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## Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resilience

Kaci Bishop  
*University of North Carolina*

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# **FRAMING FAILURE IN THE LEGAL CLASSROOM: TECHNIQUES FOR ENCOURAGING GROWTH AND RESILIENCE**

Kaci Bishop\*

## **ABSTRACT**

In law school, a fear of failure can paralyze students and hinder their learning. Students may not try a new skill or a new argument or even give an answer in class if they are unsure or uncertain that they will get it right—or are afraid they will get it wrong. In part, this resistance to and fear of failure is exacerbated by legal education’s institutional focus on outcomes: grades, class rank, and high-paying jobs. This focus often causes students to be increasingly extrinsically motivated and encourages a “fixed mindset,” which contributes deleteriously to the mental health and intellectual curiosity of some law students.

And this fear and shunning of failure does not end in law school. In practice, lawyers who feel pressure to be perfect or to avoid even the appearance of failure are more likely to suffer from depression, anxiety, and stress than peers in other professions or in the general population. Similarly, they are less resilient to the setbacks inherent in practicing within the adversarial system and

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\*Clinical Associate Professor of Law at the University of North Carolina School of Law. For helping me develop these ideas on walks and in talks, I thank Alexa Chew. For their comments on and support of this project, I am grateful to Barb Fedders, Rachel Gurvich, Jeff Hirsch, Melissa Jacoby, Holning Lau, Craig Smith, and Judith Wegner, all at the University of North School of Law, and to Victor Flatt of the University of Houston Law Center, Laura Webb of the University of Richmond School of Law, Danielle Tully of Suffolk University Law School, and Emily Zimmerman of the Thomas R. Kline School of Law at Drexel University. For his diligent research assistance and thoughtful reflection on his own law school experiences, I thank Matt Tomsic. I also thank my colleagues in the Writing and Learning Resources Center for entertaining and furthering my ideas and thank for their support and interest those who have participated in the various Legal Writing Institute presentations that have given rise to this Article. Many people listed above and many more that are not, including those nearest and dearest to me at home, have been and continue to be instrumental to my own practice of having growth mindset and putting forth effort in the face of my own failures both in my personal and professional life.

receiving constructive feedback from supervising attorneys. They also may be less creative in crafting arguments to best represent their clients and may shy away from meritorious yet difficult cases because they do not want to “lose.”

To help law students be effective in their studies and prepare for the intellectual and emotional demands of practice, law professors have a responsibility to help counteract law school’s negative institutional forces. Like other skills that we teach, we can teach our students to react to failure with a “growth mindset” and resilience and help them to engage even when something is difficult. To that end, this Article identifies and suggests a tiered set of tangible techniques for any legal classroom aimed at helping our students cultivate growth mindsets and habits of resilience. Specifically, this Article provides a failure pedagogy that professors can incorporate to their curricula easily to create a safe space for failure; incorporate growth language into their feedback; and help students analyze, anticipate, and prevent failures. Together, these techniques are designed to help the students of today be more effective and engaged lawyers tomorrow.

## I. INTRODUCTION

Start talking with any law student about failure and that student will likely cringe at the mere mention or idea.<sup>1</sup> That is true for many law professors and attorneys, too. Failure is treated like the other F word.<sup>2</sup> It suggests finality and is stigmatizing<sup>3</sup>

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1. On several occasions, in discussing this project, people—particularly students—visibly cringed as soon as I said the word “failure.” Similarly, almost invariably when presenting these ideas at conferences in advance of writing this article, the term “failure” was met with resistance, even by people who otherwise favored using a failure framework in the classroom and shared the related pedagogical goals. People preferred terms like “setback” or “mistake” or “risk-taking.” See also Anne Sobel, *How Failure in the Classroom is More Instructive Than Success*, THE CHRONICLE OF HIGHER EDUC. (May 5, 2014), <http://chronicle.com/article/How-Failure-in-the-Classroom/146377/> (acknowledging that it is difficult to take the “sting” out of failure).

2. EDWARD B. BURGER & MICHAEL STARBIRD, THE 5 ELEMENTS OF EFFECTIVE THINKING 48 (2012); Dale M. Bauer, *Another F Word: Failure in the Classroom*, 7 PEDAGOGY: CRITICAL APPROACHES TO TEACHING LITERATURE, LANGUAGE, COMPOSITION, AND CULTURE 157, 157 (2007), <https://muse.jhu.edu/article/215276> [<https://perma.cc/EJ83-WBBF>].

3. Sim B. Sitkin, *Learning Through Failure: The Strategy of Small Losses*, 14 RESEARCH IN ORGANIZATIONAL BEHAVIOR 231, 232 (1992) (“Common sense suggests that

and associated with guilt, blame, and shame.<sup>4</sup> Something people understandably want to ignore or sweep under the rug.<sup>5</sup>

By hiding and ignoring failure, people foreclose the possibility of learning from it, leaving a powerful resource untapped.<sup>6</sup> When people do not learn from their failures, they may be destined to repeat them. For law students, and the attorneys they will become, repeatedly failing in the same way jeopardizes how well students perform in law school and how well they can represent their clients when out in practice.<sup>7</sup> Similarly, in law school, a resistance to failure may become a fear of failure, which can paralyze students and hinder their learning, hampering their growth and their potential.<sup>8</sup> Students may not try a new skill or a new argument or even give an answer in class if they are unsure or uncertain that they will get it right—or are afraid they will get it wrong. In practice, this fear of failure might stifle attorneys' creativity in advocacy or willingness to take cases that might be more challenging but also more impactful.<sup>9</sup>

This Article argues that law schools should endeavor to help students maximize their learning and their potential as attorneys by helping them accept and learn from failure. To be clear, by failure, I do not mean a failing grade (although that could be a failure). Rather, I define failure as whatever feels like a failure to the person experiencing it. Law students will likely face

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failure is something to be avoided. After all, failure can stigmatize: the taint of failure can jeopardize even the most stellar career . . .”).

4. “Failure and fault are virtually inseparable in most households, organizations, and cultures. Every child learns at some point that admitting failure means taking the blame.” Amy C. Edmondson, *Strategies for Learning from Failure*, HARV. BUS. REV. (Apr. 2011), <https://hbr.org/2011/04/strategies-for-learning-from-failure> [<https://perma.cc/VQ24-CTGZ>]; Brené Brown, *Listening to Shame*, TED2012, [https://www.ted.com/talks/brene\\_brown\\_listening\\_to\\_shame/transcript](https://www.ted.com/talks/brene_brown_listening_to_shame/transcript) [<https://perma.cc/6JL5-B554>] (pointing out that vulnerability is not weakness, though many people confuse the two); Carrie A. Bulger, *Self-Conscious Emotions: A New Direction for Emotion Research in Occupational Stress and Well-Being*, in 11 RESEARCH IN OCCUPATIONAL STRESS & WELL BEING: THE ROLE OF EMOTION AND EMOTION REGULATION IN JOB STRESS AND WELL BEING 225, 226-31 (Pamela L. Perrewé, Christopher C. Rosen & Jonathon R. B. Halbesleben eds., 2013); Guy Winch, *7 Ways to Practice Emotional First Aid*, TED: WE HUMANS, (Feb. 26, 2015), <http://ideas.ted.com/7-ways-to-practice-emotional-first-aid/> [<https://perma.cc/JW3T-H55G>].

5. Sitkin, *supra* note 3, at 232.

6. See Edmondson, *supra* note 4.

7. Stephen D. Easton & Julie A. Oseid, “*And Bad Mistakes? I’ve Made a Few*”: *Sharing Mistakes to Mentor New Lawyers*, 77 ALB. L. REV. 499, 501, 509 (2013-14).

8. Carrie Sperling & Susan Shapcott, *Fixing Students’ Fixed Mindsets: Paving the Way for Meaningful Assessment*, 18 LEGAL WRITING 39, 39-40 (2012).

9. See CAROL S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS 6-7 (2006).

academic and intellectual challenges in law school and have to work harder than they have previously, and this struggle or getting things “wrong” may make students feel like they are failing. While the words “mistake” or “setback” may not be as loaded with negative connotations as “failure,” students sometimes feel they are one in the same.<sup>10</sup> Whether a failure is big or small, if it feels like a failure, it feels crummy.<sup>11</sup> Thus, I use the word failure to honor the feeling that it evokes.

Using the word failure also minimizes its power. Acknowledging failure is hard.<sup>12</sup> Failure is our cultural “anathema. We rarely hear about it, we never dwell on it and most of us do our best to never admit to it.”<sup>13</sup> However, using the word failure is an important part of demystifying it.<sup>14</sup> Part of the power I want my students to have in overcoming and learning from failures, comes from not letting failure loom so large or be so debilitating.<sup>15</sup>

Some undergraduate institutions<sup>16</sup> and secondary and elementary schools<sup>17</sup> have already taken up this mantle to teach

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10. See Sperling & Shapcott, *supra* note 8, at 39-40.

11. See GUY WENCH, EMOTIONAL FIRST AID: PRACTICAL STRATEGIES FOR TREATING FAILURE, REJECTION, GUILT, AND OTHER EVERYDAY PSYCHOLOGICAL INJURIES 173 (2013) (noting that failure inflicts psychological wounds by damaging self-esteem, killing confidence and triggering stress and fear).

12. See, e.g., Sitkin, *supra* note 3, at 232 (quoting PHILIP H. MIRVIS & DAVID N. BERG, FAILURES IN ORGANIZATION DEVELOPMENT AND CHANGE (John Wiley & Sons 1977)).

13. *Id.* (discussing how “in organizations, failure is often simply not tolerated and people avoid being associated with failure of any kind”).

14. Using failure to deflate its magnitude may be akin to Harry Potter usurping Voldemort’s power by invoking Voldemort’s name. Harry refused to give Voldemort more power by calling him, as so many did, “He Who Shall Not Be Named.” HARRY POTTER AND THE DEATHLY HALLOWS 389, 444-45 (2007). As Hermione said: “Fear of a name increases fear of the thing itself.” HARRY POTTER AND THE CHAMBER OF SECRETS (Heyday Films and 1492 Pictures 2002).

15. The pedagogical goals and techniques presented in this Article do not require using the word “failure”; “mistake” or “setback” could easily be substituted.

16. See, e.g., Susan Donaldson James, *College Teaches Anxious Students Not to See Failure as ‘Catastrophic’*, NBC NEWS (Sept. 4, 2016), <http://www.nbcnews.com/feature/college-game-plan/college-teaches-anxious-students-not-see-failure-catastrophic-n641521> [<https://perma.cc/BS7W-FKXQ>]; Bonni Stachowiak, *The Power of Failure*, TEACHING IN HIGHER ED, <http://teachinginhighered.com/2017/07/11/power-of-failure/> [<https://perma.cc/YF32-HZ59>].

17. Jessica Lahey, *When Children Say ‘I Can’t,’ but They Can, and Adults Know It*, THE NEW YORK TIMES: MOTHERLODE (Jan. 13, 2016), <http://parenting.blogs.nytimes.com/2016/01/13/when-children-say-i-cant-but-they-can-and-adults-know-it> [<https://perma.cc/5CX5-E9KX>] (stressing the importance of children working through anxiety on tasks that they cannot complete immediately); Brad Ermeling et al., *Beyond*

their students to tap into failure as a resource and have designed curricula to teach students how to have a growth mindset<sup>18</sup> and to exercise grit and resilience<sup>19</sup> and engage in deliberate practice<sup>20</sup> in the face of failure.<sup>21</sup> This Article, building on the research and work of psychologists Carol Dweck, Angela Duckworth, and K. Anders Ericsson, assumes the premise that reacting to failure with a growth mindset and resilience, putting in or redoubling efforts,

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*Growth Mindset: Creating Classroom Opportunities for Meaningful Struggle*, EDUCATION WEEK TEACHER (Dec. 7, 2015), <http://www.edweek.org/tm/articles/2015/12/07/beyond-growth-mindset-creating-classroom-opportunities-for.html?roi=echo4-33912293760-83364825-11edcf19f218a6716ff65bf76d00f49c&cmp=emlebwel1> [https://perma.cc/8LCM-S4F4] (showing a need to strike a balance between productive struggle and frustration) Deborah Farmer Kris, *How Teens Benefit From Reading About the Struggles of Scientists*, KQED NEWS: MINDSHIFT (May 10, 2016), <http://ww2.kqed.org/mindshift/2016/05/10/how-teens-benefit-from-reading-about-the-struggles-of-scientists/> [https://perma.cc/4UM5-3842] (showing the effects of students reading about famous scientists' struggles as well as their successes); Katrina Schwartz, *How 'Productive Failure' in Math Class Helps Make Lessons Stick*, KQED NEWS: MINDSHIFT (Apr. 19, 2016), <http://ww2.kqed.org/mindshift/2016/04/19/how-productive-failure-for-students-can-help-lessons-stick/> [https://perma.cc/MD38-ZEPW].

18. DWECK, *supra* note 9, at 6-7 (defining growth mindset as believing that intelligence is fluid or malleable, that working hard and learning from criticism will improve performance, and that embracing challenges and persisting despite obstacles or setbacks will lead to success).

19. Angela Lee Duckworth, *Grit: The Power of Passion and Perseverance*, TED TALKS EDUCATION (Apr. 2013), [https://www.ted.com/talks/angela\\_lee\\_duckworth\\_grit\\_the\\_power\\_of\\_passion\\_and\\_perseverance/transcript](https://www.ted.com/talks/angela_lee_duckworth_grit_the_power_of_passion_and_perseverance/transcript) [https://perma.cc/N2PB-83YK]; *see also* Angela Lee Duckworth & Lauren Eskreis-Winkler, *True Grit*, 26 OBSERVER (Apr. 2013), <http://www.psychologicalscience.org/index.php/publications/observer/2013/april-13/true-grit.html> [https://perma.cc/HP5E-Q6BH].

20. ANDERS ERICSSON & ROBERT POOL, *PEAK: SECRETS FROM THE NEW SCIENCE OF EXPERTISE* 99-100 (2016) (defining deliberate practice as being both purposeful and informed practice that pushes people outside of their comfort zone and involves “a person’s full attention and conscious actions” as well as feedback on and modification to the person’s efforts).

21. Nate Kreuter, *The Freedom to Fail*, INSIDE HIGHER ED (Oct. 7, 2011), <https://www.insidehighered.com/advice/2011/10/07/freedom-fail> [https://perma.cc/8E2Z-N2B4]; Edward Burger, *Teaching to Fail*, INSIDE HIGHER ED (Aug. 21, 2012), <https://www.insidehighered.com/views/2012/08/21/essay-importance-teaching-failure> [https://perma.cc/8ADL-UPC4] (noting the importance of creating a space for failure in the classroom); Peter Gray, *Declining Student Resilience: A Serious Problem for Colleges*, PSYCHOL. TODAY (Sept. 22, 2015), <https://www.psychologytoday.com/blog/freedom-learn/201509/declining-student-resilience-serious-problem-colleges> [https://perma.cc/M8LV-D9N8] (pointing out that declining student resilience leads to some students seeing low marks as huge failures in their academic careers); Jeffrey S. Ashby, Christina L. Noble & Philip B. Gnilka, *Multidimensional Perfectionism, Depression, and Satisfaction with Life: Differences Among Perfectionists and Tests of a Stress-Mediation Model*, 15 J. OF COLLEGE COUNSELING 130, 130, 133 (July 2012) (studying “maladaptive perfectionism”).

and engaging even when something is difficult are skills.<sup>22</sup> And because they are skills, they can be learned. They can be practiced, and eventually mastered. They can be taught.

