

FAILURE BEGETS FAILURE: AN EXAMINATION OF THE PSYCHOLOGY OF FAILURE AND HOW LAW SCHOOLS OUGHT TO RESPOND

By Elizabeth Ruiz Frost*

I. INTRODUCTION

Nearly every American child has experienced the heartbreak of pumping coins into a carnival game only to learn that the game is rigged. The player can never win—the milk jugs in the ring toss are weighted, the darts are dulled, the basketball hoop is misshapen. In response to public concern about gamers stacking the deck against consumers, the American Amusement Machine Association (AAMA)—a gaming group that “preserve[s], protect[s] and promote[s] the coin-operated entertainment industry”¹—offered a Fair Play Pledge.² The Fair Play Pledge promises that AAMA-member games will give every player a fair chance to win with every game; every player has a level shot to develop his or her skills and win.³ No more accepting money to play an unwinnable game.

Law schools ought to behave at least as ethically as a carnival claw machine.

When students fail a course in law school, their odds of future success drop. The psychological and cognitive impact of failure on a student is profound. Yet, despite the lowered odds of future success after failure, many law schools allow failing students to try

* © Elizabeth Frost is a senior lecturer at the University of Oregon School of Law in Eugene, Oregon. The Author wishes to thank Suzanne Rowe and Megan Austin for their help and guidance with this Article and the University of Oregon School of Law for generously supporting its legal writing faculty by providing research sabbaticals.

1. American Amusement Machine Association, *About AAMA*, COIN-OP.ORG, <http://coin-op.org/about/mission/> (last visited July 1, 2018).

2. Tina Schwartz, *American Amusement Machine Association Adopts Fair Play Pledge*, COIN-OP.ORG (May 4, 2017), <http://coin-op.org/wp-content/uploads/2017/05/FPP-PR-FINAL-FINAL-05.04.17.pdf>.

3. *Id.*

again—letting them pump their coins into the machine—without giving those students a fair chance at success.

In this Article, failure means that a student does not meet external assessment criteria—the student does not earn a passing grade in a course—as opposed to a student’s failure to meet their own personal standards. Further, this discussion relates only to interim failure, which means a failure to satisfactorily complete a class in a course of study, as opposed to terminal failure, which would require a student to drop out from the course of study altogether.⁴

The ways that law schools respond to a student’s interim failure versus terminal failure are, and should be, quite different. For a student who experiences terminal failure, the faculty’s and administration’s responses are relatively easier than with interim failure. Though a law school might offer career counseling to help the terminally failed student find a new, more promising path, the relationship between the institution and the student—and the institution’s obligations toward that student—typically ends.

For a student who experiences interim failure, on the other hand, the administration and faculty ought to take education psychology into account to craft a more sophisticated aid response. At many law schools today, policies regarding student failure are stuck in a nether region between a humanistic approach and a traditional gatekeeper approach. That means that a student who has failed a required course may retake the course instead of failing out, but the school doesn’t give the student the necessary tools to succeed the second time around. That response is too simple for a complex problem, and it results in a system that is rigged against weaker students.

To create fair play in law school, academic standing policies ought to follow one approach more faithfully—either the gatekeeper approach or the humanistic approach. If a school chooses to act as a gatekeeper, failing students should be expelled—a harsh but justifiable outcome. But if a school grants second chances to the weakest students by allowing them to continue with their course of study and continue investing tuition dollars, the school ought to provide the necessary support to help those students succeed. More specifically, it should help those

4. Colin Rogers, *Developing a Positive Approach to Failure*, in *FAILING STUDENTS IN HIGHER EDUCATION* 113, 113 (Maira Peelo & Terry Wareham eds., 2002).

students achieve the requisite skills or knowledge to successfully continue along the course of study by requiring them to engage in robust remedial support.

In support of that argument, this Article explores how students and professors experience and respond to student failure to better understand why failure begets failure. Part II describes the various approaches to legal education and includes a discussion of some of the internal and external motivations that create pressure for law schools. Those pressures drive schools' curricular choices regarding failure. Next, Part III illustrates how some American law schools currently work with students who experience interim failure. And finally, Part IV explains some of the root causes of student failure and how that failure affects a student's opportunities for success going forward. Because of the psychological and cognitive causes and effects of failure, simply requiring a student to retake a failed course can be a meaningless fix for the student. Instead, law schools should be more creative and flexible in addressing student failure, ideally by crafting a remedial course that attends to both the pastoral and academic needs of a failing student. Of course, that requires a significant commitment of resources. At a minimum, law schools that allow a failing student to continue with a course of study ought to require the student to engage in supplemental academic support that coincides with retaking the failed course.

