing, mind you. See generally ahem, Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645 (2003) (brilliantly arguing that complex tax laws serve the greater good).

³ With marriage comes, among other things, the decision whether to file a joint federal income tax return. Others have written extensively on the tax aspects of marriage. See Stephanie Hunter McMahon, *To Have and to Hold: What Does Love (of Money) Have to Do with Joint Tax Filing?*, 11 NEV. L.J. 718 (2011); Lily Kahng, *One is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651 (2010); James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409 (2010); Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805 (2008); Shari Motro, *A New “I Do” : Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006).

⁴ Death itself is not a taxable event in the United States, but an estate may be liable for payment of federal estate taxes, generally payable no later than nine months after the decedent’s death. I.R.C. §§ 2001(a), 6075(a). There may also be ongoing liability for federal generation-skipping transfer taxes. *Id.* § 2601. And those receiving property from a decedent’s estate generally take a basis in that property (for purposes of determining gain or loss upon a subsequent disposition of the property) in an amount equal to the property’s fair market value as of the date of the decedent’s death. *Id.* § 1014(a)(1).

⁵ Actually, current law makes the tax aspects of divorce much simpler than before. Ex-spouses generally do not recognize gain or loss on property transfers “incident to the divorce.” I.R.C. § 1041(a)(2). Instead, any lurking gains and losses pass from the transferor spouse to the recipient spouse. *Id.* § 1041(b). So while the recipient will recognize gain or loss upon a disposition of the property, the transfer between the ex-spouses is not a taxable event. Cash transfers between exes, whether in the form of alimony,

and selling a home,⁶ and chronic illness.⁷ So it stands to reason that “tax season”—the months leading up to the deadline for filing federal income tax returns—might induce dread, anxiety, or even panic.⁸ One psychologist half-jokingly proposes labeling the fear of filing federal income taxes “forosophobia,” from the Greek “*foros*” for tax.⁹

Regardless of whether it can or should be labeled, the fear is real.¹⁰ As one practitioner puts it, “We have seen people refuse to open letters from the IRS fearing the worst. We have seen people close to panic attacks when discussing their tax issues. We have seen people in tears, feelings of stress, and even thoughts of hurting themselves.”¹¹ Just as some taxpayers have a

maintenance, or child support, are generally not income to the recipient and not deductible by the payor. *Gould v. Gould*, 245 U.S. 151, 154 (1917) (finding alimony is not taxable income to the recipient).

Prior to 2018, cash transfers in the form of “alimony or separate maintenance payments” were gross income to the recipient and deductible by the payor, though exes could agree that payments would not be taxable to the recipient if the transferor would forego the deduction. I.R.C. §§ 71(a), 215(a) (repealed 2017). Child support payments were not taxable to the recipient (nor deductible by the payor), but that rule incentivized clever recipients to disguise alimony payments as child support to avoid taxation. *See* I.R.C. § 71(c) (repealed 2017). “Who pays the tax” was just one more thing for a divorcing couple to negotiate.

⁶ A seller can exclude all or a portion of the realized gain from the sale of a home provided the seller has owned and used the home as a principal residence for at least two of the five years prior to the sale. I.R.C. § 121(a). To the extent a buyer finances a home purchase through a mortgage loan, interest on the loan will be deductible provided the buyer foregoes the standard deduction and instead itemizes. *Id.* § 163(a), (h). Property taxes on the home may also be deductible. *Id.* § 164(a)(1)–(2).

⁷ A taxpayer can deduct medical expenses to the extent they exceed 7.5 percent of the taxpayer’s adjusted gross income. I.R.C. § 213(a). For taxpayers with chronic illness, deductibility may hinge on whether a particular expense is incurred to affect a “structure or function of the body” or whether the cost is for the treatment of a disease. *Id.* § 213(d)(1)(A). Over-the-counter medication is not deductible; prescription drugs, however, qualify as “medical expenses.” *Id.* § 213(b).

⁸ Even WebMD recognizes the issue and offers tips for handling stress related to filing taxes. *See* Louise Chang, *How to Cope With Tax-Time Stress*, WEBMD, <https://www.webmd.com/balance/stress-management/features/cope-tax-time-stress> (last visited Dec. 30, 2021).

⁹ Dale Hartley, *Forosophobia: Fear of Taxes and the IRS*, PSYCH. TODAY (Feb. 12, 2021), <https://www.psychologytoday.com/us/blog/machiavellians-gulling-the-rubes/202102/forosophobia-fear-taxes-and-the-irs>.

¹⁰ *See, e.g.*, Charles Delafuente, *A Paralyzing Fear of Filing Taxes*, N.Y. TIMES (Apr. 11, 2009), <https://www.nytimes.com/2009/04/12/weekinreview/12delafuente.html> (quoting a tax manager explaining that clients find “filing a tax return ‘is almost like going to the dentist’”).

¹¹ Lavon Duvall, *IRS Phobia*, PACEY L. CORP.: BLOG (Feb. 13, 2020), <https://taxattorneyllm.com/irs-phobia/>.

fear of filing, some law students have a fear of taking a federal income tax course.¹² The justifications for the fear vary and are, at bottom, irrational. But that doesn't mean the fear is unreal.