In some ways, though, teaching students to how to respond to and think about failure constructively<sup>23</sup> may not seem necessary in legal education, or appropriate.<sup>24</sup> Law students have already made it through their undergraduate program, and likely have done well academically there. So, by the time they come to law school, students have already demonstrated resilience, grit, and a willingness to learn. But, as some have already recognized, these skills have a place in legal education.<sup>25</sup> This Article furthers that conversation by arguing that teaching these skills should be an integral part of legal education and by providing tangible techniques for doing so in any legal classroom.

Because teaching professionalism is already at the heart of legal education, law school is the natural place to instill in students the value of learning from failure. Teaching law students how to respond productively in the face of failure will help increase resilience and efficacy in the legal profession. For example, if students fear failure in law school, they may not try a new skill or argument or be willing to give an answer in class if they are afraid they will get it wrong. Rather, they might look for an easier route—perhaps one that would be less confrontational. In practice, this fear of failure can make someone more likely to overlook creative ways to advocate for his client and more

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22. Nicole Sweeney Etter, *The Art of Bouncing Back*, GARGOYLE (May 13, 2015), <http://gargoyle.law.wisc.edu/2015/05/13/the-art-of-bouncing-back/> [<https://perma.cc/74ZB-RM32>]; *The Road to Resilience*, AM. PSYCHOL. ASS'N, <http://www.apa.org/helpcenter/road-resilience.aspx> (last visited Feb. 10, 2018) (defining resilience as “the process of adapting well in the face of adversity, trauma, tragedy, threats or significant sources of stress . . . — such as family and relationship problems, serious health problems or workplace . . . and financial stressors” and explaining that it is “not a trait that people either have or do not have” but rather that it “involves behaviors, thoughts and actions that can be learned and developed in anyone.”).

23. Elizabeth Murray, ‘*Harry Potter*’ Author J.K. Rowling on Failure: It’s ‘Inevitable’, TODAY (Interview with Matt Lauer, Apr. 12, 2015), <https://www.today.com/popculture/j-k-rowling-importance-failure-t14616> [<https://perma.cc/6G9C-S6FS>].

24. See Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 122-23 (2002) [hereinafter “Dark Side”].

25. See, e.g., Corie Rosen, *The Method and The Message*, 12 NEV. L.J. 160, 162-63 (2011); Allison D. Martin & Kevin L. Rand, *The Future’s So Bright, I Gotta Wear Shades: Law School Through the Lens of Hope*, 48 DUQUESNE L. REV. 203, 205 (2010); see also *Dark Side*, *supra* note 24, at 118.

reluctant to take a meritorious case just because he might lose it.<sup>26</sup> Incumbent to promoting “independent problem solving and creative thinking”<sup>27</sup> is encouraging students to take academic risks and persist in the face of failure.

In addition to helping to make new attorneys more creative and resilient, teaching these skills and giving students opportunities to practice them while in law school can help the students’ employment prospects.<sup>28</sup> In the current economy, it can be easy for new attorneys to think that they cannot afford to make mistakes because they might ruin their “career prospects.”<sup>29</sup> However, this is a misconception: firms seek to hire new attorneys who are able “to positively handle mistakes and disappointments.”<sup>30</sup> These skills are thus at least equally as important as other skills taught in law school.<sup>31</sup>

Additionally, teaching these skills in law school could help to counteract some of the deleterious effects of law schools’ focus on and valuation of outcomes. Law school is tough for most every student; for some it can be emotionally ruinous.<sup>32</sup> Students facing this higher level of distress often feel discouraged from putting forth more effort and are likely to see a resulting decline in their

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26. Anecdotally, I have heard of novice immigration attorneys who reluctantly (or refuse to) take meritorious asylum cases, because they fear that the immigration judge will not be receptive to the case. Similarly, I have heard of novice legal services attorneys telling clients who have suffered domestic violence that they do not have a case or being reluctant to actually litigate a case because the attorneys know the judge is not going to be sympathetic. This dynamic may not just be due to fear of failure, but a fear of disapproval. This Article nevertheless may have techniques that would help encourage these attorneys to take the cases that are meritorious but not slam-dunks. After all, who will represent these clients if attorneys are only taking the easy cases?

27. Emily Grant, *Helicopter Professors* 5 (Jan. 23, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2904752](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2904752) [<https://perma.cc/WF7H-68LV>].

28. *See id.*

29. Easton & Oseid, *supra* note 7, at 501, 507.

30. *Id.* at 509-10.

31. *See* Alli Gerkman & Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, *EDUCATING TOMORROW’S LAWYERS* 20, 22, 31-33 (July 2016), [http://iaals.du.edu/sites/default/files/reports/foundations\\_for\\_practice\\_whole\\_lawyer\\_character\\_quotient.pdf](http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf) [<https://perma.cc/GBY3-WTF9>] (emphasizing the importance of being willing to receive feedback, grit, having resilience in the face of a setback as necessary or highly valued traits in new attorneys).

32. *See, e.g.,* Dan, *In the Beginning—Depression in Law School*, *LAWYERS WITH DEPRESSION BLOG*, <http://www.lawyerswithdepression.com/articles/in-the-beginning-depression-in-law-school/> [<https://perma.cc/CS8V-JNNY>].



well-being, which can then carry over into the profession.<sup>33</sup> Teaching students to engage productively with failure can thus enhance students' experiences while in law school and help them carry these lessons and habits into practice. Law professors are in a great position to help students realize that failure is a necessary part of learning to be (and being) an effective attorney.<sup>34</sup>

With the foregoing premises, this Article provides an introduction to failure pedagogy,<sup>35</sup> demonstrating why teaching failure is important and outlining how law professors can teach their students how to respond productively when facing failure. Because teaching failure requires overcoming the seemingly insurmountable pile of negative connotations associated with failure, Part II of this Article begins by examining our relationship with failure and by contextualizing failures as spanning a spectrum from blameworthy to praiseworthy. Part II also provides some of the social and theoretical background regarding the divergent ways we respond to failure and how our mindset affects how we view and approach failure. Specifically, Part II explores how those who occupy a fixed mindset often blame in the face of failure and see intelligence as static, effort as fruitless, and feedback as criticism, and how those with a growth mindset often respond to failure with humility and curiosity, see intelligence as malleable, and effort and feedback as the keys to mastery.<sup>36</sup> The Section finishes with the premise that because all people occupy both mindsets at different points, cultivating a growth mindset is essential to teaching students to respond to failure constructively.

However, while viewing failure as a learning tool on the path to success is necessary for students to maximize their learning and effectiveness, Part III argues that law schools institutionally tend to perpetuate an unproductive response to failure. Specifically,

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33. See Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOCIAL PSYCHOL. BULL. 883, 883-84 (2007).

34. See BURGER & STARBIRD, *supra* note 2, at 49 (“Teachers need to embrace the power of failure by consciously inspiring students to learn the productive potential of making mistakes as important steps toward understanding.”).

35. Although this Article assumes the premises set out in the Introduction, the premises are peripheral to the main thesis of this Article: that legal educators can benefit from employing failure pedagogy and its related tips and techniques.

36. See DWECK, *supra* note 9, at 6-7.

law schools' traditional pedagogical approach and focus on outcomes tend to foster the fixed mindset,<sup>37</sup> which contributes deleteriously to the mental health and intellectual curiosity of some of our students. Part III also examines evidence that these effects from law school are carried forward to permeate legal practice, evidenced in part by newer practitioners suffering from depression, anxiety, stress, and substance abuse at higher rates than other, more experienced attorneys.<sup>38</sup>

All is not lost, however. Part IV details tangible curricular choices to incorporate into any law school classroom to help cultivate growth mindsets and habits of resilience. Specifically, Section IV describes how professors can easily add a failure framework to their curricula without having to overhaul their curricula, to create a safe space for failure and help students recognize failure's importance in their learning. Section IV also suggests ways to incorporate growth language into feedback—in the classroom, on assignments, and in conferences—and provides tools for engaging with this failure pedagogy on a deeper curricular level.

## II. RESISTING AND RESPONDING TO FAILURE

That failure is loaded with negativity is no surprise. From early in our lives, we see excellence resulting in praise, promotion, or reward.<sup>39</sup> But we do not see the struggles, efforts, and mistakes that preceded that finished product.<sup>40</sup> Perfection thus seems attainable, even when it is not, and as Section A argues, our striving for perfectionism largely contributes to failure being seen as a bad word—or as something final, from which we cannot recover. Section A also explores how law students—and lawyers—may be particularly resistant to

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37. *See id.*

38. Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 51 (Jan./Feb. 2016) (finding in a study sponsored by the American Bar Association and the Hazelton Betty Ford Foundation that lawyers who had been in practice ten years or less, those who were thirty years old or less, and those who were in junior associate positions were most at risk for mental health and substance abuse disorders); James Podgers, *Younger Lawyers are Most at Risk for Substance Abuse and Mental Health Problems, a New Study Reports*, ABA J. (Feb. 7, 2016), <http://www.abajournal.com/news/article/younger-lawyers-are-most-at-risk-for-substance-abuse-and-mental-health-prob/> [<https://perma.cc/P9EY-SPMS>].

39. B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 93-94 (1953).

40. Easton & Oseid, *supra* note 7, at 502, 504-05.

acknowledging or accepting failure,<sup>41</sup> and thus have the potential to particularly benefit from being taught how to best respond to it. Nevertheless, as Section B discusses, the legal profession, like other professions, also has a history of discouraging or shunning failure. This culture contributes to encouraging people to go out of their way to avoid failure or at least the appearance of having made a mistake, which in turn perpetuates having people either place blame on anyone or anything but themselves or unreasonably blame only themselves.<sup>42</sup> Failures are viewed thus as being only blameworthy, even though, as described in Section C, many are praiseworthy. Finally, though, as Section D details, we have choices as to how we respond to failures and can shift our mindset to more easily find the productive and praiseworthy aspects of failure.

### A. Perfectionism and Failure

Striving for perfection or for flawlessness<sup>43</sup> is by its nature the antitheses of failure. Unsurprisingly, individuals who tend to be perfectionists or who have perfectionistic tendencies set “exceedingly high standards of performance” and are thus more apt to be negatively impacted or “overly self-critical” when that performance falls short of expectations.<sup>44</sup> Although the legal profession attracts people who are autonomous and driven, many law students and lawyers are also perfectionistic.<sup>45</sup> Likewise, they often “tend to be skeptical, even cynical, judgmental, questioning, argumentative[,] and somewhat self-protective.”<sup>46</sup> These traits often serve students well in law school and in their careers, particularly in representing their clients and working in our adversarial justice system.<sup>47</sup> Indeed, to best serve their

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41. See generally Larry Richard, *Herding Cats: The Lawyer Personality Revealed* 7, MANAGING PARTNER FORUM, <http://www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20-%20Herding%20Cats%20-%20Richard%20-%20203-5-121.pdf> [https://perma.cc/N5GT-XA4C] (discussing the unique complications involved in managing lawyers); Easton & Oseid, *supra* note 7, at 506-07.

42. See Easton & Oseid, *supra* note 7, at 506.

43. See Joachim Stoeber et al., *Perfectionism and Negative Affect After Repeated Failure: Anxiety, Depression, and Anger*, 35 J. INDIVIDUAL DIFFERENCES 87, 87 (2014) (defining perfectionism as “striving for flawlessness”).

44. *Id.*

45. See Richard, *supra* note 41, at 1, 4.

46. *Id.* at 4.

47. See *id.* at 5.

clients, lawyers need to think through all that might go wrong and shore up any weaknesses in their case.<sup>48</sup> Perfectionism thus helps law students or lawyers achieve the high standards that they set for themselves, causing them to carefully check their work and that of others, seek reassurance, and deliberate before making a decision.<sup>49</sup> Additionally, our legal system is built on having each side believing it is “right” and arguing why it is “right”—or flawless.<sup>50</sup> Moreover, lawyers face with skepticism arguments by others, looking for the weaknesses and gaps. They also work hard to convince others that their own arguments have no weaknesses or gaps.

However, these traits often make lawyers less resilient in the face of feedback and criticism.<sup>51</sup> Accordingly, they are less willing to admit that they have made a mistake or hear that they have from someone else.<sup>52</sup> Similarly, they also may be more prone to suffering negative consequences of failure.<sup>53</sup> What starts out as positive can become “excessive, negative, and destructive” over time<sup>54</sup> or—as this Article suggests in Part III—in an environment that focuses on outcomes and extrinsic measures of success. Even short of having clinical or dysfunctional perfectionism, those with perfectionist tendencies can be negatively impacted and impeded from reaching their goals by procrastinating tasks because trying to “complete it perfectly will make it hard or unpleasant . . . .”<sup>55</sup> Similarly, people may “prematurely end[] tasks because perfectionist standards are unlikely to be met . . . .”<sup>56</sup> Unfortunately, procrastinating or prematurely ending a task only perpetuates and increases the

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48. See Easton & Oseid, *supra* note 7, at 518.

49. Roz Shafran & Warren Mansell, *Perfectionism and Psychopathology: A Review of Research and Treatment*, 21 CLINICAL PSYCHOL. REV. 879, 880 (2001) (identifying people with perfectionism as those who set “unrealistically high standards, rigidly adher[e] to them, and defin[e] their self-worth in terms of their achieving these standards”).

50. Shelley Bookspan, *Introducing “Historians and the Legal System,”* 20 THE PUBLIC HISTORIAN 5, 5-6 (1998).

51. Richard, *supra* note 4141, at 7.

52. See *id.*

53. See Stoeber et al., *supra* note 43, at 87-88, 91; see also Shafran and Mansell, *supra* note 49, at 880.

54. Shafran and Mansell, *supra* note 49, at 881.

55. See *id.* at 880 (defining “dysfunctional perfectionism” as being “neurotic” and “self-defeating”) (internal quotations omitted).