Students, of course, fail for many reasons. Some students fail because of an external disruption, such as a family emergency, that keeps the student from completing his coursework. For those students, perhaps the most reasonable course of action is, in fact, to simply redo the course once the external disruption has been resolved. The focus of this Article, however, is on those students who fail due to lack of academic knowledge or skill. As this Article discusses, for those students, simply redoing the course is an oversimplified solution to a complex problem.

II. TRADITIONAL NOTIONS OF LEGAL EDUCATION & THEIR IMPACT ON STUDENT FAILURE POLICIES

Tradition tends to drive law school pedagogy, and curricular reform in legal education tends to be slow. Traditionally, law schools acted as gatekeepers to the profession. But as views toward the institution's obligations to students have changed, many law

schools have begun to angle toward a more humanistic approach by incorporating student counseling and academic support into their curriculum. However, at many law schools, academic standing policies addressing student failure are stuck in limbo between the more traditional and modern approaches: schools permit students to retake courses and stay in school rather than failing them out, but the school makes insufficient curricular accommodations to make the students' success more likely.

The challenge of crafting effective policies regarding student failure is complicated by the tension between the external and internal motivations that drive legal education. That internal versus external tension derives from the way law schools perceive their role in the profession, the institutional philosophies concerning assessment and achievement, and the pressures of external oversight from accrediting bodies.

A. Institutional Gatekeeper Versus Educational Product

First, the policies and practices a law school puts in place to remediate failure depends, in part, on how the school perceives its role in the legal profession. A law school's purpose can be perceived in two conflicting ways. On one end of the spectrum, a law school can serve as a gatekeeper to the profession. As a gatekeeper, the law school owes a duty to the practicing bar and the public. On the other end of the spectrum, legal education could be considered a commodity, with the institution serving law students as its customers. Under the latter model, the obligation is owed wholly to students. To protect the profession and the public, some other entity further down the line—the state bar and prospective employers—would have to serve the gatekeeping role.

Under the gatekeeper conception of legal education, one primary purpose of assessing students is external messaging. Law schools assign grades to assure other stakeholders, such as prospective employers, alumni, and accreditors, of "quality control."⁵ The self-regulated nature of the profession supports this view of legal education.⁶ As lawyers, we owe an ethical duty to recognize and report unethical or incompetent practice in

5. DEREK ROWNTREE, *ASSESSING STUDENTS: HOW SHALL WE KNOW THEM?* 21 (1987).

6. IRENE LLOTT & ROGER MURPHY, *SUCCESS & FAILURE IN PROFESSIONAL EDUCATION: ASSESSING THE EVIDENCE* 19 (1999).

ourselves and others.⁷ Thus, as gatekeeper, a law school's obligations are largely external, and the institution owes very little to the student aside from an opportunity to participate, if qualified.

Followers of the gatekeeper model might also claim an obligation to maintain the integrity of the institution for the sake of past and future students. A school can maintain its integrity by separating the wheat from the chaff among current students.⁸ With this purpose in mind, schools model their assessment processes accordingly, with mandatory curves to weed out the weakest students. Stiff class curves and high attrition rates exemplify the gatekeeper mentality. Perhaps nowhere is it as clearly enunciated as in the famous scene in *The Paper Chase*, when Professor Houseman says to the newly minted first-year law students: "Look to your left, look to your right. One of you won't be here next year."⁹

A law school that acts primarily as a gatekeeper to the legal profession has a reduced—or perhaps nonexistent—obligation to remediate a student's failure. Under the gatekeeper theory, a student who cannot independently meet the school's criteria for completion of the degree, which would include the satisfactory completion of every required course in uniform fashion, should not earn the degree. Allowing otherwise could harm the profession, the public, and the institution. Though a student might be permitted to retake a failed course, the very idea of academic support or designing an individualized curriculum to accommodate a student's development would be anathema to strict gatekeeping. Gatekeepers recognize that not every student can or should pass.¹⁰ In so keeping, assessment at this type of law school is merely an opportunity for students to prove they have met the school's standards, but not for the development of learning itself. Uniformity is crucial, and for a student who cannot pass independently, the gate closes.

At the other extreme lies the commodity view of legal education.¹¹ Under this view, education is a product for purchase. And in this model, the customer, or law student, who is willing to pay tuition ought to be allowed to continue through without the

7. MODEL R. PROF'L CONDUCT 8.3 (AM. BAR ASS'N 2016).

8. ROWNTREE, *supra* note 5, at 21.

9. THE PAPER CHASE (Twentieth Century Fox 1973).

10. LOTT & MURPHY, *supra* note 6, at 1.

11. ROWNTREE, *supra* note 5, at 20–21.

risk of terminal failure. From an institutional perspective, one can understand how the commodification of legal education arises. First, law schools are driven by output-related funding, which means that their institutional survival depends on students continuing to pay tuition.¹² Attrition affects the law school's tuition stream. So, law schools have an economic interest in passing students.¹³

Second, and perhaps less cynically, some educators might justify their commodity view—and simultaneously argue against the gatekeeper view—by arguing that law schools do more than train lawyers. Indeed, some law school graduates choose not to seek a license to practice after law school. Because legal education is itself a valuable good, a student customer should be entitled to stay if he keeps paying. So, under this view, a law school's curriculum ought to focus on the individual student's learning development, deferring gatekeeping duties to state licensing bodies and legal employers.