Though many (most?) come to see the federal income tax class is not as intimidating as they feared, that's little comfort to the student who starts the semester reluctantly enrolled because "everyone told me I should take tax." This student wants some early assurance that the course is manageable. Over the years, I have employed several techniques in my tax law courses designed both to assess student performance and, as importantly, to alleviate anxiety students may have about their performance on the final examination. This Article explains five of these techniques and makes the case that they have pedagogical advantages in the law school classroom beyond reassurance. In addition to minimizing anxiety over the final exam, the five techniques explained in this Article also help assess student performance and give students multiple avenues to engage with the material.

While this Article limits its scope to the introductory federal income tax class, the techniques described can easily be used in advanced tax courses and in other, non-tax courses. Indeed, I have adapted most of these techniques for courses I have taught in property, trusts and estates, professional responsibility, and commercial law.

Most of the suggested techniques described in this Article will be familiar to experienced law school professors. All have been adapted to suit the introductory federal income tax course, often through a trial-and-error approach. I am constantly modifying the structure of each technique, sometimes in response to specific constraints (the timing of the course, enrollment size, other demands on my schedule that semester) and other times simply to make the technique a better pedagogical tool. Though every technique described in this Article undergoes constant tinkering, none of them has undergone anything resembling scientific study as to whether it is effective in reducing student anxiety, improving student performance on

¹² Some schools have to make the case for their students to enroll in the federal income tax course. See, e.g., *Want to Be a Happy Lawyer? Study Tax Law*, NEW ENG. L. BOS., [https://www.nesl.edu/blog/detail/want-to-be-a-happy-lawyer-study-tax-law-\(9-reasons-why-you-should\)](https://www.nesl.edu/blog/detail/want-to-be-a-happy-lawyer-study-tax-law-(9-reasons-why-you-should)) (last visited Dec. 30, 2021). And the stress of the federal income tax occasionally pops up on Reddit. See *Dying In Federal Income Tax, Send Help*, REDDIT (Oct. 16, 2019, 2:34 PM), https://www.reddit.com/r/LawSchool/comments/ditkqs/dying_in_federal_income_tax_send_help/; see also *Income tax?*, REDDIT (Mar. 6, 2020, 9:34 PM), https://www.reddit.com/r/LawSchool/comments/feoqmj/income_tax/.

exams, or bolstering mastery of the subject matter. Most of the evidence offered in this Article is based on my own (inevitably limited and biased) perspective. But to the extent these techniques appear successful, and since students tell me even after I can no longer change their grades that they found these techniques helpful, I offer them to experienced and novice colleagues for use in their own courses.

Before turning to each of the techniques, I should note that I do not use every technique in every class. Too many tricks would, in my view, give the class a “gimmicky” feel. I might use two or, at most, three techniques in any given course depending on factors like enrollment, coverage, and whether I have to miss specific class meetings for academic and professional conferences.

I. MIDTERM EXAMINATION

Within the past twenty years, midterm exams have become popular among law professors and, to a lesser extent, law students.¹³ There is evidence that midterm exams are helpful in improving student performance.¹⁴ Students appreciate the opportunity to test their mastery of the material and giving students multiple opportunities for assessment takes some pressure off the final exam. A midterm exam in the federal income tax course is especially helpful for several additional reasons. First, students receive feedback at a point in the semester when they still have time to take corrective action in their studies, if needed. Second, it gives students some feel for the format of the final exam and the conditions under which they will take the exam. Third, it lets students see how the instructor crafts questions and “what the professor is looking for” in their answers. Fourth, it

¹³ See, e.g., MICHAEL HUNTER SCHWARTZ ET AL., TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM 154–58 (2009); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 164–67 (2007); GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 143 (2000).

¹⁴ See, e.g., Karen McDonald Henning & Julia Belian, *If You Give a Mouse a Cookie: Increasing Assessments and Individualized Feedback in Law School Classes*, 95 U. DET. MERCY L. REV. 35, 50–52 (2017); Carol Springer Sargent & Andrea A. Curcio, *Empirical Evidence that Formative Assessments Improve Final Exams*, 61 J. LEGAL EDUC. 379, 380–81 (2012); Rogelio A. Lasso, *Is Our Students Learning?: Using Assessments to Measure and Improve Law School Learning*, 15 BARRY L. REV. 73, 106 (2009).

incentivizes students to keep up with the daily reading assignments and their own outlining.

Grading a midterm exam takes more time than grading final exams, however, even though a midterm exam has fewer questions and is much shorter than the final exam. This is because of the need to provide more detailed written feedback with each submission. Final exams are usually scored without written comments, especially in an upper-division course like federal income tax.¹⁵ But a midterm exam is only helpful to students when they can receive detailed feedback on their performance. It is not enough simply to tell students their raw scores along with the class median and mean. The instructor needs to let a student know if there are missed issues, if certain terms of art are used incorrectly, if conclusions are inadequately explained, and whether the answer format is clear and helpful to the reader.¹⁶

It is primarily because of the added time needed to grade midterms that it is best to keep them short. In a prior year, for example, students took a thirty-minute midterm exam consisting of one twenty-minute essay question and two multiple-choice questions. This format was consistent with the format of the final exam, complete with two guesses at each multiple-choice question, a technique discussed in Part IV, below. The midterm was worth thirty points, representing just under twenty percent of the points possible for the course. This made the midterm important, but not so much so that poor performance would ruin a student's chances for a good grade.

Where possible, the midterm exam should simulate the conditions of the final exam so that students know what to expect at the end of the semester. To do this, I often ask the registrar's office to assign each student a temporary exam number for the midterm exam, and I ask that someone from that office

¹⁵ A law student's interest in meeting after the submission of final grades to "debrief" the student's performance on the final exam is inversely proportional to the number of semesters the student has been in law school. We can refer to this as the Law of Diminishing Interest. You read it here first.