56. *Id.* at 880, 898 (discussing ending task prematurely and other self-handicapping measures).

pressure to execute the task perfectly,<sup>57</sup> causing the student to get caught in a perfection-paralysis cycle.<sup>58</sup> Thus, those with perfectionist tendencies are more likely to see even small mistakes or setbacks as significant failures<sup>59</sup> and, particularly in the face of repeated failure (or perceived failure), may spiral into feeling guilt and shame, as well as anxiety, depression, and anger.<sup>60</sup>

## B. Failure in Practice

Despite the truisms that “to err is human” and we must “learn from our mistakes,” no one particularly likes making a mistake—or being wrong.<sup>61</sup> “This idea is not new. Paradoxically, we live in a culture that simultaneously despises error and insists that it is central to our lives.”<sup>62</sup> Although people know on some level that we cannot reach perfection—even practice rarely makes

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57. See Stoeber et al., *supra* note 43, at 91-92.

58. The perfection-paralysis cycle is a dynamic I have observed. Among the examples included in this Article, students may manifest being in this cycle by having prolonged writer’s block or frequently missing deadlines. Part IV of this Article provides some tangible ways that a professor might begin to help a student stuck in this perfection-paralysis cycle as well as other students negatively impacted by a fear of failure. However, some students who are particularly stuck in this cycle may need additional academic support or mental health services.

59. See Shafran and Mansell, *supra* note 49, at 881.

60. Stoeber et al., *supra* note 43, at 87, 90, 93. Researchers in the School of Psychology at the University of Kent in Canterbury, United Kingdom, surveyed a sample of 100 students and found that participants who are socially prescribed perfectionists (people who “believe that others expect them to be perfect” and that “others will be highly critical of them” when they fall short of those expectations) are most likely to experience anxiety, depression, and anger in the face of an initial failure, and “further increased anger” after repeated failures. *Id.* at 87, 89-90. Those who are self-oriented perfectionists (people who have “high personal standards,” expect perfection in their own performance, and are “highly self-critical if they fail to meet [their] expectations”), however, do not necessarily exhibit more anxiety, depression, or anger after an initial failure, and will have more anxiety after repeated failures. *Id.* at 87, 90; see also Bulger, *supra* note 4, at 240 (discussing how perfectionism adds an emotional stress that can lead to an outsized reaction based on shame or guilt).

61. See KATHRYN SCHULZ, BEING WRONG: ADVENTURES IN THE MARGIN OF ERROR 6 (2010) (building on the premise that “however disorienting, difficult, or humbling our mistakes might be, it is ultimately wrongness, not rightness, that can teach us who we are”).

62. *Id.*

perfect<sup>63</sup>—we expect it not just in ourselves but also in others.<sup>64</sup> Take, for example, the medical profession: physicians, humans that they are, make mistakes, but no one wants to think that they do.<sup>65</sup> Atul Gawande begins one of his *Annals of Medicine* pieces with the quip: “Like everyone else, surgeons need practice. That’s where you come in.”<sup>66</sup> This line makes us, the readers and potential patients of surgeons, feel on edge because we recognize the truth in the statement: we want anyone operating on us to have had lots of practice and to be perfect. But we do not want to be the ones subject to the “practice.” Nor do we want to hear about the inefficiencies, the errors in safety practices, or the mix-ups in lab samples or dosages of medicine occurring in our hospitals.<sup>67</sup> We cannot then blame the medical profession for its reluctance to acknowledge or discuss failures.<sup>68</sup> However, we also want our hospitals, our physicians, surgeons, and other medical professionals to learn from and correct their mistakes. As Dr. Brian Goldman, an Emergency Room physician at Mount Sinai Hospital in Toronto and medical journalist for CBC Radio, has said: “If I [a medical professional] can’t come clean and talk about my mistakes, . . . how can I share it with my colleagues? How can I teach them about what I did, so that they don’t do the same thing?”<sup>69</sup>

This reluctance to acknowledge failure stems from the notion that by admitting failures, we are somehow permitting or

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63. Perhaps we would have a healthier relationship with failure (and with perfectionism) if instead of saying “practice makes perfect,” we said “practice makes permanent” or “progress not perfection.”

64. See Brené Brown, *Want to be Happy? Stop Trying to be Perfect*, CNN, <http://www.cnn.com/2010/LIVING/11/01/give.up.perfection/index.html> [<https://perma.cc/VH7B-VJVR>].

65. Brian Goldman, *TED Radio Hour: Making Mistakes, What Can Doctors Learn by Admitting Their Mistakes?*, National Public Radio (Mar. 11, 2013), <http://www.npr.org/2013/03/11/174030515/making-mistakes> [<https://perma.cc/9FEC-H5T6>]; Christopher P. Landrigan et al., *Temporal Trends in Rates of Patient Harm Resulting from Medical Care*, 363 *NEW ENGL. J. MED.* 2124, 2124-25, 2130 (2010) (reporting findings from a six-year study of ten North Carolina hospitals with little or change in the rate of patient harm despite the hospitals’ devoting many resources and efforts to improving patient care and safety).

66. Atul Gawande, *Annals of Medicine: The Learning Curve*, *THE NEW YORKER*, Jan. 28, 2002, at 52.

67. Richard M.J. Bohmer, *Fixing Health Care on the Front Lines*, *HARV. BUS. REV.* (Apr. 2010), <https://hbr.org/2010/04/fixing-health-care-on-the-front-lines> [<https://perma.cc/GUS4-SKWQ>].

68. Goldman, *supra* note 65.

69. *Id.*

encouraging failures.<sup>70</sup> Amy Edmondson, Professor at Harvard Business School, observed this dichotomy in investment banks as well as in hospitals.<sup>71</sup> The executives she interviewed expressed being torn between wanting to “respond constructively to failures” and not wanting to give “rise to an anything-goes attitude[.]”<sup>72</sup> They worried that if their employees were not “blamed for failures,” nothing would “ensure that [the employees would] try as hard as possible to do their best work[.]”<sup>73</sup> When asked how many of the errors their employees committed were truly blameworthy,<sup>74</sup> the executives answered “in single digits—perhaps 2% to 5%. But when [Edmondson] ask[ed] how many are *treated* as blameworthy, they sa[id] (after a pause or a laugh) 70% to 90%.”<sup>75</sup>

Like doctors and bankers, lawyers are also loath to admit failures.<sup>76</sup> By the time they are in practice, lawyers have undergone intense study developing their analytical and communication skills and are expected to be highly competent (or even perfect) and to put the needs of their clients above their own.<sup>77</sup> Although attorneys may not literally have the lives of their clients in their hands in the same way a surgeon might, they are sometimes responsible for their clients’ life and death and often responsible for otherwise life-changing matters.<sup>78</sup> Their failures often have a very real and very detrimental effect on their clients’ lives.<sup>79</sup> Like other professionals, lawyers also hide and ignore

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70. Edmondson, *supra* note 4.

71. *Id.*

72. *Id.*

73. *Id.*

74. “Truly blameworthy” failures are those resulting from deviance—intentionally violating or deviating from some law, policy, or procedure. *Id.*; *see also infra* Part II.B.

75. Edmondson, *supra* note 4.

76. *See, e.g.,* Paula Davis-Laack, *Training Your Brain for Self-Regulation and Resilience*, AM. BAR ASS’N, [https://www.americanbar.org/groups/young\\_lawyers/publications/tyl/topics/professional-development/training\\_your\\_brain\\_selfregulation\\_and\\_resilience.html](https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/professional-development/training_your_brain_selfregulation_and_resilience.html) [<https://perma.cc/SA78-DFAM>] (noting that lawyers rank low in resilience and dealing with failure); Kathryn Schulz, *Alan Dershowitz on Being Wrong, Part I: Lawyers, Pundits, Errors, and Evil*, SLATE (May 12, 2010), [http://www.slate.com/blogs/thewrongstuff/2010/05/12/alan\\_dershowitz\\_on\\_being\\_wrong\\_part\\_i\\_lawyers\\_pundits\\_error\\_and\\_evil.html](http://www.slate.com/blogs/thewrongstuff/2010/05/12/alan_dershowitz_on_being_wrong_part_i_lawyers_pundits_error_and_evil.html) [<https://perma.cc/TBV4-52QQ>].

77. *See e.g.,* ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* 12, 175, 182 (2009).

78. *See, e.g.,* Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 209, 263, 270 (2006); Leslie E. Velez & Claire A. Smearman, *Protecting the World’s Most Vulnerable*, 41 MD. B.J. 32, 37 (2008).

79. Velez & Smearman, *supra* note 78, at 37.

failures, giving rise to unfortunate consequences.<sup>80</sup> Without acknowledging, studying, and taking steps to correct these failures, “their lessons are lost.”<sup>81</sup> The risk of harm magnifies to more and more clients, repeating the cycle of ignoring failures and perpetuating harm again and again.

It is thus a mistake to view failure as the path to be avoided and abhorred.<sup>82</sup> Indeed, we cannot avoid failure; it is inherent and inevitable. We will all fail—many times, in fact.<sup>83</sup> But we cannot improve without acknowledging and learning from our failures,<sup>84</sup> and to learn from them, we need to turn toward them, rather than away from them, and to begin to see failure as the necessary first step on the road to success. We can break the detrimental cycle of ignoring failures by recognizing that like fields left to fallow, failure has untapped power and potential and provides rich opportunity for growth.<sup>85</sup> In the case of law, an attorney who not only can acknowledge but also study and learn from a failure will be able to prevent that same failure from happening again with the same or another client.

### C. Spectrum of Failure

Turning toward failure and trying to learn from it is no easy task. It requires ceasing to blame in the face of failure. Frequently, when a failure occurs, it is much easier to explain away how the failure happened and place blame than it is to take

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80. *See id.*

81. Edmondson, *supra* note 4.

82. BURGER & STARBIRD, *supra* note 2, at 48 (“The typical attitude that mistakes should be avoided is patently wrong and has several detrimental consequences.”).

83. Sometimes we might fail many times in one day, and certainly, many times over a career. For example, Michael Jordan, once of the UNC Tar Heels and more famously of the Chicago Bulls, has said of his career: “I’ve missed more than 9,000 shots in my career[.] I’ve lost almost 300 games[.] 26 times I’ve been trusted to take the game winning shot and missed. I’ve failed over, and over and over again in my life. And that is why I succeed.” Eric Zorn, *Without Failure, Jordan Would be False Idol*, CHICAGO TRIBUNE (May 19, 1997), [http://articles.chicagotribune.com/1997-05-19/news/9705190096\\_1\\_nike-mere-rumor-driver-s-license](http://articles.chicagotribune.com/1997-05-19/news/9705190096_1_nike-mere-rumor-driver-s-license) [<https://perma.cc/6QMH-98H9>].

84. Easton & Oseid, *supra* note 7, at 501-02 (“Nobody can do anything of consequence in the practice of law without making mistakes. . . . If [one] cannot improve, there is no point in practicing law.”).

85. *See* BURGER & STARBIRD, *supra* note 2, at 48 (“[F]ailure is a potent teacher . . . .”)



responsibility for it.<sup>86</sup> And this willingness to blame in the face of failure does not mean just ascribing the fault for the failure to another person; it extends to blaming the process, the material, or even the weather. “Even without meaning to, we all favor evidence that supports our existing beliefs rather than alternative explanations. We also tend to downplay our responsibility and place undue blame on external or situational factors when we fail, only to do the reverse when assessing the failures of others . . . .”<sup>87</sup>

Alternatively, in the face of failure, rather than placing blame outward,<sup>88</sup> a person may turn the blame inward, which can be equally unproductive.<sup>89</sup> After a failure, a person may not feel only that he did something wrong, but also that he is a bad person.<sup>90</sup> He may feel guilt—and shame.<sup>91</sup> A person feeling shame will not focus on his actions or behavior; rather, he will feel like he is a bad person and thus wish to “hide or escape.”<sup>92</sup> His inner critic is suddenly strident and reproachful.<sup>93</sup> This negative internal soliloquy and feelings of shame can lead to a

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86. See A. David Nussbaum & Carol S. Dweck, *Defensiveness Versus Remediation: Self-Theories and Modes of Self-Esteem Maintenance*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 599, 600 (2008).

87. Edmondson, *supra* note 4.

88. *Id.* (discussing how acknowledging failure and learning from it “is more than emotional; it’s cognitive, too” and how this downplaying our own responsibility and augmenting that of others when there is a failure is “a psychological trap known as *fundamental attribution error*.”).

89. *TED Radio Hour: Can We Gain Strength from Shame?*, NPR (Mar. 11, 2013), <https://www.npr.org/templates/transcript/transcript.php?storyId=174033560> [<https://perma.cc/T5RD-KJNQ>].

90. *Id.* (playing Guy Raz’s interview of Brené Brown).

91. Guilt is an “other-oriented emotion.” Bulger, *supra* note 4, at 230. The person feeling guilt feels like she did something wrong and thus focuses on her actions and behavior. *Id.* In the workplace (or academic setting), guilt can be debilitating and counterproductive, but modifying or improving work performance will alleviate or prevent feelings of guilt. *Id.* at 237. Shame, however, is directed inward, toward oneself. *Id.* at 230. Of course, in the face of failure, people may feel just guilt or just shame, or both. *Id.*; see also *TED Radio Hour: Can We Gain Strength from Shame?*, *supra* note 89 (playing Guy Raz’s interview of Brené Brown).

92. Bulger, *supra* note 4, at 229-30, 236-37 (discussing how shame invokes a much less productive response than guilt, causing a person to become paralyzed and even more afraid to make a mistake).

93. See *TED Talks: Guy Winch Discusses Why We All Need to Practice Emotional First Aid* (Nov. 2014), [https://www.ted.com/talks/guy\\_winch\\_the\\_case\\_for\\_emotional\\_hygiene/transcript](https://www.ted.com/talks/guy_winch_the_case_for_emotional_hygiene/transcript) [<https://perma.cc/3KLJ-5RCM>].

downward spiral of his emotions, causing him to lose motivation and become paralyzed in the face of failure.<sup>94</sup>

But not all failures are blameworthy, and recognizing failures fall on a spectrum is a way to begin turning toward failure and to improve our relationship with it. Indeed, failures come in different shades, with many being praiseworthy, not blameworthy.<sup>95</sup> While some—those arising out of deviance or deliberate violation of a rule or process, such as lying, cheating, stealing—may be truly blameworthy,<sup>96</sup> failures arising out of testing a hypothesis or experimenting to expand knowledge or investigate a possibility are praiseworthy and should be encouraged.<sup>97</sup> These latter failures can be called “[i]ntelligent failures at the frontier” and are praiseworthy because “they provide valuable new knowledge” that helps ensure growth and ingenuity.<sup>98</sup> We want our students to engage in these praiseworthy failures to maximize their learning and to solve problems creatively. To help students not be paralyzed by the fear of even these praiseworthy failures, we need to examine how we frame our mindset.

#### D. Failure and Mindset

Beyond merely understanding how failures fill a spectrum and are rarely, if ever, wholly blameworthy, we can improve our relationship with failure through our beliefs about our ability to actually learn. Carol Dweck, Professor of Psychology at Stanford University, refers to our beliefs about how we learn as “mindset.”<sup>99</sup> In decades of research examining how people think about intelligence, Dweck has concluded that at any given time

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94. BURGER & STARBIRD, *supra* note 2, at 48 (“The mind-set that mistakes are poisonous often freezes us into inaction.”); *see also* discussion of the perfection-paralysis cycle *supra* Section II.A.