A commodity view of education would impact a school's curriculum, and the way the school views assessment and academic standing. If legal education is a commodity, under the most benevolent interpretation of that view, the goal should not be to keep weak students out but to deliver a useful product to customers. Even under a more cynical commodity view, where law schools pass weaker students through to preserve the flow of tuition dollars, they have a reciprocal obligation to help those students learn in exchange for payment. Thus, the curriculum ought to be modeled in a way that is accessible for all its students and maximizes their individual development.¹⁴ Because external stakeholders are not the primary audience for assessment and grades, assessment would be designed only to advance individual students' development.¹⁵ In these programs, an instructor wouldn't intend for a grade to serve as a signal to external stakeholders of a student's ability or the degree's value. Instead, a low grade would

12. ILOTT & MURPHY, *supra* note 6, at 9.

13. *Id.*

14. Karen Hinett, *Failing to Assess or Assessing Failure*, in *FAILING STUDENTS IN HIGHER EDUCATION* 172, 173 (Maira Peelo & Terry Wareham eds., 2002).

15. *Id.*

signal to the student the areas where he or she needed to improve.¹⁶

Law students seem to share this commodity view in growing numbers. Millennials, in particular, perceive education as a commodity.¹⁷ Along with their consumeristic attitude about education inevitably comes an expectation of customer service that directly conflicts with the concept of gatekeeping and failure. Less obviously, their view conflicts with their professors' version of the commodity as well. Unlike their professors who would tout a legal education as a valuable good, Millennials tend to believe education is a "means to an end, rather than an experience with intrinsic value."¹⁸ They pay for the degree rather than the learning experience associated with earning the degree. Their expectations for education will likely impact law schools' curricular decisions, as their generation now floods law schools.¹⁹

Law schools have traditionally tended to tip toward gatekeeping, though the trend may be shifting.²⁰ As this Article explores in Part III, law schools typically permit students to retake failed courses, which pays lip service to the commodity view, but do not require those students to participate in remedial courses or an academic support program designed to make them more successful the second time through. For those schools that offer academic support, the courses or programs tend to lack customization to address a particular student's shortcomings. Those signs of curricular inflexibility reflect the more traditional gatekeeper mentality, and together with mandatory curves, yield an up-or-out system for law students that ignores their learning needs.

16. But, of course, this view doesn't track with the reality of how students use law school grades. Despite a grading philosophy geared solely toward the student's personal development, grades continue to signal a student's ability to external stakeholders. As an obvious example, prospective employers base decisions to offer even a screening interview on a student's transcripts and class rank.

17. Jason S. Palmer, *"The Millennials are Coming!": Improving Self-Efficacy in Law Students Through Universal Design in Teaching*, 63 CLEV. ST. L. REV. 675, 689 (2015) (citing Steven K. Berenson, *Educating Millennial Students for Public Obligation*, 1 CHARLOTTE L. REV. 101, 110 (2008)).

18. *Id.* (quoting Steven K. Berenson, *Education Millennial Students for Public Obligation*, 1 CHARLOTTE L. REV. 101, 100 (2008)).

19. *Id.* at 676.

20. Louis N. Schulze, Jr., *Alternative Justifications for Law School Academic Support Programs: Self-Determination Theory, Autonomy Support, and Humanizing the Law School*, 5 CHARLESTON L. REV. 269, 274 (2010).

Realistically, no institution adheres purely to one philosophy or the other. And likely, there are faculty and administrators at every law school who share both views or a combination of both. But there is a tension in law schools that try to split the difference by allowing weaker students to continue through, even after interim failures, while denying those students the curricular accommodations necessary to maximize the value of the students' education.²¹ Our reluctance to help failing students could be a vestige of institutional gatekeeping traditions. Or rather than being rooted in tradition, that impulse to allow a student to try again without acknowledging a student's inability could reflect our discomfort with failure.²² That discomfort can cause us to look away from the problem rather than addressing remediation head-on.²³

B. Technical-Rational Approach to Education Versus Humanism

The philosophical tension in law schools is also manifest in the conflict between technical-rationalism and humanism. These two philosophical approaches are in some ways at odds with the gatekeeper and the commodifier views, but the result is the same: a system that simultaneously values both uniformity and individual development—though these values are often at odds—and therefore fails to take adequate steps to remediate student failure.