¹⁶ This is where students can see my stylistic pet peeves. For example, I make it a point to cross out the words "or not" when an answer says "whether or not." I likewise cross out "in the event that" and write in "if." And I also spill significant ink (or graphite) attacking pre-formatted statements of nothingness like "The issue is whether there are federal income tax consequences from these facts."

proctor the exam where possible.¹⁷ Only after grading the midterms do I get a list of student names and temporary exam numbers.

After all of the midterm exams are graded and returned to students, those disappointed with their scores are encouraged to confer with me about techniques for improving for the final exam. Because the final exam is graded anonymously using different exam numbers, students are not helped or hurt by the instructor knowing their performance on the midterm exam. Although I have never formally measured this, it is my sense that the students most likely to visit with me are not the ones who performed most poorly on the midterm; rather, the ones who darken my office door (or pop up on my video chat) tend to be those who earned a merely “average” score instead of the normal “high” score they are used to receiving in law school. One could pen a “see me” comment on low-scoring exams, but there is concern that students might feel an extra degree of shame that would outweigh the benefits of conferring over strategies for improving performance.

II. TAKE-HOME ESSAY QUESTIONS

Students often have the chance to complete part of the final exam in advance of exam day. This usually comes either in the form of a policy essay or through writing answers to assigned practice questions. This Part II presents both techniques.

A. *The Policy Question*

In some years, students in the federal income tax class must submit on the last day of class an answer to the following policy-based essay question:

¹⁷ It is my impression that many law schools (at least those with which I have been affiliated) have, over time, shown greater willingness to provide students with reasonable testing accommodations in light of documented needs, most commonly in the form of allowing extra time for completing an exam. Students entitled to accommodations, whether in the form of more time, a different setting, or otherwise, are given them for the midterm exam as well. A midterm exam, therefore, also consumes extra bandwidth from whatever offices service students receiving accommodations, whether that be the law school registrar’s office, a university-wide student accommodations center, or both. With the advent of online examinations, this proves somewhat easier to implement, as giving a particular student added time, for example, can often be implemented through a few mouse clicks. Still, I try to be cognizant of the demands on other offices in deciding whether to offer a timed midterm exam in any given semester.

If you could make one change to the federal income tax laws we have studied in this course, what change would you make? Briefly explain the reasons for your proposed change.

Answers must not exceed three pages. Indeed, instructions accompanying this assignment make clear that answers in excess of three pages will be marked down twenty percent for each excess page (or portion thereof).¹⁸ The instructions also specify the required type size, margins, and spacing. Late submissions¹⁹ are also marked down twenty percent for each day late (or portion thereof). To maintain anonymity, students use their final exam numbers to identify their papers.

The question is posed in the course syllabus, and the instructor should make specific reference to it during the first class session when discussing how final grades will be determined. It is also helpful to refer to this assignment again in the final weeks of the class, reminding students that submissions are due on the last day of class. Theoretically, at least, students have this assignment in mind throughout the semester, giving them ample opportunities both to reflect upon and evaluate the many statutory and regulatory provisions we cover in the course.

Responses to this policy question can be graded while waiting for the box of completed exams to land in the instructor's inbox. The policy question technique is helpful for at least three reasons. First, because it counts toward the final grade, it reduces some of the anxiety about the final exam. Second, it allows students the opportunity for deeper reflection and evaluation of the many topics we tackle during the semester. Third, it forces students to evaluate a provision of the Code using one or more of the tax policy criteria we identify and discuss early in the course.²⁰ Too often in the haste of the semester we lose the opportunity to engage in deeper policy discussions; this technique gives students the chance to flex their normative muscles.

¹⁸ Remarkably, it seems that every year there are two or three students who exceed the page limitation despite these express instructions.

¹⁹ Yes, there is usually at least one of these, and sometimes there will be a student who fails to make any submission at all even after I follow up with the student after the deadline.

²⁰ The exact criteria (and the labels used for those criteria) can change from one semester to the next, depending on the casebook we use. But generally speaking, the criteria are equity, efficiency, and (occasionally) administrability.

B. The Essay Question Portfolio

In other years, students receive a packet of sample essay questions about a month before the end of the course, along with the promise that one or more of the distributed questions will appear verbatim on the final exam. Students are allowed to collaborate with others in the class—indeed, this is encouraged—but students must write their own answers to each of the questions. The exact instructions usually read as follows:

Note: One or more of the following sample questions will appear verbatim on the final examination. You are welcome to write out your answers to these questions in advance and have them with you during the final exam.

In preparing your answers to these questions, you may (and should) work with others in the class but you must write your own answers to the questions. For obvious reasons, I will not discuss the answers to these questions until everyone has completed the final exam and grades have been submitted, though I am happy to discuss the underlying substantive law.

The packet will usually contain three or four sample essay questions. Each sample question comes with a suggested time allocation, just like a real exam question. On the actual final exam, the suggested time allocation reflects an assessment of the time required for a student who has mastered the material to read the question, outline the major talking points, and write out a detailed and complete answer. It also signals the relative weight of the question. A forty-minute question, for example, is worth twice as many points as a twenty-minute question.