95. *See id.*

96. For example, failures due to honor code violations may be more “blameworthy” on the spectrum of failures.

97. *See* Edmondson, *supra* note 4.

98. *Id.* (discussing the discovery of new drugs, new businesses, and innovative products because of experiments that did not go as expected); *see also* Sitkin, *supra* note 3, at 232; SCHULZ, *supra* note 61, at 306-07 (discussing the importance of companies engaging in error-prevention strategies both for “material and moral” reasons and noting that for corporations, “paying attention to error pays” and advising that individuals follow companies’ lead in this regard).

99. DWECK, *supra* note 9, at 6-7.

people occupy either a fixed mindset or a growth mindset.<sup>100</sup> Someone occupying a fixed mindset believes that one's intelligence and ability to learn are set and cannot be changed; they are innate and stagnate.<sup>101</sup> Effort is fruitless.<sup>102</sup> If the person does not at first succeed, she will not try and try again, but rather avoid challenges and give up easily.<sup>103</sup> Moreover, the "fixed mindset creates an internal monologue that is focused on judging . . . ."<sup>104</sup> Thus, a person with a fixed mindset will be more prone to depression and learned helplessness, manifested by a prolonged pessimistic view that "no effort on their part can mitigate their circumstances."<sup>105</sup> They are also more likely to ignore any criticism and blame others for errors.<sup>106</sup>

By contrast, someone occupying a growth mindset believes that intelligence is fluid or malleable, and that she can improve and expand her knowledge, performance, and abilities by working hard and by being willing to receive and learn from feedback, including criticism.<sup>107</sup> Intelligence is not static. It grows incrementally.<sup>108</sup> Accordingly, with a growth mindset, a person is more likely to "embrace challenges," persist despite obstacles, and "see effort as the path to mastery."<sup>109</sup> The internal monologue for someone with a growth mindset is focused on "implications for learning and constructive action . . . ."<sup>110</sup> Consequently, those who believe that "intelligence can be grown and that performance

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100. *Id.*

101. *Id.*

102. *Id.* at 8.

103. *Id.*

104. DWECK, *supra* note 9, at 215.

105. Rosen, *supra* note 25, at 172, 175 (citing studies by Martin Seligman as showing that those who were most successful saw "obstacles not as permanent roadblocks, but as temporary states that [could] be overcome or defeated with hard work[,] and that those who predominantly had an optimistic attribution style were more resilient than those who predominantly had a pessimistic one and discussing in depth "learned helplessness").

106. DWECK, *supra* note 9, at 215, 245.

107. *Id.* at 245; *see also* Rosen, *supra* note 25, at 166 (discussing mindset theory and Carol Dweck's work).

108. Jennifer A. Mangels et al., *Why Do Beliefs About Intelligence Influence Learning Success? A Social Cognitive Neuroscience Model*, 1 SOC. COGNITIVE AND AFFECTIVE NEUROSCIENCE 75, 75 (2006) (discussing the incremental theory of intelligence).

109. DWECK, *supra* note 9, at 245; *see also* Rosen, *supra* note 25, at 178 ("[L]earners with [a growth] mindset believe their abilities can be extended through step-by-step effort, so they persist.") (quoting Ron Ritchart & David N. Perkins, *Learning to Think: The Challenges of Teaching Thinking*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 775, 786 (Keith J. Holyoake & Robert G. Morrison eds., 2005)).

110. DWECK, *supra* note 9, at 215.

can be improved are more likely to be insulated from stress-related and performance-related depression.”<sup>111</sup>

All people can—and do—occupy both mindsets.<sup>112</sup> Often, though, people gravitate to one or the other mindset more frequently.<sup>113</sup> However, we can train ourselves and help train our students to occupy a growth mindset more frequently and to recognize when we are occupying a fixed mindset. It is in this training that law schools and law professors can play an important role. Specifically, law professors are positioned to help our students—future attorneys—develop skills and gain practice in acknowledging and studying failure. To do so, however, requires counteracting how law schools contribute to the view that failure is a bad thing to be avoided and institutionally encourage fixed mindsets.

### III. LEGAL EDUCATION AND FOSTERING THE FIXED MINDSET

Seen at its very best, law school is a pinnacle of intellectuality, full of achievers pursuing the higher mind.<sup>114</sup> Indeed, “[m]ost students come to law school with high expectations for themselves. They are the sort of people who are highly motivated, who set goals and seek excellence, and who are committed to the long haul.”<sup>115</sup> However, in the first few months of law school, law students’ well-being, outlook, and motivation often decline significantly.<sup>116</sup> As Okianer Christian Dark, Professor of Law at Howard University School of Law, writes:

[A]t some point—and usually it is early in their first semester—[students] forget about seeking or maintaining high expectations. Instead, they focus on just getting by, not embarrassing themselves in the classroom on a given day,

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111. Rosen, *supra* note 25, at 172.

112. See DWECK, *supra* note 9, at 10.

113. See Mangels et al., *supra* note 108, at 75.

114. Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027, 2027 (1998).

115. Okianer Christian Dark, *Principle 6: Good Practice Communicates High Expectations*, 49 J. LEGAL EDUC. 441, 441 (1999).

116. *Dark Side*, *supra* note 24, at 113; Sheldon & Krieger, *supra* note 33, at 883-84, 893 (finding that “law school has a corrosive effect on the well-being, values, and motivation of students, ostensibly because of its problematic institutional culture”).

and somehow slogging through all the briefing and reading of cases for classes the next day.<sup>117</sup>

Of course, this decline can easily be chalked up to the stress and psychological distress of law school.<sup>118</sup> Some of that stress and distress, though, is due to students being challenged academically like never before and feeling failure for the first time.<sup>119</sup> This may come at the time they receive their first law school grades, because many students will receive some of the lowest grades they have ever received, courtesy of the mandatory curve that most classes have.<sup>120</sup> Even if their grades are not actually failing grades, the grades may not be the grades the students are accustomed to getting, and thus, the students may still feel like they have failed.<sup>121</sup>

Moreover, even before grades are released, many law students will have their first experiences with failure.<sup>122</sup> Law school may be the first time that some students have had to grapple with material they are learning, and be challenged by it.<sup>123</sup> For some, this struggle can feel like failure. For example, being called on in class and not having a “right” answer can feel like a failure, and many students end up fearing being called on because

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117. Dark, *supra* note 115, at 441.

118. See, e.g., Sheldon & Krieger, *supra* note 33, at 883.

119. Sperling & Shapcott, *supra* note 8, at 39-40.

120. *Id.*; see Shannon Achimalbe, *The Cruel Grading System of Low-Ranked Law Schools*, Above the Law (May 27, 2015), <https://abovethelaw.com/2015/05/the-cruel-grading-system-of-low-ranked-law-schools/> [<https://perma.cc/PUZ6-C59Z>].

121. See Colleen Flaherty, *The Great Shadow Grade Debate*, INSIDE HIGHER ED (JUNE 1, 2016), <https://www.insidehighered.com/news/2016/06/01/should-colleges-shield-freshmen-themselves-hiding-first-term-grades-their> [<https://perma.cc/Q95M-X6WL>] (discussing how college freshmen, “many of whom are accustomed to high marks” but not the academic rigor of college, have a “rude awakening” when they receive their first semester grades and then start worrying about grades to the point of preventing themselves “from taking the kinds of intellectual risks they’re supposed to in college—or at least from focusing on real understanding over rote learning”); see also Emily Zimmerman, *Do Grades Matter?*, 35 SEATTLE U. L. REV. 305, 346 (2012) (finding in an empirical study of first-year law students that “most students reported that their law school grades were worse than their college grades” but that their expectations of grades in law school were varied).

122. Some may not experience failure until they are practicing—or may experience it anew in practice when the impact of a mistake or failure affects a client or the firm, someone other than the attorney herself. See, e.g., Easton & Oseid, *supra* note 7, at 500, 503 (writing a letter to new attorneys who may “have had the occasional minor setback from time to time, but nothing of [the] magnitude” of losing a trial or making other “costly mistakes in negotiating, drafting, arguing,” or other lawyering tasks).

123. Dark, *supra* note 115, at 441.

they are afraid that they will make fools of themselves in front of their classmates or disappoint the professor.<sup>124</sup>

Additionally, in some of their classes—like their first semester legal writing classes—students receive critical feedback on their work, analysis, research, and writing.<sup>125</sup> They may be accustomed to receiving only praise for their achievement,<sup>126</sup> and may have never before received this kind of criticism—and it feels like criticism no matter how constructively it is framed.<sup>127</sup> In receiving feedback about how much work they have to do to make their product effective, some students feel like they have failed.

Regardless of the impetus, once students are feeling that they have failed, they are susceptible to getting caught in the negative cycle of guilt, shame, and blame or stalling out in a fixed mindset.<sup>128</sup> Such a mindset affects and hampers students' motivation to engage in their studies or put forth effort; it also contributes to a rise in mental health issues.<sup>129</sup> More and more frequently law students “manifest learned helplessness,<sup>130</sup> depression, substance abuse,”<sup>131</sup> and other interpersonal problems, and those issues, as discussed above, carry forward into the profession.<sup>132</sup>

Law students might self-select into law school because they share some traits with those in the legal profession,<sup>133</sup> but “the problems arising in law students are largely attributable to the process of legal education . . . .”<sup>134</sup> The precipitous decline in our

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124. *See id.* (noting that law students have as a primary goal not embarrassing themselves in the classroom).

125. *See* Sperling & Shapcott, *supra* note 8, at 39.

126. Grant, *supra* note 27, at 7 (citing Susan K. McClellan, *Externships for Millennial Generation Law Students: Bridging the Generation Gap*, 15 CLINICAL L. REV. 255, 270 (2009)).

127. *See* Sperling & Shapcott, *supra* note 8, at 39-40; *see also* Jesse C. Grearson, *From Editor to Mentor: Considering the Effect of Your Commenting Style*, 8 LEGAL WRITING 147, 165 (2002) (cautioning that “[s]tudents may feel overwhelmed at the disparity between where they are and where they will need to be as professional legal writers[,]” and thus may feel inadequate and unworthy).

128. *See* Sperling & Shapcott, *supra* note 8, at 39-40.

129. *See* Rosen, *supra* note 25, at 166.

130. “[L]earned helpless[ness] can be taught . . . . If a student’s overall law school experience causes the student to believe that nothing she does can change her circumstances, she is helpless, academically speaking.” *Id.* at 175-76 (internal citations omitted).

131. *Id.* at 170, 185-86; *see also* *Dark Side*, *supra* note 24, at 113.

132. Krill et al., *supra* note 38, at 52.

133. *See, e.g.*, Richard, *supra* note 41, at 1; *Dark Side*, *supra* note 24, at 123.

134. *Dark Side*, *supra* note 24, at 123.

students' motivation and outlook is partly attributable to their shift from intrinsic to extrinsic motivation,<sup>135</sup> which is nurtured by law school's institutional focus on outcomes.<sup>136</sup> The focus on grades results not only in a loss of "well-being and life satisfaction," but also a shift "from service-oriented career preferences and toward lucrative, high-status career choices."<sup>137</sup> Moreover, when students are extrinsically motivated, they are more likely to occupy a fixed mindset<sup>138</sup> and thus be hindered in their own learning.

This shift in motivation can develop when the institutional forces at play within law schools and within the legal profession combine to send students the message that grades count more than learning.<sup>139</sup> Specifically, grading on a curve, ranking first-year law students, and being aware that large firms might not look beyond the top ten percent of the class, all contribute to the outcome-focused nature of law school.<sup>140</sup> Even in schools that do not disclose rankings to first-year students except those in the top ten percent, students who do not receive a rank know by omission that they are not in the top ten percent, and may thus perceive that they are "locked out of the all-important top 10 percent after the first semester or, even more disheartening, at the end of the first year."<sup>141</sup>

Undeniably, whether or not an accurate measure of one's knowledge and ability,<sup>142</sup> grades and class rankings are a part of

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135. See Sheldon & Krieger, *supra* note 33, at 883-84.

136. *Id.* at 885; see also *Dark Side*, *supra* note 24, at 123 (refuting "the idea that the problems of law students and lawyers are the inevitable result of self-selection and personal attributes"); JESSICA LAHEY, *THE GIFT OF FAILURE: HOW THE BEST PARENTS LEARN TO LET GO SO THEIR CHILDREN CAN SUCCEED*, AT xix (2015) (asserting that using grades as rewards or incentives de-prioritizes "exploration and experimentation").

137. *Dark Side*, *supra* note 24, at 123.

138. Sheldon & Krieger, *supra* note 33, at 883-84; Angela Lee Duckworth et al., *Boring but Important: A Self-Transcendent Purpose for Learning Fosters Academic Self-Regulation*, 107 J. PERSONALITY & SOC. PSYCHOL. 559, 560-61, 566-67 (2014) (noting that students are more likely to work through challenging problems when they are motivated by an opportunity to benefit themselves as well as have a larger connection to the world beyond themselves).

139. Rosen, *supra* note 25, at 176, 182; see also LAHEY, *supra* note 136, at 228 (discussing how "plenty of evidence [shows] that grades are just about the worst way to promote learning through intrinsic motivation").

140. Rosen, *supra* note 25, at 176-77; see also *Dark Side*, *supra* note 25, at 117.

141. Rosen, *supra* note 25, at 177 (emphasis added).

142. Grades only "measure how well [a student] did relative to [her] classmates on a few 3-hour exams taken at a particular place at a particular time." Orin Kerr, *Thoughts on First-Year Law School Grades*, THE VOLOKH CONSPIRACY (Jan. 16, 2010), <http://>

being hired into a law firm—particularly the large ones—or into a clerkship.<sup>143</sup> Grades are “a necessary feature of the academic environment,” and neither the focus on grades and rankings in the hiring process or the need for giving grades in the academic setting is going to change any time soon,<sup>144</sup> nor does this Article argue that it should.<sup>145</sup> I also do not want to suggest that all or even most professors or staff members within any law school are outcome-focused,<sup>146</sup> or that all law schools are. I recognize that this focus on outcomes is not unique to law school and that many forces throughout our educational system and pervasive in our societal ideals encourage students to “measure [their] progress . . . by means of points, scores, and awards.”<sup>147</sup> However, given that those entering law school are more intrinsically motivated and more service-minded when they begin their first year than when they finish it,<sup>148</sup> evaluating law schools’ focus on outcomes and how we can begin to alleviate those effects is crucial. At 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>149</sup>

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volokh.com /2010/01/16/thought-on-first-year-law-school-grades/ [https://perma.cc /LDL8-ZR6H].