To make sure students hone their analysis to the most relevant issues rather than just regurgitate their outlines into their answers, there is a word limit for each answer. It's a generous word limit—usually 250 words for every ten minutes allocated to the question. But without a word limit, some students will prepare overly long answers, desperately hoping that somewhere amidst a sea of verbiage there are points to be awarded.

The carrot here is obvious. If a student writes out an answer in advance of the exam and then sees the question on the final, the student can paste the prepared answer into the exam, thus saving whatever time has been allocated for the question for use elsewhere on the exam.

The number of sample questions actually used on the final exam will vary from year to year. Sometimes only one sample question appears on the final; in other years two or more sample questions may be used. It is important not to use the same set of sample questions from one year to the next so as to keep prior students from “bequeathing” their answers to an incoming crop of new students. Thus, there is a significant investment of time at the front end in creating new, additional essay questions, many of which will never be used on a real exam.

But this technique offers a number of benefits. First, it’s very effective for getting students to meet outside of class to discuss the material. It motivates students to meet and compare answers, nearly always leading to discussions about whether certain rules do or do not apply. In days when students met in person at the law school to study, I would sometimes overhear extended debates between students over the issues raised in a sample question. That kind of engagement is nearly impossible to achieve without the incentive of saving time on the final exam. Second, it encourages students to submit detailed and well-written responses. This benefits both author and reader. Third, it gives students a measure of confidence that they have already completed some portion of the exam before it has even started. Fourth, to the extent a student saves time on the final exam by completing answers in advance, the student can relax and feel less time pressure.

Again, though, this technique requires drafting more essay questions earlier in the semester. Although some questions might involve topics yet to be discussed in the course, it is best to build questions that cover material from earlier in the course so that students are equipped to answer the questions from the moment they are distributed. Another drawback, admittedly, is that, without fail, at least a handful of students choose not to prepare any answers in advance or, if they do, the answers are in outline form. At least that’s the conclusion I reach based on reading their answers—I certainly hope it’s not the result of careful crafting and editing.

III. SAMPLE MULTIPLE-CHOICE QUESTIONS

This technique was born from a conversation I had as a junior faculty member with the late Professor Richard Kummert at the University of Washington School of Law. We wondered whether students would engage with the material more carefully if they received some multiple-choice questions in advance. I quickly implemented the idea and have used it in nearly every federal income tax course since.

The idea here is similar to the essay question portfolio described in Part II, above. At regular intervals throughout the course—usually every two or three weeks—students receive a set of multiple-choice questions. Each set contains five questions based on the material recently covered in class. Here too, students are allowed to work with their colleagues in tackling the problems, although students never receive answers. By the end of the course, students have received twenty to twenty-five questions. The promise is that six of the multiple-choice questions on the final exam will come from these distributed questions. Because five minutes is typically allocated to each multiple-choice question, students who prepare all of the questions in advance will in effect have a free half-hour to use elsewhere on the exam. Students like having that free half-hour to use for the essay questions or for the other multiple-choice questions. There is no reason to get cute with which questions come from the distributed samples: the six questions selected from the advance sets are the first six multiple-choice questions on the final exam, and the questions are not changed in any way.²¹

Unsurprisingly, the questions distributed to students in advance are by design more difficult than the questions they will see for the first time on the final exam. Because the real goal is to get students working through the problems in small groups (thus discussing the material with each other outside of class when they might not do so otherwise), questions with obvious answers are not effective. Of course, the instructor cannot answer any questions from students that would reveal the answer to a specific sample question, but the instructor should welcome “indirect” questions about the substantive law underlying any sample question.

In my experience, this technique has been successful in facilitating student collaboration and debate. I have seen many study cartels huddled over the sample multiple-choice questions, discussing (sometimes arguing over) the answers. I firmly believe that a lot of learning comes from these discussions, and much of it might not take place if the promise of a payoff at exam time was absent.

²¹ Like many law professor noobs, I thought final exams needed to be tricky so that those who really mastered the material could flex their muscles. I worried that if an exam was too straightforward that students would all get very high scores, and it would be even harder to apply the school’s mandatory grading curve with any degree of confidence. Over the years I have learned that the law school exam that’s “too easy” is rather like a unicorn: theoretically possible, allegedly seen in the wild, even the subject of many dreams. But I’m not sure it exists.

Over the years I have tracked student performance on the final exam. As one would expect, students generally score better on the first six questions than they do on the remaining, “new” questions. What surprised me at first, though, was that, without exception, a small number of students (around ten to fifteen percent of any given class) miss a substantial number of the first six questions. I assume either that these students chose not to work through the questions in advance or, if they did, they did not consult with colleagues in the class about the answers. Go figure, those lone wolves also tend to perform worse than their peers on the essay questions and the other multiple-choice questions. Consequently, I find this technique does not meaningfully affect the overall curve in any given class.

I lack the data to claim that overall exam performance is better in the years I have supplied students with multiple-choice questions in advance. This is for many reasons, including the fact that I use different question sets from one year to the next and I use different teaching materials from one year to the next.²² There are just too many variables to compare one class against another with any degree of confidence. But at least I know that students are more engaged with the material outside of class, and I am happy with that.

One might think some students would complain of free riders who simply charm the eggheads in the class to get the answers with very little effort, but feedback on student evaluations about the sample questions is

²² More precisely, I have a rotation of three or four casebooks I use for the federal income tax class. The reasons for that approach, and whether it’s healthy, exceed the scope of this essay. But the short version is this: recalling my own experience as a law student, I know that students trade class outlines like they were recipes. When a professor uses the same book and the same approach year after year, the outline almost becomes a script for the class. To me, this spoils the classroom experience and does nothing to encourage the student to grapple with the material directly. By switching casebooks, topics are addressed in different depths and in a different order, making an older outline with summaries of other cases and answers to other problems substantially less helpful. Necessarily, students have to work through the problems themselves, which I think gives them a better learning experience.