143. See Rosen, *supra* note 25, at 169.

144. *Id.*

145. This Article also does not mean to suggest that most law students are not resilient in the face of disappointing grades. See, e.g., Zimmerman, *supra* note 121, at 354 (noting that even though many law students “come to law school with unrealistically optimistic grade expectations,” they are “relatively resilient”). Rather, this Article sees grades as one piece of the puzzle that causes law students to become more extrinsically focused and more fixed in their mindset.

146. We have the responsibility, though, to promote “the regular experience of authenticity, relatedness, competence, self-esteem, and security in our students” and to support their intrinsic motivation and personal growth. See *Dark Side*, *supra* note 24, at 126 and Part IV, *infra*.

147. LAHEY, *supra* note 136, at 20, 161 (noting that “we are all implicated in this crime against learning” and arguing that recently many parents have not allowed their children to fail because “even one failure could spell the end of a scholarship opportunity, the loss of honor roll, the uneraseable record of a detention, academic probation, or suspension”).

148. Sheldon & Krieger, *supra* note 33, at 884; *Dark Side*, *supra* note 24, at 123.

149. See Rosen, *supra* note 25, at 166-67; see also Grant, *supra* note 277, at 12-13 (observing that students who were schooled under the No Child Left Behind policies were often in “‘performance-oriented’ classroom[s]” focused on the test results and thus “may [have] struggle[d] with internal motivation and coping skills, abstract thinking, and challenges or the possibility of failure”) (citing Mary Ann Becker, *Understanding the Tethered Generation: Net Gens Come to Law School*, 53 DUQ. L. REV. 9, 20-21 (2015)).



For example, with law school exams, students generally only have one opportunity to show what they know, only to learn that the resulting grade from that one exam is the metric that seems to matter most for their legal career.<sup>150</sup> No wonder students feel tremendous pressure to complete that exam perfectly and get a high grade. Having only one final exam on which the student's future career seems to hinge reinforces any perfectionist tendencies students might have and also propagates the related negative consequences of those tendencies.<sup>151</sup> Moreover, this form of assessment requires no feedback other than the grade, which sends the message that learning is less valuable than outcome.<sup>152</sup> Many law students thus come to believe that "learning is less privileged than being perceived as intelligent" and that "the Socratic dialogue and the final exam [are] a contest of minds in which the 'smart' people will be rewarded, with both grades and social desirability."<sup>153</sup>

This perception that some students are "smart" while others are "not-so-smart" damages the learning process and fosters a fixed mindset.<sup>154</sup> Sending the message that only "smart" people are rewarded fosters a belief that intelligence is "a fixed trait and that performance could not be improved, even with instruction and training."<sup>155</sup> And students may infer this message from law schools' focus on outcomes, even if they have not been told explicitly.<sup>156</sup> For both the student thinking, "I did well on this exam, because I am smart," and for the student thinking, "I did not do well, so I must not be smart," the fixed mindset is reinforced.<sup>157</sup> Students occupying a fixed mindset see "a task [a]s either easy or impossible," and therefore conclude "that failure is

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150. Rosen, *supra* note 25, at 177.

151. Although many law students and lawyers share the trait of perfectionism or exhibit perfectionistic tendencies, those personality traits "aren't always consistent with healthy coping skills and the type of emotional elasticity necessary to endure the unrelenting pressures and unexpected disappointments that a career in the law can bring." See Patrick Krill, *Why Lawyers Are Prone to Suicide*, CNN OPINION (Jan. 21, 2014), <http://www.cnn.com/2014/01/20/opinion/krill-lawyers-suicide/index.html> [<https://perma.cc/DJ3A-D9KY>]; see also Section II.A, *supra*.

152. Rosen, *supra* note 25, at 168.

153. *Id.* at 167.

154. *Id.* at 167; DWECK, *supra* note 9, at 16, 18, 141. Ability labeling is related to "[a]bility praise," which "is praise that promotes a belief in the entity [or fixed] theory of intelligence." Rosen, *supra* note 25, at 167.

155. Rosen, *supra* note 25, at 167; DWECK, *supra* note 9, at 112, 114, 148.

156. Rosen, *supra* note 25, at 183-84.

157. See *id.* at 168-69.

a product of a permanent deficiency in one's intelligence."<sup>158</sup> For these students, law school itself may discourage them from further effort and thus hinder their own learning.<sup>159</sup> Faced with the unprecedented trials of law school plus the outcome-based focus of legal education, many students become "unwilling to set difficult learning goals or engage in tasks that . . . present a threat of failure."<sup>160</sup> Even in their first year of law school, they may resign themselves to "academic mediocrity," believing that they will be able to improve neither their abilities nor their outcomes no matter what they do.<sup>161</sup>

Once mired in a fixed mindset, a student may not recognize that facing the failure, working through the challenge, and engaging in the struggle are necessary parts of learning to be an effective lawyer. Moreover, the combination of experiencing failure for the first time and the downward spiral that can invoke with the shift to being extrinsically motivated help explain why so many people detest law school and why law schools are seeing increased mental health disorders.<sup>162</sup> And these patterns of fixed mindsets and fear of failure and resulting depression and anxiety flow into the legal profession as well.<sup>163</sup> That the profession is

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158. *Id.* at 178.

159. *See id.* at 169, 180; Claudia M. Mueller & Carol S. Dweck, *Praise for Intelligence Can Undermine Children's Motivation and Performance*, 75 J. PERSONALITY & SOC. PSYCHOL. 33, 33-34, 48-49 (1998). Also, as was discussed earlier in Part III, law students often come to law school already believing that they have been successful academically because they are "smart" and thus may enter law school with the mindset that their intelligence is fixed. *See Rosen, supra* note 25, at 168 n.54 (discussing how it may be harmful to affirm to students that they have been successful because they were smart, or that they must be smart to have made it to law school).

160. Rosen, *supra* note 25, at 169; *see also* DWECK, *supra* note 9, at 21, 35-36 (noting in her study of seventh graders that those with an entity or fixed mindset were disinclined to study more if they did not do well on an exam, because there was no point if they did not have the ability, whereas those with a growth mindset thrived on challenges).

161. Rosen, *supra* note 25, at 179.

162. *Dark Side, supra* note 24, at 114 ("The incidence of clinically elevated anxiety, hostility, depression, and other symptoms among [law] students ranged from eight to fifteen times that of the general population.") (citing G. Andrew Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, AM. B. FOUND. RES. J. 225 (1986)); *see also* Zimmerman, *supra* note 121, at 360 (finding that law students "who receive lower grades" are "less satisfied with their grades" and more likely to think that their grades do not "accurately reflect the quality of their work" than are students who receive higher grades).

163. Sheldon & Krieger, *supra* note 33, at 893-94 ("[M]otivation-dampening effects of law school may indeed have negative effects that extend well beyond graduation.").

plagued by alcoholism and depression<sup>164</sup> may be another side effect of law school.

Although law professors need not change the grading or ranking methods, we can help correct the message that results. We can learn to recognize when our students (and when we, ourselves) occupy a fixed mindset and work to cultivate a growth mindset in our students, encouraging effort and engagement and allowing them to fail safely and to learn from that failure<sup>165</sup> with the goal of ultimately being more effective and resilient attorneys. We can adopt practices in our classrooms to help preserve students' motivation and encourage them to maintain a growth mindset to persevere in the face of failure,<sup>166</sup> which will benefit both our students and the profession.

#### IV. FOSTERING FAILURE AND FIXING THE FIXED MINDSET

If we foster an environment in our classrooms in which failing is a natural and necessary component in making progress, then we allow our students to release their own genius and share their authentic ideas—even if (or especially when) those ideas aren't quite polished or perfectly formed.<sup>167</sup>

Much of this Article has focused on the consequences of ignoring failure and how legal education often reinforces the mindset that nothing is to be gained by effort and that failure is a bad thing. Legal education doesn't have to be this way. Instead, it could reinforce a growth mindset and help students embrace failure for the powerful learning tool it is. And because failure is a powerful learning tool, it is a powerful teaching tool.

While at the institutional level, law schools could do things to help students learn from failures and develop the skills and habits necessary for creative and effective lawyering, this Article

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164. Krill et al., *supra* note 388, at 46.

165. Jessica Lahey writes that too often we overlook the gifts that failure can provide: “[A]ll sorts of disappointments, rejections, corrections, and criticisms are small failures, all opportunities in disguise, valuable gifts misidentified as tragedy.” Lahey, *supra* note 136, at xx.

166. *See, e.g.*, Rosen *supra* note 25, at 179, 182 (discussing the importance of changing the message in law school, even if we cannot change the method).

167. Edward Burger, *Essay on the Importance of Teaching Failure*, INSIDE HIGHER ED (Aug. 21, 2012), <https://www.insidehighered.com/views/2012/08/21/essay-importance-teaching-failure> [<https://perma.cc/MTD2-UFBK>].

does not tackle these larger interventions. Rather, it focuses on providing a failure pedagogy that individual professors might use in their classrooms to encourage students to learn from failure and develop habits of resiliency. As law teachers, we can foster failure in our classrooms, as opposed to leaving it to fester. With these tools and techniques, we can begin to counteract the negative effects of law school and help cultivate our students' growth mindsets by helping them realize failure's importance in their learning and in being effective attorneys.

Many professors in legal writing classes, experiential classes, and problem-based classes are already designing their curricula to give students more opportunities to deliberately practice rising up in the face of challenge, getting comfortable with struggle, and failing in a praiseworthy way.<sup>168</sup> With this focus, professors are adding or altering their assignments and assessments,<sup>169</sup> and these curricular innovations are available to any law professor who wishes to employ a failure pedagogy. For example, instead of having only one exam, or summative assessment, at the end of the semester, professors could offer multiple assessments<sup>170</sup> throughout the semester—graded or ungraded. If graded, professors might consider replacing a grade from an earlier assignment with a later assignment, assuming the grade has improved.<sup>171</sup> Alternatively, professors could offer

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168. See, e.g., Rosen, *supra* note 25, at 176, 184-85; Martin & Rand, *supra* note 25, at 224-25.

169. Martin & Rand, *supra* note 25, at 224-25.

170. Incorporating more opportunities for students to “fail” does not mean simply assigning them more work to do. Students already struggle to read, let alone digest or synthesize, the large amount of material they are assigned for each class. See Grant, *supra* note 277, at 8 (noting that current law students who have been able to access information quickly and easily online throughout their lives may have a harder time reading longer and denser texts).

They may have to work below their personal level of excellence just to get the job done. Instead of helping them develop a definite sense of high expectations and a commitment to excellence, we allow them to develop a work habit that places a higher premium on outcome—*any* outcome—than on the quality of the product.

Dark, *supra* note 115, at 441.

171. See BURGER & STARBIRD, *supra* note 2, at 62 (“Instructors need to celebrate students’ useful missteps, because those failed attempts lead to important epiphanies at the end. For example, if an instructor gives a cumulative final examination, then why not allow that grade to replace an earlier exam grade if the score on the final is higher? Why are we punishing students for their intermediate missteps that are, in fact, essential for the learning process?”).

ungraded assignments<sup>172</sup> as pure opportunities to practice legal reasoning and get feedback.

These additional assignments might seem difficult for large classes because of the time for the professor to review and give feedback, yet they can be designed in a way to allow the students to practice without overly taxing the professor. Professors could have the students write out the answer to one exam question as homework and then debrief that question and answer as a class or have each student bring to class his or her draft answer to swap with a classmate to give and gain feedback through a guided peer review exercise.<sup>173</sup> Similarly, professors could have students (inside the class or outside as homework) engage in a short motion hearing in a small group with the other group members taking turns making arguments, acting as opposing counsel, or acting as the judge hearing the motion. The professor would not need to see or evaluate the final work product, yet each student would have practiced formulating and communicating an argument on a particular area of the course's subject matter.

Employing a failure pedagogy does not require a professor to overhaul her entire curriculum, however. Without adding or altering assignments and assessments, law professors can still help students maximize their education by learning from their failures and recognizing the importance of struggle. First, and most easily, in our classrooms we can begin to normalize failure and to help students be open to it. Section A presents different techniques for adopting a framework to welcome failure. Second, as Section B sets forth, we can change how we construct our feedback to students to encompass and encourage a growth mindset. Then, we may need to help some students engage more fully in examining and learning from failures; Section C provides techniques for helping those students engage in this deeper study.

### A. Failure Framework

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172. Greg Siering, *Why Risk and Failure are Important in Learning*, INDIANA UNIV. BLOOMINGTON (Feb. 2012) (on file with review) (discussing how teachers can build assignments to encourage failure on smaller levels, creating an environment of "small and manageable" risks and potential failures, before a final exam or other high stakes assignment).

173. See ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* 407-15 (2016) (detailing the pedagogical value of peer feedback exercises and giving guidance to students and to professors about conducting peer review sessions).

Adopting a failure framework requires only some curricular or pedagogical tweaks to create a safe space for failure by acknowledging, contextualizing, and sharing failure. The first is really easy. Simply acknowledging failure and its important role in the learning process lessens the likelihood that students will suffer debilitation through their eventual failures. Merely letting students know explicitly that we have high expectations for them and their work *and* that we expect them to make mistakes helps students engage in their learning process.<sup>174</sup> In essence, acknowledging failure in this way asks only that professors expose and explain their goals and reasons behind their teaching methods, confessing to the students that they are deliberately making choices to help students struggle and flail.

The law students discussed in Part III who feel like they have failed by not having the “right” answer in class would benefit from learning a bit about legal pedagogy—that the Socratic and case methods enable students to learn by struggling or puzzling through the issues.<sup>175</sup> Students may not know that their law professors do not expect them to get it “right”<sup>176</sup> the first time. Instead, they are wanting students to struggle, because that struggle helps students develop their legal thinking abilities.<sup>177</sup> Many professors cold call on students with the idea of letting

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174. See, e.g., MICHAEL HUNTER SCHWARTZ, GERALD F. HESS & SOPHIE M. SPARROW, *WHAT THE BEST LAW TEACHERS DO* 148 (2013) (emphasizing that transparency in teaching is integral to effective teaching and quoting Professor Patti Alleva of University of North Dakota School of Law for the proposition that teaching with integrity requires “teaching with transparency, and making known, when appropriate, what [the teacher is] trying to achieve, and why”) (emphasis omitted).

175. See Phillip E. Areeda, *The Socratic Method (Lecture at Puget Sound 1/31/90)*, 109 HARV. L. REV. 911, 915, 917 (1996) (emphasizing that students learn by having to answer questions they did not anticipate and by making errors and exploring those errors). This Article views the case method through the lens of failure pedagogy; it is not a critique of the Socratic method or the Langdell Case Method, nor does it enter the debate as to whether these methods should continue to be used in the legal classroom. For such articles, see, e.g., Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597 (2007); Myron Moskovitz, *Beyond the Case Method: It’s Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992).

176. Often, there is no “right” answer in law, and many students assume not only that there is a “right” answer but “the” right answer. See Areeda, *supra* note 175, at 915, 917.

177. See, e.g., *The Socratic Method (Green Bag Article)*, UNIV. OF CHICAGO LAW SCHOOL, [http://www.law.uchicago.edu/socrates/soc\\_article.html](http://www.law.uchicago.edu/socrates/soc_article.html) [<https://perma.cc/H3S9-2LXS>] (“[P]rofessors who rely on the Socratic Method today use participatory learning and discussions with a few students on whom they call (in some classrooms, randomly) to explore very difficult legal concepts and principles. The effort is a cooperative one in which the teacher and students work to understand an issue more completely.”).

students struggle, “build[ing] in an expectation of mistakes . . . .”<sup>178</sup> Without recognizing that legal pedagogy is built on importance of the struggle, students can quickly become hindered in their learning because they become intent on not feeling humiliated.<sup>179</sup> They do not necessarily know, for instance, that the case method helps students learn to think on their feet, see the different sides of an issue, and realize that they need to support claims with reasons.<sup>180</sup> They may not realize that engaging with the different facets of a legal issue and probing weaknesses in arguments is itself practicing lawyering.<sup>181</sup> Being transparent about our goals for the students and our methods for assisting students to achieve those goals will help our students know that we value failure as a learning tool and will allow them to enhance their learning from our pedagogical methods.<sup>182</sup>

Likewise, we can explain to our students *why* and *how* struggling helps them learn.<sup>183</sup> In addition to acknowledging that our classroom methods are designed to let students test hypotheses and take risks in their analysis, we can acknowledge

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178. See LAHEY, *supra* note 13636, at 164 (quoting a high school teacher talking about his and his colleagues’ expectations for freshmen year students and how they know and expect freshmen, or any student for that matter, to make mistakes).

179. Anecdotally, students have described that they do not want to contribute in class because they are afraid of “being” humiliated. Because I believe very few, if any, law professors currently teaching in law schools are deliberately trying to humiliate students, I chose to phrase the students’ fears as wanting to avoid “feeling” humiliated. Like with failure, the experience of feeling humiliation is what counts for the purposes of this Article.

180. See, e.g., Russell L. Weaver, *Langdell’s Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 518, 548-53 (1991) (discussing how Langdell’s Case Method, introduced by Christopher Columbus Langdell at Harvard University School of Law in 1870, enhances the student’s learning process, builds the student’s ability to read cases and think critically, and develops the student’s mental toughness).

181. *Id.* at 558-61.

182. See, e.g., SCHWARTZ ET AL., *supra* note 17474, at 148-49 (discussing the importance of transparency and setting clear expectations in effective teaching); Laura A. Webb, *Why Legal Writers Should Think Like Teachers*, 67 J. LEGAL EDUC. 315, 315, 336-37 (2017) (demonstrating how being transparent with students about pedagogical techniques and cognitive science can help students strengthen their legal writing skills).

183. I tell my students that my goals for them go beyond the bounds of my course and that I want them to have the tools and skills to be exceptional attorneys. I explain that I welcome and expect them to make mistakes, and also emphasize that acknowledging and embracing those mistakes allows them to best learn and work towards the goal of someday being an exceptional attorney. I remind them that they should not expect themselves to be effective right out of the gate. Rather, the learning curve is high, and they will need lots of practice.

that it is in “being wrong”<sup>184</sup> and practicing reasoning<sup>185</sup> that students learn most effectively. Along these lines, professors can explain that even if a student provides an answer that may be correct, professors may still push that student to struggle by questioning the correctness of that answer, for example, by raising the counterarguments and opposing points.<sup>186</sup>

Students who are particularly demotivated by a fear of failure,<sup>187</sup> may not fully appreciate or realize that struggling, flailing, and failing will help them be more successful.<sup>188</sup> For these students, as discussed above, getting the “wrong” answer in class inhibits their ability to maximize their learning, and they may spiral into a fixed mindset and be afraid to expose themselves as not being “smart” in the classroom.<sup>189</sup> These students, though, may be helped by having professors contextualize failure.

Professors can contextualize failure by accepting students’ fear of failure and helping students adjust their mindsets. We can do this simply by giving them information about fixed versus growth mindsets and how mindset impacts learning.<sup>190</sup> Likewise,

184. SCHULZ, *supra* note 61, at 23, 332 (“Our mistakes, when we face up to them, show us both the world and the self from previously unseen angles, and remind us to care about perspectives other than our own. And, whether we like it or not, they also serve as real-life plot devices, advancing our own story in directions we can never foresee.”)

185. Areeda, *supra* note 175, at 915 (“[M]ethodologies are better absorbed when actually practiced by the student and when made concrete by actually being used to solve a legal problem.”).

186. As Professor Phillip E. Areeda of Harvard Law School said on using the Socratic Method: “More generally, whenever a student seems very uncertain as to how to answer or seems wary, [I] tell him with a smile: I will press you however you answer; take any position to get us started and we will see where it goes.” *Id.* at 918.

187. See, e.g., LAHEY, *supra* note 13636, at xxiii (quoting an eighth-grade student as saying: “I am afraid of failure; which, for the record, is called *atychiphobia*. I am so afraid of failing that I lose focus on what actually matters; learning. In focusing on the outcome, I lose the value of the actual assignment and deprive myself of learning.”).

188. As Nate Kreuter, Assistant Professor of English at Western Carolina University, notes:

[M]any of us [in academia] have anecdotes about how from the ashes of some spectacular failure arose some much greater success than the one that we had originally been aiming for . . . [but] we often neglect to reveal this ‘secret’ to students. More problematically, we let down our students when we neglect to allow for, and even encourage, certain types of ultimately productive classroom failures.

See Kreuter, *supra* note 21.

189. See *supra* Section II.D.

190. Even exposing people to the idea that our mindset is malleable helps to cultivate a growth mindset over a fixed one. See discussion of fixed versus growth mindset *supra* Section II.C; see also DWECK, *supra* note 9, at 6-7, 216, 218-21.



presenting and reinforcing the idea that ability is malleable helps students occupy growth mindsets.<sup>191</sup> Because everyone occupies both mindsets at different times and under different circumstances,<sup>192</sup> being aware of the characteristics of each mindset allows us to more quickly discern which mindset we are occupying at any given time. And teaching our students about mindsets gives them the tools to more readily discern their own mindsets. With this awareness, when students find themselves occupying a fixed mindset, or we recognize that they might be occupying a fixed mindset, we can help them work to shift to one of growth. Giving this information to students and enabling them to be more mindful of their own mindsets helps to create a safe space for failure and reframes failure from being wholly negative to something that could lead them to greater success.

Similarly, we can further contextualize failure by helping students understand that not all failures are equal.<sup>193</sup> Some failures are praiseworthy, not blameworthy,<sup>194</sup> and we should want to encourage these praiseworthy failures in our classroom. Many of our students would be relieved to be exposed to the spectrum of failure and to be explicitly encouraged to engage in these praiseworthy and intelligent failures.<sup>195</sup> By contextualizing some kinds of failure as praiseworthy, we can encourage our students to take risks in their thinking, ask questions, try out different hypotheses about the reasoning or holding in a case, and push the bounds of their understanding of the law. As we remind them that we expect them to fail and flail, and that doing so enhances their learning in law school, we can show that by engaging in these praiseworthy failures, they can be more creative and effective in their representation of clients in their work as attorneys.

Finally, we can create a safe space for and lower the stakes of failure by sharing failure. Sharing quotes or stories about others' journeys, missteps, and failures<sup>196</sup> is the easiest way to

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191. DWECK, *supra* note 9, at 224.

192. *See generally id.* at 213-46 (discussing how developing a growth mindset is an ongoing process and how we might react initially to an event or incident with a fixed mindset and then engage in a growth mindset process to change our view).

193. *See* Edmondson, *supra* note 4 (demonstrating that not all failures are equal and that they fall on a spectrum ranging from praiseworthy to blameworthy).

194. *See supra* Section II.C.

195. *See generally* Edmondson, *supra* note 4; *see also supra* Section II.C.

196. *See* BURGER & STARBIRD, *supra* note 2, at 55.

share failure. For instance, in my classes I like to share quotes by famous people relating to failure being the path toward success. There are enough of these quotes<sup>197</sup> that I can pepper them throughout the semester.<sup>198</sup> Often the quotes themselves may sound cliché, like Bill Gates's quote: "It's fine to celebrate success but it is more important to heed the lessons of failure."<sup>199</sup> But including them in a PowerPoint or on the board at different points in the semester provides quick reminders that I want and expect students to "fail" and try again and that doing so will help

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197. Perhaps so many quotes or "tales of failure" exist because although they "may contain plot twists and surprise endings . . . we can bet hard money" that they end well. See LAHEY, *supra* note 13636, at 242.

198. I try to choose quotes from a variety of people to remind students of intellectually successful people from all backgrounds and as one way in which I work to reduce any "identity and stereotype threat" in my classroom. See generally CLAUDE M. STEELE, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US (2010) (discussing his extensive research showing how pervasive stereotypes, particularly negative ones, influence the behavior and performance of people with social identities threatened by those stereotypes). Some examples of the quotes I use are:

- James Joyce: "A man's errors are his portals of discovery." BURGER & STARBIRD, *supra* note 2, at 56.
- George Eliot (a.k.a. Mary Anne Evans): "Failure after long perseverance is much grander than never to have a striving good enough to be called a failure." GEORGE ELIOT, MIDDLEMARCH 185 (Doreen Roberts ed., Wordsworth Editions Limited 1994) (1871).
- Colin Powell: "There are no secrets to success. It is the result of preparation, hard work and learning from failure." Alina Dizik, *Career Advice from Iconic Leaders*, CNN (Apr. 4, 2011), <http://www.cnn.com/2011/LIVING/04/04/cb.world.leader.career.tips/index.html> [<https://perma.cc/53YR-XQBJ>].
- Henry Ford: "Failure is only the opportunity more intelligently to begin again." HENRY FORD & SAMUEL CROWTHER, MY LIFE AND WORK 19 (1923).
- Confucius: "Our greatest glory is not in never falling, but in rising every time we fall." TRYON EDWARDS, A DICTIONARY OF THOUGHTS: BEING A CYCLOPEDIA OF LACONIC QUOTATIONS FROM THE BEST AUTHORS OF THE WORD, BOTH ANCIENT AND MODERN 149 (1908).
- Winston Churchill: "Success is the ability to go from one failure to another with no loss of enthusiasm." BURGER & STARBIRD, *supra* note 2, at 47.
- Arianna Huffington: "Failure is not the opposite of success; it's a stepping stone to success." Gina Marinelli, *Life Coach: Arianna Huffington Tells Us How Success Begins in Bed*, REFINERY29 (July 2, 2013), <http://www.refinery29.com/2013/07/49295/arianna-huffington-interview> [<https://perma.cc/PP6R-UA8W>].
- Dr. Maya Angelou: "[W]e may encounter many defeats, but we must not be defeated." *An Interview with Maya Angelou*, PSYCHOL. TODAY (Feb. 17, 2009), <https://www.psychologytoday.com/blog/the-guest-room/200902/interview-maya-angelou> [<https://perma.cc/797T-67LB>].

199. Tanya Prive, *Top 32 Quotes Every Entrepreneur Should Live By*, FORBES (May 2, 2013), <https://www.forbes.com/sites/tanyaprive/2013/05/02/top-32-quotes-every-entrepreneur-should-live-by/#161b565719a9> [<https://perma.cc/U7TM-W9AH>].

them be successful. In this way, I acknowledge failure on an ongoing basis and set the tone for the rest of the course.<sup>200</sup>

We can share not only the failures of others, but also our own.<sup>201</sup> Some professors may not feel comfortable sharing their own failures; to do so certainly requires the hard work of being vulnerable and turning the mirror inward.<sup>202</sup> It is important, though. Vulnerability helps to build trust, which is important in creating a safe space for failure.<sup>203</sup> It builds connection between the professor and the students.<sup>204</sup> By being transparent about the mistakes we have made in the past and lessons we have learned, our students can see that failure is not necessarily tied to gloom, doom, shame, and blame. They also can more readily understand that mistakes are inevitable and can be “career-boosters, not career-killers.”<sup>205</sup>

Then, after we have established trust and connection, we can invite students to share—or at least recall to themselves—their own failures. To keep the space safe for failure, this sharing need not occur in front of the whole class; it could take place in an individual conference or by having students take a few moments

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200. Sharing these quotes and stories about failures in history helps students see that learning and becoming successful are iterative processes. William Shakespeare did not write Hamlet in one sitting; he had many rough drafts, see BURGER & STARBIRD, *supra* note 2, at 55, and Thomas Edison found “10,000 ways” that a lightbulb would not work before figuring out how one would work. See Nathan Furr, *How Failure Taught Edison to Repeatedly Innovate*, FORBES (June 9, 2011), <https://www.forbes.com/sites/nathanfurr/2011/06/09/how-failure-taught-edison-to-repeatedly-innovate/#6c0f43f765e9> [<https://perma.cc/H8BE-DZA7>]. “The defects as well as the strengths of our first effort aren’t available for us to examine until they exist. Making the errors overt makes the corrections overt as well.” BURGER & STARBIRD, *supra* note 2, at 55-56.

201. See, e.g., L. Danielle Tully, *Tell Your FAIL Stories*, LEGAL WRITING MATTERS (Nov. 16, 2017), <https://sites.suffolk.edu/legalwritingmatters/2017/11/16/tell-your-fail-stories/> [<https://perma.cc/FY7H-GRZW>].

202. If we really wish to make ourselves vulnerable and strengthen our own growth mindsets and resiliency, in addition to sharing our past failures, we can seek feedback, beyond just evaluations, about our current teaching and innovations. See e.g., John Warner, *The Necessity of Looking Stupid: Not Being Afraid to Look Stupid has Great Benefits*, INSIDE HIGHER ED (July 10, 2017), <https://www.insidehighered.com/blogs/just-visiting/necessity-looking-stupid> [<https://perma.cc/PZ5L-742X>] (discussing how professors’ fears of failure keep them from trying new things and how seeking feedback from students about innovations they have tried in the classroom helps professors learn and grow).

203. See Brené Brown, *The Power of Vulnerability*, TED TALKS (June 2010), [https://www.ted.com/talks/brene\\_brown\\_on\\_vulnerability/transcript](https://www.ted.com/talks/brene_brown_on_vulnerability/transcript) [<https://perma.cc/TAM9-RQ5S>].

204. For more on the importance of being vulnerable and how it leads to connection, see *id.*

205. Easton & Oseid, *supra* note 7, at 509.

in class (or as homework) to think of or write about an experience in which they feel that they failed and evaluate how they handled it. Or students could reflect on a time when they had to work hard to master a new skill. By having students engage in this reflection and sharing, we can help students connect their current struggles or challenges to times when they persevered in the past and give them confidence to persevere in the face of these new challenges.