Modernly, of course, this reason for switching casebooks is rather obsolete. The industrious slacker (the student that will work just as hard to develop a shortcut as it would take to master the material in the first place) will scour the internet to find a leaked Teacher’s Manual or an outline from a student at another law school whose class used the same text. So rotating casebooks may not be as effective for this reason as it was in the past. But there’s another reason I rotate books, which may be even more valuable: it keeps me fresh. Each time I teach from a different book, I learn new perspectives on the material. The course never feels stale, and I like that class prep always feels fresh.

Would I recommend this approach to all colleagues? No. It is hardly efficient. It cuts into the time you can spend on other parts of the job. Those in a position to evaluate your work will not respect you more; if anything, they will question your need to “reinvent the wheel” every year. It works for me, though.

uniformly positive. If there are any free riders getting the answers to the sample questions from sympathetic jellyfish, they very likely reveal themselves elsewhere on the exam through lackluster performance on essay questions or the remaining multiple-choice questions.

IV. MULTIPLE-ANSWER MULTIPLE-CHOICE QUESTIONS

Early in my career I found that scores on multiple-choice questions tended to be quite low. Admittedly, the questions were tough, and that remains the case. When drafting multiple-choice questions, an instructor should anticipate where a student will take a wrong turn and then supply an answer choice that supports that wrong turn. This way, the instructor gets some idea of how a student parsed the question and where the student erred. If a particular fact pattern only lends itself to three or four possible answers, there might also be one “silly” answer—not one that students can identify right away as clearly wrong but one that no respondent would select after at least some analysis.

A peek behind the curtain into the multiple-choice question construction process might be helpful. Most every introductory federal income tax course covers the taxation of damage awards.²³ Section 104(a)(2) of the Code excludes from gross income damages received on account of physical injury or physical sickness,²⁴ but an exception buried within § 104(a) excepts punitive damages from exclusion. In other words, punitive damages are includible in the gross income of a plaintiff. To test a student’s understanding of the statute, I might create a question where P sues D for injuries stemming from an auto accident and P recovers \$700,000 in total damages, consisting of \$100,000 for medical expenses that P paid but never deducted, \$200,000 for loss of future income, and \$400,000 in punitive damages. The call of the question might be something along the lines of, “How much gross income

²³ The topic is discussed in some detail in all of the popular casebooks. *See, e.g.*, JAMES J. FREELAND ET AL., *FUNDAMENTALS OF FEDERAL INCOME TAXATION* 187–200 (19th ed. 2018); JOSEPH BANKMAN ET AL., *FEDERAL INCOME TAXATION* 107–24 (18th ed. 2018); J. MARTIN BURKE & MICHAEL K. FRIEL, *TAXATION OF INDIVIDUAL INCOME* 185–216 (12th ed. 2018); MICHAEL J. GRAETZ ET AL., *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 218–25 (8th ed. 2018).

²⁴ I.R.C. § 104(a)(2).

does P have on these facts?” The answer choices would probably look like this:

- A. Zero
- B. \$100,000
- C. \$400,000
- D. \$500,000
- E. \$700,000

The correct answer, on these facts, is \$400,000.²⁵ The other answer choices are not random, however. If a student forgets the exception for punitive damages but remembers everything else, the student will choose “Zero,” for that student would conclude that all of the damages would be excluded from gross income. Likewise, if a student mistakenly applies a second exception for reimbursed medical expenses not applicable on these facts, then the student will conclude that \$500,000 (the punitive damages and the amount received for the medical expenses) is the proper amount included in gross income. If a student just plain forgets about the § 104(a)(2) exclusion altogether, \$700,000 would likely be the most attractive choice. The final answer, \$100,000, would be (hopefully) the answer choice least likely to be selected, as it requires not one but *two* wrong turns to get there.²⁶

This example shows that even straightforward multiple-choice questions can be pretty difficult. For that reason, it is not unusual to allocate three, four, or five minutes of exam time per question.²⁷ When I first started grading multiple-choice questions, I was very disappointed with the results. It was not unusual to see at least one-third of the students—sometimes many more—get fewer than half of the questions correct. This remained the case even after utilizing the sample multiple-choice question technique in Part III, above. While I realized the questions may have been too difficult, I sensed that if students had another shot at each question, the scores on the multiple-

²⁵ The punitive damages are included in gross income, as explained in the text. The \$200,000 award for lost future income is excluded as damages received on account of physical injury under I.R.C. § 104(a)(2), as is the reimbursement of medical expenses, assuming the taxpayer did not deduct such expenses under I.R.C. § 213 on a prior federal income tax return.

²⁶ The student would have to conclude the punitive damages were excludable (strike one) and that damages for the undeducted medical expenses are includible (strike two).

²⁷ If I want to devote one hour of final exam time to multiple-choice questions, then, I need twelve questions (five minutes per question), fifteen questions (four minutes per question), or twenty questions (three minutes per question).

choice portion of the test would better reflect the student's overall comprehension. So, one year I introduced the "second-chance format" described below and was happy to see not only that scores improved but that, for the most part, multiple-choice scores bore a strong resemblance to essay scores. Several years later, I tweaked the technique by using a "point allocation format," also described below. While I tend to prefer the second-chance format to the point allocation format, I explain both approaches here so that instructors inclined to let students have more than one chance to get the right answer can use the method they like most or perhaps devise a better method of their own.