Acknowledging explicitly to our students that we expect them to make mistakes and that we see failure as an important learning tool will help them see it that way too. Then, by contextualizing and sharing failure, we can assist students in understanding that the setbacks they experience “are a normal part of a rigorous education” and, likewise, help “change the perception of failure from something to be avoided at all costs, to something that has meaning, purpose, and value.”<sup>206</sup>

### B. Constructing Feedback

In addition to setting up the framework for learning from failure, we can provide students with feedback in a constructive manner designed to encourage a growth mindset. Receiving and responding to critical feedback is essential to learning, improving, and being a professional.<sup>207</sup> For the student who is debilitated or paralyzed by failures or the fear of failure, though, law professors may need to shift how they give feedback to allow that student take charge of and maximize her learning. For students to feel safe trying new skills, arguments, or ways of thinking, even when those skills, arguments, and thinking are imperfect, we have a duty to help them see that these trials and errors are indeed praiseworthy. By praising these efforts and errors, we give credit to failure<sup>208</sup> and show that it is valuable. Some professors might be able to devise ways to actually account for students’

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206. *The Resilience Project*, STANFORD UNIV.: STUDENT LEARNING CONNECTION, <https://undergrad.stanford.edu/resilience> [<https://perma.cc/7NEL-Q6E7>] (encouraging and supporting students to work through failure and to know that setbacks are integral to a rigorous education by sharing “personal storytelling, events, programs, and academic skills coaching”).

207. Elana Lyn Gross, *The Right Way to Respond to Constructive Criticism*, MONSTER, <https://www.monster.com/career-advice/article/constructive-criticism-0817> [<https://perma.cc/9NT9-J4ZN>].

208. BURGER & STARBIRD, *supra* note 2, at 51, 62.

praiseworthy failures in their grades,<sup>209</sup> such as by giving points for testing hypotheses, for example. In most legal courses, however, we will credit failure by evaluating what we praise and by using growth language in giving feedback—in the classroom, on written assignments, and in individual conferences.

As discussed in Part III, traditionally and institutionally, law schools have sent the message that outcomes (grades and rankings) are the most laudable. Yet even in our classrooms,<sup>210</sup> where we might not subscribe to or perpetuate the view that only the top ten percent of each class matters, we might inadvertently convey that we value efficiency or decisiveness over deliberativeness, or that we see students who understand legal concepts more quickly as being naturally smarter than others who are struggling to grasp the material. For example, we may say things like “she’s smart,” “he’s a good writer,” or “you’ll have no problem—things seem to come easily to you.” These phrases and similar ones are what Professor Dweck refers to as “ability labeling”—some students are considered or labeled smart, but others are deemed to possess lesser cognitive abilities.<sup>211</sup> Ability labels implicitly suggest that intelligence is fixed, meaning the effort a student exerts is inconsequential.<sup>212</sup>

Even silence can send the message that a student is not “right” and therefore is not smart. For example, when the professor “is confronted with a clearly incorrect answer,” that professor may give silent feedback by “ignor[ing] the answer, dismiss[ing] it out of hand, or call[ing] on another student . . . .”<sup>213</sup> This silence can defeat or embarrass the student

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209. *See id.* at 62-63.

210. Certainly, as institutions, law schools could emphasize to students that intelligence can be improved simply by communicating that more than grades and rankings matter, but this Article focuses only what can be done in the classroom or with individual students. For a larger discussion about what schools might do more broadly, *see* Rosen, *supra* note 25, at 183; *Dark Side*, *supra* note 24, at 126-27.

211. Rosen, *supra* note 25, at 167.

212. DWECK, *supra* note 9, at 112, 114, 148; Rosen, *supra* note 25, at 184 n.164 (sharing extreme examples of professor feedback that would not only foster a fixed mindset but also might also negatively affect a student’s morale and mental health: “You always struggle with proximate cause”; “All those study aides are worthless. Not one of them can do you any good”; or “Maybe law school just isn’t for you”).

213. *See* Rosen, *supra* note 25, at 184.

and inadvertently communicate to the student (or even to the class) that the student is not smart or not smart enough.<sup>214</sup>

Shifting the focus of our praise to that of effort, process, or progress and actively using language of growth<sup>215</sup> can counter the above fixed-mindset messages and encourage the growth mindset. Instead of focusing on the result or the student's momentary intelligence, growth language concentrates on praising attitude, effort, and improvement over time.<sup>216</sup> "Regardless of their grades or place in the class, students who receive such messages are more likely to become responsible for their own learning and invested in their own educational processes."<sup>217</sup> Thus, using such language allows setbacks to become "motivating and informative."<sup>218</sup>

By simply shifting the language used, the professor described above can correct the message sent to the student and communicate that while the student's particular answer or thinking on this issue is deficient, the student can fill "the gaps in her understanding"<sup>219</sup> or work to provide a fuller and more effective answer. Specifically, the professor can help guide the student "to a corrected understanding" by using "temporary, specific, and hopeful language . . . to explain an incorrect answer's shortcomings."<sup>220</sup> For example, a professor might encourage the student to develop a better answer by using a

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214. These messages, be they audible or silent, can be particularly damaging to students who already have social identities that are associated with the negative stereotype of being less intellectual. For example, African-American or Latino law students may be afraid, even subconsciously, of living up to the negative stereotype that African Americans are not as intellectually capable as those who are Caucasian and of European descent. *See, e.g., STEELE, supra* note 198, at 56-58, 158-59 (discussing how students' awareness of a negative stereotype of a group with whom they share a social identity negatively affects their performance and describing how students with "stronger academic confidence and skills" are more susceptible to stereotype pressure).

215. DWECK, *supra* note 9, at 7; Mueller & Dweck, *supra* note 15959, at 34, 37.

216. Rosen, *supra* note 25, at 181, 183 ("[L]aw schools must curb ability praise, and must stop sending their students the message that high-achieving students succeed because they are inherently smart. Instead, schools should move to a model that incorporates praise for hard work, so that students can see that any law school task is a learnable one in which, with the appropriate academic guidance and sufficient hard work, anyone can compete and succeed.").

217. *Id.* at 181.

218. *See id.* at 181, 186 (advocating that professors "should employ in-class response methods that encourage students . . . to think about setbacks, however large or small, through the lens of optimistic attribution").

219. *See id.* at 185.

220. *Id.* at 184.

particular case or by reconsidering the facts of the problem.<sup>221</sup> Thus, the professor addresses the deficient answer while also encouraging the student “to envision [her] wrong answer as a necessary step in the mastery process as opposed to a public indictment of . . . her intelligence.”<sup>222</sup>

An easy shift in language is using the word “yet.” This three-letter word is my favorite example of language that emphasizes the incremental theory of intelligence. “Yet” is powerful;<sup>223</sup> it packs in what the student has done, what the student still needs to do, and my belief that she is capable of doing it. It thus encourages an active learning cycle in which the student will gain mastery with practice and by receiving, reflecting on, and incorporating feedback.<sup>224</sup> Professors can use “yet” in the classroom, in individual conferences with students, and in written feedback on papers or exams. For example, on a paper, a professor could tell a student that he has extracted the relevant law accurately from a case and a statute and has *yet* to synthesize them together to give the reader a rule applicable to the client’s case. Or in class, a professor could tell a student that while she understood one part of the court’s rationale, she has *yet* to account for some of the court’s reasoning, and then suggest that she look back at the opinion and identify additional facts the court emphasized.

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221. Rosen, *supra* note 25, at 184-85.

222. *Id.* at 185.

223. See Carol Dweck, *The Power of Believing that You Can Improve*, TED TALKS (Nov. 2014), [https://www.ted.com/talks/carol\\_dweck\\_the\\_power\\_of\\_believing\\_that\\_you\\_can\\_improve?language=en](https://www.ted.com/talks/carol_dweck_the_power_of_believing_that_you_can_improve?language=en) [<https://perma.cc/6NLJ-VBPD>] (describing the change in a person’s thought process about a challenging problem when the instructor shifts the phrasing of the problem from “Are you not smart enough to solve it?” to “Have you just not solved it yet?”); see also Glenn Whitman, *The Power of Yet*, EDUTOPIA (Aug. 6, 2014), <http://www.edutopia.org/discussion/power-yet> [<https://perma.cc/448P-X5RM>]; Sesame Street, *Sesame Street: Janelle Monae—Power of Yet*, YOUTUBE (Sept. 10, 2014), <https://www.youtube.com/watch?v=XLeUvZvuvAs> [<https://perma.cc/2FU2-RJ9J>] (teaching children through song that believing in themselves, working hard, and staying focused will help them get to where they want to be—the power of yet).

224. See DWECK, *supra* note 9, at 7; see also Grant, *supra* note 277, at 26-29 (advocating for professors to be “authoritative,” which balances being “responsive and demanding,” to best help students gain the skills to “practice law with a sense of self-efficacy”). These methods can likewise help reframe and modify “the academic narratives of ability-stereotyped students[.]” as discussed in notes 198 and 214, *supra*, to help them counteract those negative effects and improve their academic performance. See STEELE, *supra* note 198, at 168-69.

The word “and” also carries a lot of power and is useful for offering constructive feedback.<sup>225</sup> Employing “and” rather than the disjunctive “or” allows for multiple truths and multiple perspectives.<sup>226</sup> That simple reframing permits a richer and more nuanced understanding of complexities in our students’ learning. If our feedback praises ability, which is also considered “ability-labeling,” we are inherently painting only a binary view of the world.<sup>227</sup> By suggesting that someone is “smart,” we set up an “either/or” proposition: one *either* is *or* is not smart. By saying someone “is a good writer,” we convey that one *either* is *or* is not a good writer. There is no altering those designations. The recipients of those messages—both those receiving the praise and those receiving the absence of the praise—are in places of stasis. Adding “and” to our feedback, however, allows for growth. With “and,” someone may be smart *and* struggling. Likewise, someone may be a good writer *and* not communicating her legal analysis effectively.

“And” is also a growth-laden substitute for the problematic use of “but” in feedback.<sup>228</sup> Using “but” can diminish whatever is said before it—however positive.<sup>229</sup> Rather, the focus is placed squarely on the negative information that follows “but.”<sup>230</sup> In addition to dismissing whatever came before it, this three-letter word can easily cause defensiveness in whomever is receiving the feedback.<sup>231</sup> For example, a professor might say to a student: “In class, you have consistently been able to explain the nuances of the law, but in this practice exam, you are not articulating the law clearly.” With the use of the word “but,” the student may be less

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225. Helen Zsohar & Jackie A. Smith, *The Power of And and But in Constructive Feedback on Clinical Performance*, 34 *NURSE EDUCATOR* 241, 242 (2009).

226. See, e.g., BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER*, AT xvii-xviii (Routledge 2015) (analyzing levels of oppression and intersectionality and observing that one can be *both* at the margin *and* at the center, *both* on the inside *and* the outside, *both* the oppressor *and* the oppressed and that viewing the world through a “both/and” lens allowed for a “sense of wholeness”).

227. Rosen, *supra* note 25, at 167.

228. Julie Zuehlke, *The Dreadful “But,”* *LIBRARY WORKLIFE* (Nov. 2010), <http://ala-apa.org/newsletter/2010/11/01/the-dreadful-but/> [<https://perma.cc/VU2G-KMJU>].

229. See, e.g., *id.*; see also *GAME OF THRONES: Dragonstone* (HBO television broadcast July 16, 2017) (showing the character Jon Snow recall that his father Ned Stark was fond of saying: “Everything before the word ‘but’ is horse shit”).

230. Zuehlke, *supra* note 228.

231. See, e.g., Patrick Allan, *Give Better Feedback by Using “And” Instead of “But,”* *LIFEHACKER* (Oct. 13, 2014), <http://lifehacker.com/give-better-feedback-by-using-and-instead-of-but-1645864365> [<https://perma.cc/HYL5-SMAR>].



able to hear the positive feedback about how she communicates the law orally and, thus, may be unable to parse out how she might use that skill to improve her written legal communication. She may hear only that she is not articulating the law clearly and interpret that statement as a finite indication that she will never communicate it clearly. Replacing the “but” with “and” allows both parts of the feedback to be true and for her to receive each.<sup>232</sup> She can hear that she expresses the law effectively in class *and* that she needs to work on communicating it clearly in her writing. Rather than reacting defensively and shutting down in response to the feedback, the student knows what she did effectively *and* what areas she needs to focus on to improve her work in the future.<sup>233</sup> She feels encouraged to put forth effort and that the professor is collaborating with her to help her develop her abilities.

“Opportunity” is another growth word. It encompasses optimism, options, and forward-thinking; it also has an element of excitement and adventure.<sup>234</sup> Feedback often focuses on what is “wrong” in an answer, an argument, or an assignment.<sup>235</sup> Merely identifying what did not work or indicating that something was wrong—even by silently moving on to another student in a classroom discussion—can send a discouraging message that reinforces a fear of failure and a sense of finality.<sup>236</sup> Reframing feedback to discuss “opportunities for improvement” allows our students to not be mired in what went wrong in an assignment or on an exam, and focus instead on actions necessary to take that work to the next level. Similarly, in the classroom we can give students *opportunities* to argue from a different

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232. *See id.*

233. *See, e.g., id.* (discussing how using “and” in place of “but” allows the feedback to be constructive and permits the person hearing the feedback to actually incorporate it, rather than causing a defensive reaction or deflated morale).

234. *See* Ron Ashkenas, *Turning a Problem Into an Opportunity*, HARV. BUS. REV. (June 26, 2012), <https://hbr.org/2012/06/turning-a-problem-into-an-oppo.html> [<https://perma.cc/WC9N-GW2H>]; Jayson DeMers, *How to Change Your Mindset to See Problems as Opportunities*, INC.: PEOPLE (July 1, 2015), <https://www.inc.com/jayson-demers/how-to-change-your-mindset-to-see-problems-as-opportunities.html> [<https://perma.cc/P5U3-6FFD>].

235. *See* Rosen, *supra* note 25, at 184.

236. *Id.*

perspective or to revisit their notes or the case to correct their understanding of the law.<sup>237</sup>

By incorporating growth language into our feedback, we allow students to further recognize that learning happens through failure. We also nurture our students' growth mindsets, allowing them to receive rather than resist constructive criticism. That does not mean that we go easy on our students or spoon-feed them. Quite the contrary.<sup>238</sup> These shifts in our feedback allow us to communicate to our students that we have high expectations for them and know them to be capable, thereby helping them put forth the efforts and deliberate practice<sup>239</sup> that they need to succeed.

Just as wordsmithing is a crucial skill for a lawyer,<sup>240</sup> vital skills for professors include selecting words deliberately and reframing feedback to account both for what they intend and for the impact the words will have. Reframing our feedback communicates to our students that they have incredible potential *and* that they need to put forth focused effort to reach that potential. Using growth language can thus help to “promot[e] a culture of intellectual curiosity—one marked by flexible optimism and the growth mindset.”<sup>241</sup>

### C. Studying and Anticipating Failure

Beyond incorporating a failure framework and employing growth language in our feedback, law professors can help students develop skills and habits to learn from failure—retrospectively with post-mortems and prospectively with pre-mortems.

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237. Sometimes my inflection when using the word “opportunity” acknowledges that I am deliberately reframing a “problem”—but even if said in this playfully conspiratorial way, characterizing a potential problem as an opportunity helps to understand it as such.

238. See, e.g., Grant, *supra* note 277, at 3 (cautioning professors against hindering students' learning by rescuing them from failure and advocating for professors to allow “students the time and space to explore their own ideas, take their chances—even if they fail, or grapple with confusing topics”).

239. See Duckworth, *supra* note 199; ERICSSON & POOL, *supra* note 20, at 99-100.

240. Courtney Lee & Tim Naccarato, *Legal Skills for Law School & Legal Practice* 3, UNIV. OF THE PAC.: MCGEORGE SCHOOL OF LAW, <http://www.mcgeorge.edu/Documents/week1LegalSkills.pdf> [https://perma.cc/6XEK-M6XP].

241. See Rosen, *supra* note 25, at 182 (“As institutions, law schools do not yet go far enough in articulating a worldview in which students are learners and in which grades are indications of progress.”).

Engaging in a post-mortem with a student might arise when a student does particularly poorly on an exam or a paper. It might also arise, though, with a student who is especially susceptible to being paralyzed by a fear of failure or to spiraling into hopelessness or into a sense of helplessness when she perceives herself to have failed. In addition to possibly referring these students to the law school's academic support program or to the student services department, professors can and should help these students directly. Specifically, they can help students study and learn from the failure (or perceived failure), which can help the student break out of the cycle of negativity, making them less debilitated by the risk of failure and perhaps more willing to try new things in the future.

For students to truly learn from their mistakes and to improve, they need not only to acknowledge failures, but also to study them.<sup>242</sup> Only in analyzing the errors and reflecting on what they could have done differently might they actually learn from mistakes and not repeat them.<sup>243</sup> This analysis, though, is no easy task. It is much easier to give up in the face of challenges and to find excuses or place blame.<sup>244</sup> Success, however, requires getting one's hands dirty and engaging in the task with "grit."<sup>245</sup>

Many corporate industries recognize that engaging in meticulous failure analyses to diagnose and solve any problems in their products ensures that they produce top quality goods and maintain lucrative practices.<sup>246</sup> However, rarely do individuals

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242. BURGER & STARBIRD, *supra* note 2, at 48-49; Edmondson, *supra* note 4.

243. Edmondson, *supra* note 4.

244. *See id.*

245. Duckworth, *supra* note 199; *see also* Duckworth & Eskreis-Winkler, *supra* note 19; Emily Zimmerman & Leah Brogan, *Grit and Legal Education*, 36 PACE L. REV. 114, 156-59 (2015) (examining how both the perseverance and passion aspects of grit may affect law students' performance and satisfaction and identifying questions for further research such as whether certain populations of law students need to be "grittier than their peers").

246. For example, Toyota has a highly effective and lucrative production process, which depends on immediately problem-solving any deficiency:

[A] team member on a Toyota assembly line who spots a problem or even a potential problem is encouraged to pull a rope . . . which immediately initiates a diagnostic and problem-solving process. Production continues unimpeded if the problem can be remedied in less than a minute. Otherwise, production is halted—despite the loss of revenue entailed—until the failure is understood and resolved.

Edmondson, *supra* note 4; *see also* *Toyota Production System*, TOYOTA, [http://www.toyota-global.com/company/vision\\_philosophy/toyota\\_production\\_system/](http://www.toyota-global.com/company/vision_philosophy/toyota_production_system/) [https://perma.cc/358J-PN9C].

engage in failure analysis so meticulously. “[E]xamining our failures in depth is emotionally unpleasant and can chip away at our self-esteem. Left to our own devices, most of us will speed through or avoid failure analysis altogether.”<sup>247</sup> Given this resistance, it is important to teach students how to study failure and give them opportunities to practice it. Then, we can teach them to not merely analyze failures that have already occurred, but also to anticipate and prevent ones that may occur.

When teaching students to analyze past failures—like a portion of an exam or a paper<sup>248</sup>—(i.e., the post-mortem), the key is to focus on “what” rather than “who.”<sup>249</sup> Instead of asking who failed, ask what happened.<sup>250</sup> Then, have students reflect on what might have caused the failure and ways that the failure might have been avoided.<sup>251</sup> Consider whether the failure could be due to inadequate planning or preparation or whether the failure resulted because of the complexity of the material or difficulty of the task.<sup>252</sup> Explore whether the failure resulted from the student’s process or execution and what variables were in the student’s control and which were not.<sup>253</sup>

For the students who are struggling significantly—either noticeably in class discussions, on practice exams or ungraded

247. Edmondson, *supra* note 4 (analyzing failure in businesses and emphasizing that “analyzing organizational failures requires inquiry and openness, patience, and a tolerance for causal ambiguity. Yet managers typically admire and are rewarded for decisiveness, efficiency, and action—not thoughtful reflection. That is why the right culture is so important”).

248. Although this Article does not specifically discuss how post-mortems can be used in law clinics, the tools for having students evaluate what went wrong in a client’s case are the same. See William Berman, *When Will They Ever Learn? Learning and Teaching from Mistakes in the Clinical Context*, 13 CLINICAL L. REV. 115, 116-18 (2006).

249. *Id.*

250. See *id.*; Guy Winch, *The 4 Keys to Learning from Failure*, HUFFINGTON POST: THE BLOG (Oct. 10, 2013 updated Jan. 23, 2014), [http://www.huffingtonpost.com/guy-winch-phd/learning-from-failure\\_b\\_4037147.html](http://www.huffingtonpost.com/guy-winch-phd/learning-from-failure_b_4037147.html) [https://perma.cc/4MWR-AZP7].

251. See Winch, *supra* note 250; Edmondson, *supra* note 4; Lais Braido et al., *Facing Failure and Breeding Success*, NY TIMES: IN EDUC., <http://nytimesineducation.com/spotlight/facing-failure-and-breeding-success/> [https://perma.cc/T3QK-JMQM].

252. Edmondson, *supra* note 4 (providing a spectrum of failure and discussing preventable failure and complex processes). Lack of ability appears high on Edmondson’s spectrum, closer to blameworthy. *Id.* This “lack of ability” label refers to failure when someone is trying something obviously over his head. *Id.* On this point, I disagree with Edmondson’s classification that lack of ability is close to blameworthy. Often lack of ability is preventable with training, and assuming that someone lacks ability may be an example of having a fixed mindset regarding that person’s intellect, knowledge, and learning.

253. See Winch, *supra* note 250.

assignments, or after receiving a grade in the course—having a context for failure can help them identify underlying causes of the failure.<sup>254</sup> A professor<sup>255</sup> may assume that the student ‘lacks ability or is inattentive and careless. But the failure may be due to process inadequacy. The student may be able to complete the task or understand the material, but may not have a good process for organizing the material or studying for the exam. While professors, particularly those providing academic support, may use these diagnostic tools with individual students, any law professor can help students know of and use these tools. Explicitly introducing in the classroom that failures fall on a spectrum gives students a safety net to think about how their processes might not be working for them.<sup>256</sup> Students can thus evaluate how their processes might contribute to their failures, helping them understand how—and hopefully feel safe—to seek or accept assistance in the face of failure.<sup>257</sup>

Then, in addition to teaching students to identify the root causes of their failures, we can help them take responsibility for those errors and reflect on and document what they have learned.<sup>258</sup> This might be seen as “us[ing] that excruciating pain” that students feel after a failure as motivation to be even better the next time.<sup>259</sup> The good news, though, is that feeling failure’s pain (or sting) is important to learning from it.<sup>260</sup> By not just brushing aside the negative feelings that come with failure and by engaging in a meticulous analysis of the failure, a student is likely to remember these lessons for the future. While simply

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254. Edmondson, *supra* note 4.

255. In assessing academic achievement problems, a professor is an outside observer, not the person doing the behavior (the actor). See STEELE, *supra* note 198, at 18 (discussing the research of psychologists, Edward Jones and Richard Nisbett). “As observers,” we look at “the person doing the behavior we are trying to explain[,]” but we do not see “the circumstances to which [the actor] is adapting[,]” and so we emphasize what we can see, the characteristics or traits of the actor, as opposed to the causes for the actor’s behavior. *Id.*

256. Braido et al., *supra* note 251.

257. Understanding more about the causes of a student’s failure also helps professors know when a student might need assistance from the school’s academic success program.

258. See Winch, *supra* note 250.

259. Easton & Oseid, *supra* note 7, at 501.

260. Jeff Grabmeier, *Want to Rebound from Failure? Feel the Pain: Emotional Response to Mistake Leads to More Improvement*, OHIO STATE UNIV. (Sept. 13 2017) <https://news.osu.edu/news/2017/09/13/feel-the-pain/> [<https://perma.cc/N2TX-KBNR>] (discussing the importance of “focus[ing] on one’s emotions” when one fails: “when people concentrate on how bad they feel and how they don’t want to experience these feelings again, they are more likely to try harder the next time”).

acknowledging a mistake might not be enough for a person to avoid making that same mistake again,<sup>261</sup> engaging in a thorough analysis of the failure helps cement the lesson.<sup>262</sup> “By owning those mistakes and committing to learning from them, [our students] are making key steps toward improving [their] lawyering skills.”<sup>263</sup>

Studying failure also has side benefits. By focusing on what happened and possibilities for doing things differently in the future, individuals shed more quickly the negative feelings associated with failing in the first place.<sup>264</sup> The fear or risk of failure is not nearly as paralyzing, and it is easier to try again.<sup>265</sup> It is also easier to try new things that you may not execute perfectly.<sup>266</sup> Thus, practicing/studying failure can help lower students’ resistance to trying new things or redoing things that have previously led to “bad” experiences.<sup>267</sup>

Another ancillary benefit of studying past failures is that it becomes easier to anticipate and prevent future failures.<sup>268</sup> Like teaching students to study past failures, or do a post-mortem, we can incorporate pre-mortems into our teaching to help students analyze and anticipate what might go wrong with a particular assignment or exam before failure occurs.<sup>269</sup> In other words,

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261. *See id.* (“Researchers found that people who just thought about a failure tended to make excuses for why they were unsuccessful and didn’t try harder when faced with a similar situation. In contrast, people who focused on their emotions following a failure put forth more effort when they tried again.”).

262. *See* Easton & Oseid, *supra* note 7, at 509.

263. *Id.*

264. *See* Braido et al., *supra* note 251.

265. *See* Michael Lindenmayer, *The Five Major Benefits of Failure*, FORBES (Dec. 2, 2013), <https://www.forbes.com/sites/michaellindenmayer/2013/12/02/5-major-benefits-of-failure/#4978a4a03699> [<https://perma.cc/F22B-7P4Q>].

266. Jeremy Bloom, *This is What It Means to Embrace Failure*, ENTREPRENEUR (May 14, 2015), <https://www.entrepreneur.com/article/244307> [<https://perma.cc/9A4G-H6J4>].

267. PETER BAOFU, *THE FUTURE OF POST-HUMAN CREATIVE THINKING: A PREFACE TO A NEW THEORY OF INVENTION AND INNOVATION* 180-81 (2009).

268. Lisabeth Saunders Medlock, *Don’t Fear Failure: Nine Powerful Lessons We Can Learn from Our Mistakes*, HUFFINGTON POST (Nov. 4, 2014), [https://www.huffingtonpost.com/lisabeth-saunders-medlock-phd/dont-fear-failure-9-powerful-lessons-we-can-learn-from-our-mistakes\\_b\\_6058380.html](https://www.huffingtonpost.com/lisabeth-saunders-medlock-phd/dont-fear-failure-9-powerful-lessons-we-can-learn-from-our-mistakes_b_6058380.html) [<https://perma.cc/692C-T4J8>].

269. *See Failure is your Friend*, FREAKONOMICS (June 14, 2014), <http://freakonomics.com/2014/06/05/failure-is-your-friend-a-new-freakonomics-radio-podcast/> [<https://perma.cc/82SX-2XRE>] (playing Stephen Dubner’s interview of Steven Levitt and sharing insights from Gary Klein, author of *SEEING WHAT OTHERS DON’T: THE REMARKABLE WAYS WE GAIN INSIGHTS* (2013), who discusses using “premortems” as a way to “try to find out what might go wrong before it goes wrong”).

rather than studying why a project or endeavor died after it dies, students study what could cause the project or endeavor to die (or fail) before it dies. This pre-mortem can help them identify measures to avoid the project's failure.

The key to anticipating potential future failures is envisioning that an endeavor or project has already failed.<sup>270</sup> The students can then systematically examine what could have happened to make it fail, exhausting all possible causes of the failure.<sup>271</sup> After brainstorming and recording all of these possible sources for the failure, students identify means to prevent those potential causes of failure.<sup>272</sup> The professor then instructs them to document and implement those preventions.

Professors could have students engage in a pre-mortem as a class or in individual conferences. Having students draft contracts, for example, is a way to use pre-mortems because the students need to account for and prevent risk of loss in the contracts. Similarly, some legal writing and simulated experiential classes, as well as clinics, use pre-mortems to help students think through how a particular strategy or argument might impact their simulated or actual client.<sup>273</sup> Some professors even have their students do their own pre-mortem for their final assessments—thinking not about potential stumbles for their client, but instead about what might go wrong for themselves in completing or submitting their final assignment. In my experience, students do not necessarily like the process, because they do not relish assuming that they have failed, but they value the exercise because it enhances their ability to prepare for and prevent errors.

Studying failure, be it before or after the failure has occurred, thus allows students to develop skills that they will assuredly need as attorneys to best represent their clients. In addition to developing lawyering skills through valuable practice, students can proactively engage with failure, which can help take the sting out of failure.

## V. CONCLUSION

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270. *Id.*

271. *See id.*

272. *See id.*

273. Legal writing classes and other simulated experiential classes often have students engage in pre-mortems for a particular assignment with a fictional client.

Acknowledging and learning from failures requires resilience, effort, and engagement, and doing so reinforces these very skills. Like any other skill, being resilient in the face of failure, engaging in deliberate and focused effort, and more frequently occupying a growth mindset can be mastered with practice. By teaching them and helping students practice them, law professors can help counteract the deleterious effects of law school. The techniques identified in this Article are designed to help law students create the habits of mind and develop resilient patterns of thought and practice that will enable them to be more effective and engaged lawyers. By framing failure in our curricula, we are giving our students additional opportunities to practice lawyering and making it easier for them to engage and put forth more effort going forward. These constructive experiences can prevent failure from derailing students in the future, and allow them to consider failure not as an unpleasant experience they must endure, but instead as a valuable opportunity for growth.