A. Second-Chance Format

For each multiple-choice question on the final exam, students supply a "first choice" answer and an "alternate choice" answer. A correct "first choice" is worth more points than a correct "alternate choice" answer.²⁸ If a student lists the same answer choice as both the "first" and "alternate" answer, the student earns only the points allocated to a correct "first choice" answer; no extra points are awarded for confidence. Here is how the exam instructions explain the second-chance format:

1. Answers to multiple-choice questions must be provided on the Answer Sheet on page ___ of this exam booklet. **ONLY THE ANSWER SHEET WILL BE GRADED.** For each question, you are allowed a "first choice" answer and a "second choice" answer. A correct "first choice" is worth five (5) points; a correct "second choice" answer is worth two (2) points. There is no penalty for indicating both a first choice and a second choice, so you should indicate a second choice even if you are convinced your first choice is right.

²⁸ Usually, a correct "first choice" is worth five points and a correct "second choice" answer is worth two points, but it can and has varied from one semester to the next. I try to make the score for a correct "second choice" answer just under half of the score for a correct "first choice" answer as a reward to students who get the right answer.

2. Each multiple-choice question is equally weighted, so it is suggested that you allocate no more than five (5) minutes per question. Be sure your exam number appears on the Answer Sheet.

Because of this system, multiple-choice answers are graded by hand.²⁹ That is why the example instructions refer to an “Answer Sheet.” The Answer Sheet is the first page of the multiple-choice section of the examination. This saves from having to flip through several pages while grading the answers. By having all of the answers on one page, it takes only a few seconds to score an exam and total the points. Here is what part of an Answer Sheet might look like:

<u>PART TWO: MULTIPLE CHOICE QUESTIONS</u> ANSWER SHEET	
QUESTION:FIRST CHOICE (5 POINTS)	SECOND CHOICE (2 POINTS)
1 _____	_____
2 _____	_____
3 _____	_____
4 _____	_____
5 _____	_____

As confessed above, I am unsure of the statistical validity of the second-chance format. But I have tracked scores over the years and the aggregate data appear (to my untrained eyes) to support my observation that scores on the multiple-choice section tend to correlate with scores on the essay section. Consistently, at least eighty-five percent of students score in the same (or within one) quintile of the class on the multiple-choice section as they do on the essay section. That is, only about fifteen percent of students will score

²⁹ I think there is a way to do this with a Scantron form, though I haven’t tried it. I could ask students to use the bubbles provided for Questions 1 and 2 on the Scantron form for their first and second choices to the first question, the bubbles for Questions 3 and 4 on the form for their first and second choice answers to the second question, and so on. It might just work, but I think this would be one more source of confusion for students, which defeats part of the purpose behind this technique.

somewhere in the bottom two quintiles of one section (essay or multiple-choice) while also scoring in the top two quintiles on the other section. And only about two percent of students score in the top quintile on one section while scoring in the bottom quintile on the other section. This gives me (perhaps false) confidence that the second-choice format does not significantly distort performance on the final exam. An important question for which I lack data is whether these discrepancies would increase or decrease if students had only one chance at each question. I welcome colleagues with backgrounds in data analysis to offer models by which this could be tested.

B. Point Allocation Format

As an alternative to the second-chance format, sometimes students are required to allocate the number of points assigned to a question among the answers. Here is how the exam instructions explain the point allocation format:

Answers to the multiple-choice questions will be indicated next to each question. Answers on a laptop or on separately submitted answer sheets will not be counted. You should plan to spend three minutes per question (45 minutes total), though this is only a recommended time limit.

Each question is worth three points, and you are allowed to allocate the three points among the answers however you wish, though there is only one correct answer per question. This allows you the chance to hedge your bets if you are unsure. For example, if you are sure that the answer to a question is C, you should assign 3 points to C, leaving the other answers blank:

_____ A. Answer.
 _____ B. Answer.
 3 C. Answer.
 _____ D. Answer.
 _____ E. Answer.

If C is correct, you would receive the full 3 points. If, on the other hand, you are fairly sure it's C but are scared that the answer could be D, you may want to assign 2 points to C and 1 to D, leaving the others blank:

_____ A. Answer.

- _____ B. Answer.
 2 C. Answer.
 1 D. Answer.
 _____ E. Answer.

If C is in fact the correct answer, you would receive two points. If you have no idea as to the correct answer, you may decide to allocate one point to three different answers:

- _____ A. Answer.
 1 B. Answer.
 1 C. Answer.
 1 D. Answer.
 _____ E. Answer.

If it turns out C is right, you would get one point. Note that if you allocate more than three points to any one question, however, you will receive zero points for that question even if you select the correct answer.

I have less data for the point allocation format since I have not employed it as often as the second-chance format. But the data I do have is consistent: about eleven percent of students score in the bottom two quintiles of one section while scoring in the top two quintiles of one of the other sections, and four percent of students score in the top quintile on one section while scoring in the bottom quintile on the other section. As with the second-chance format, I lack data as to whether these discrepancies would change significantly if students had only one chance at each question.

While students shower universal love on the second-chance format, they are less enamored with the point allocation format. Although feedback from students on the point allocation format is still generally positive, some students have remarked that choosing whether and how to allocate points among answer choices was just another time-pressured decision that did not meaningfully reduce their anxiety. That feedback, though somewhat isolated, has made me more hesitant to employ the point allocation format.

V. GRADE INSURANCE

I adapted this technique from something similar used by one of my former professors, Michael Oberst, at the University of Florida Levin College

of Law.³⁰ I saved the best for last: of all the techniques described in this Article, “grade insurance” has done the best job of reducing student stress and facilitating review of the material.

Students have the option to complete a “grade insurance project” during the course. Successful completion of the project comes with “grade insurance”: a guarantee that the student will receive at least a certain minimum final grade no matter how poorly they perform on the other evaluative components of the course, although they still must complete those other components in order to pass the course.

The guaranteed minimum grade largely depends on the law school’s grading curve. For example, when I introduced the grade insurance concept early in my career, my school’s grading curve was such that “B” was the highest discretionary grade I could award in a class with large enrollment. I could not guarantee an “A” with grade insurance because I could only give that grade to fifteen percent of the class. But once I gave the requisite number of “A,” “A-minus,” and “B-plus” grades, I was free to award whatever other grades I think are appropriate. Accordingly, grade insurance assured a student of a “B” but nothing more.³¹ Importantly, grade insurance is not a grade booster; it does not raise a “B” to a “B-plus,” nor a “B-plus” to an “A-minus,” nor an “A-minus” to an “A.” Grade insurance is merely a safety net to protect students against a disastrous performance on other aspects of the course, most notably the final exam.

The project varies from year to year, but typically consists of several exercises requiring application of rules covered in the class, statutory

³⁰ For his own description of how his technique worked, see Michael A. Oberst, *Teaching Tax Law: Developing Analytical Skills*, 46 J. LEGAL EDUC. 79, 86 (1996).

³¹ In recent years I have taught tax at law schools with grading curves that require only a mean grade point average for an upper-division class. In other words, I can award as many high and low grades as I choose, subject only to the requirement that the average grade for the class (not including failing grades) is either a specific grade (3.33 at one school) or within a narrow range (3.0 to 3.2 at another school). In both cases, I set the grade insurance guarantee at 3.0, assuring students of a slightly low (but still respectably decent) final grade.

While it has yet to happen (knock on wood), there could be a situation where the substantial majority of the class earns grade insurance and decides to perform poorly on the final exam. Should that happen, I might be forced to award students who would otherwise earn a final grade below 3.0 a grade of 3.3 or higher in order to comply with the school’s mandatory grading curve. This technique thus presents the risk of affecting the grades of students who do not elect to participate in grade insurance (or who do participate but do not earn grade insurance), but the most likely skew would work to the benefit of the uninsured student. I can live with that, and I’m sure the uninsured student can, too.

interpretation, tax policy analysis, and sometimes even application of Code and Regulation provisions not studied elsewhere in the course. Students are encouraged to discuss the project with their colleagues in the course, but they must submit their own answers. In order to earn grade insurance, the work must be substantially correct (where appropriate), detailed, and well-reasoned. As explained in the syllabus, “half-baked” submissions do not get grade insurance. Students have been denied grade insurance in the past, but not in every year in which the option has been provided.

Participation in the grade insurance project is entirely optional. By not participating, the only risk a student runs is that the student could earn a lower grade for the course (“B-minus” or below, in my example) if the work on other evaluative components warrants such a grade. It is, of course, possible for a student to earn a very high grade in the course without completing the grade insurance project, and such has been the case in each of the years that grade insurance has been available.

Some students choose to participate in the grade insurance project not because of the guaranteed minimum grade but because students are promised detailed written feedback on all of their submissions. On average I spend about fifteen minutes reviewing and commenting on each submission. In years when fifty or more students decide to participate, the time commitment over the course of the class is significant. But it’s another chance to help students both with substantive misunderstandings and issues of style, grammar, and vocabulary. The earlier an instructor can identify errors in substance or expression, the better the chance the student can internalize that feedback and do better going forward. On a few occasions, persistent misunderstanding among a critical mass of submissions has caused me to revisit concepts in class. Were it not for grade insurance, I would only learn of the gaps in my teaching when reading final exams, a time too late to take effective corrective action.

In most years, about one-third of the students enrolled in the course have submitted answers for the grade insurance project. Participation tends to be lower in years in which there are other avenues for de-emphasizing the final examination (like a midterm exam or a take-home essay question) and in

years when the guaranteed minimum grade is not exactly high.³² By giving students additional avenues for improving performance and receiving feedback, no doubt some students feel compelled to participate in grade insurance. What's more, the project is not a walk in the park. Students have to spend hours working through their answers and writing them out, and they do this in addition to their regular preparation for the course.³³ Students are given limited space to answer each question, forcing their answers to be tightly edited before submission. This might explain why some students start to participate but then elect not to complete all of the submissions required to receive insurance.

The Appendix to this Article contains an excerpt from a grade insurance handout used in 2021. The excerpt includes the instructions along with two of the four problems contained on the handout. This was one of three handouts required to be completed over the course of the semester. By the time students completed all of the handouts, they had worked through a total of fourteen detailed problems. Thus, a student earning grade insurance has demonstrated sufficient mastery of the material that the student should receive a decent final grade even if the performance on the final exam is poor.

Every year, some number of students who earn grade insurance effectively opt not to take the final exam. Apparently content with the guaranteed minimum grade, these students will usually submit a final exam containing only the words "Grade Insurance." Indeed, they only do this much because a student who does not submit a final examination will be hounded by the registrar's office and asked to explain and justify their failure to take the exam. While this is admittedly disappointing, there is some comfort in

³² One year, due to a change in my school's grading curve, I set the minimum grade guarantee at "B-minus" instead of the "B" it had been for many years before. Less than twenty percent of that class participated in the Grade Insurance Project.

³³ Students are sometimes surprised that the federal income tax class requires more advance preparation than most upper-division law courses. By the second or third year of law school, a student can read twenty pages from a casebook in under an hour and feel prepared for class. But preparing for a tax class requires not only twenty pages from a casebook but also assigned Code and Regulation provisions and usually a handful of problems that will be the focus of class discussion. I let students know that they generally need to devote double the amount of study time they normally allot for a course with the same number of credits, and even then students report that I'm lowballing the average workload. Sorry not sorry.

knowing that these students were put through their paces throughout the semester and certainly earned the minimum grade they will receive.³⁴

While alleviating student anxiety is a principal purpose of grade insurance, it is not the only reason to employ the grade insurance technique in the federal income tax course. Grade insurance uses the reward of a guaranteed minimum grade to encourage more engagement with the material covered in the course. Students will work harder throughout the semester than they would otherwise, as grade insurance requires keeping up with the assigned readings and regular course review. It gives them something concrete and worthwhile to discuss in study groups.³⁵ Importantly, when students see the extensive written feedback given to all submissions—even those that have everything right—they see that their instructor is invested in their success. It builds a rapport between student and instructor that facilitates mentoring through the rest of law school and early into the profession. For these reasons, grade insurance is the most successful technique I have used in the federal income tax class.

CONCLUSION

The techniques discussed in this Article offer comfort to the student feeling anxious about completing the introductory federal income tax course. But they also encourage students to engage with the material outside of class, both on their own and with their colleagues. They give students opportunities for early feedback and, where needed, time to make necessary corrections in their study. Thus, these techniques very likely improve final exam performance and mastery of the assigned material. But even if they did not, it is enough that they offer some comfort and demonstrate care and concern for the student's successful completion of the course.

³⁴ There is also comfort in having fewer exams to grade after the end of the semester. Everyone wins!

³⁵ Often the only worthwhile topic of discussion in a law school study group relates to pizza toppings.

Appendix

Excerpt from a Grade Insurance Handout

Here are the instructions and two questions from a grade insurance project handout used in an introductory federal income tax class in 2021. As the instructions suggest, each problem came with lined spaces beneath the facts for students to write their answers. These lined spaces have been omitted from this Appendix.

*Instructions: Insert answers to each question in the space provided (if you type your answers, **please double-space your answers and use a font size of 11 or larger**). Do not exceed the space provided. Completed handouts may be submitted in either of two ways: (1) in person at the start of class on Thursday, November 4; or (2) by email to the instructor. Late submissions will not be accepted, regardless of the reason.*

Problem 1. In Year One, Charlotte purchased a piece of equipment for use in her business at a cost of \$100,000. To pay for the equipment, she borrowed \$40,000 from Bank and gave Bank a security interest in the equipment. Under the terms of the security agreement, Bank's recourse in the event of Charlotte's default was limited to the equipment and no other assets. Charlotte used the loan proceeds plus \$60,000 from her own funds to buy the equipment. Over the next several years, Charlotte properly claimed \$80,000 in depreciation deductions attributable to the equipment. In Year Six, Charlotte sold the equipment to John, an unrelated buyer, for \$30,000. As part of the deal, John agreed to assume the Bank loan, and Bank properly consented to this arrangement. At the time of the sale to John, the principal balance of the amount due to Bank was still \$40,000.

What are the federal income tax consequences of the Year Six transaction to Charlotte and John? [one page of answer space provided]

Problem 2. On March 1, 2021, Charles Chubb paid \$1,400,000 for a new, state-of-the-art safe. Chubb used the safe in his business. The safe was the only depreciable asset Chubb placed in service during 2021. Chubb's taxable income from all business activities for 2021 (without regard to depreciation deductions) was \$2,400,000.

(a) Complete the following table assuming Chubb made no § 179 election, elected out of the application of § 168(k), and elected to employ the straight-line method under § 168(b)(5) to depreciate the cost of the safe. *Do not make any computation beyond 2024.*

Year	Total Depreciation Deduction	Adjusted Basis in Safe After Deduction
2021		
2022		
2023		
2024		

If you feel compelled to explain any of the answers in the table, you may (but are not required to) do so here: [brief space provided].

(b) Complete the following table assuming Chubb made no § 179 election, elected out of the application of § 168(k), and decided to depreciate the safe under the regular MACRS method. *Do not make any computation beyond 2024.*

Year	Total Depreciation Deduction	Adjusted Basis in Safe After Deduction
2021		
2022		
2023		
2024		

If you feel compelled to explain any of the answers in the table, you may (but are not required to) do so here: [brief space provided]

(c) Complete the following table assuming Chubb makes a § 179 election for the maximum amount available (ignoring inflation adjustments) and claims the maximum amount allowable under § 168 each year (using the MACRS method). *Do not make any computation beyond 2024.*

Year	Total Deduction Allowed With Respect to the Safe	Adjusted Basis in Safe After Deduction
2021		
2022		
2023		
2024		

If you feel compelled to explain any of the answers in the table, you may (but are not required to) do so here: [brief space provided]