As law schools have become subject to more and greater oversight and monitoring from local and national accreditation bodies and prospective students poring over and dissecting national rankings on blogs and social media, those schools find themselves placing greater emphasis on outputs—for instance, bar passage rates and post-graduate employment—than on the value of the education itself.²⁴ That emphasis on outputs leads to the technical-rational approach, which favors uniformity and performativity.²⁵ This approach rests on the view that “academic

21. Moira Peelo, *Setting the Scene*, in *FAILING STUDENTS IN HIGHER EDUCATION* 1, 7 (Moira Peelo & Terry Wareham eds., 2002).

22. ILOTT & MURPHY, *supra* note 6, at 5.

23. *Id.*

24. Terry Wareham & Lesley Wareing, *The Administrator's Tale*, in *FAILING STUDENTS IN HIGHER EDUCATION* 141, 153 (Moira Peelo & Terry Wareham eds., 2002).

25. *Id.*

ability and performance can be measured objectively against clearly defined standards through a fair and transparent process of discriminating between those who achieve the standard and those who do not.”²⁶ The result of ever-increasing oversight tends to be an increasing focus on measuring inputs and outputs, controlling curriculum, and decreasing curricular variation. More specifically, with respect to students’ interim failure, students must satisfy a uniform course of study without variation that would allow for learning development.

That approach sounds fair and logical, and it aligns with the gatekeeper approach, but it can be crippling for struggling students and the educators who adhere to a humanistic approach.

Many individual educators find themselves in conflict with their institution’s rational-technical approach because they still tend to think of education as transformational for the individual.²⁷ That is, they are humanistic in their beliefs about education. Humanism favors the education process rather than the result.²⁸ Just as commodification emphasizes consumer-oriented curriculum, a humanistic approach should yield curricular variety that would be responsive to the particular needs and experiences of individual students.²⁹ The opposing technical-rational view that all students must follow the same curricular path leaves little room for the students who might achieve the same standards through a different route. Regardless of the humanistic view of many educators, law schools’ policies surrounding failure and remediation rarely reflect that view.

And, of course, educators and students are not the only parties shaping institutional culture. Accreditors impact culture and practices as well. Recent changes to the American Bar Association (ABA) Accreditation Standards might have inadvertently dropped a rock on the scale, causing law schools to shift away from gatekeeping and toward commodification and the technical-rational approach.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

C. External Pressure from Accreditors—The Revised ABA Standard 501

As bar passage rates across the country have fallen and both the academic qualifications of applicants and number of applications have taken corresponding drops,³⁰ the ABA—the accreditation body for American law schools—has sought to increase law schools’ accountability by tightening accreditation standards. In February 2017, the ABA Accreditation Standards Review Committee approved a proposal to restrict law schools’ admissions practices under Standard 501.

The shift in language is subtle but impactful:

Original Language – Standard 501	Revised Language – Standard 501 (revisions indicated below)
<p>(a) A law school shall maintain sound admission policies and practices consistent with the Standards, its mission, and the objectives of its program of legal education.</p> <p>(b) A law school shall not admit an applicant who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.</p> <p>(c) A law school shall not admit or readmit a student who has been disqualified previously for academic reasons without an affirmative showing that the prior disqualification does not indicate a lack of capacity to complete its program of legal education and be admitted to the bar. For every admission or readmission of a</p>	<p>(a) A law school shall maintain <u>adopt, publish, and adhere to</u> sound admission policies and practices consistent with the Standards, its mission, and the objectives of its program of legal education.</p> <p>(b) A law school shall not admit an <u>only</u> applicants who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.</p> <p>(c) A law school shall not admit or readmit a student who has been disqualified previously for academic reasons without an affirmative showing that the prior disqualification does not indicate a lack of capacity to complete its program of legal education and be admitted to the bar. For every</p>

30. Sheri Qualters, *Bar Exam Pass Rates Drop Across the Country*, NAT'L L. J. (Nov. 23, 2015), <https://www.law.com/nationallawjournal/almID/1202743222671/?sreturn=20180024181900>.

previously disqualified individual, a statement of the considerations that led to the decision shall be placed in the admittee's file.

Interpretation 501-1

Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school's entering students, the academic attrition rate of the law school's students, the bar passage rate of its graduates, and the effectiveness of the law school's academic support program.

Interpretation 501-2

Sound admissions policies and practices may include consideration of admission test scores, undergraduate course of study and grade point average, extracurricular activities, work experience, performance in other graduate or professional programs, relevant demonstrated skills, and obstacles overcome.

admission or readmission of a previously disqualified individual, a statement of the considerations that led to the decision shall be placed in the admittee's file.

Interpretation 501-1

Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school's entering students, the academic attrition rate of the law school's students, the bar passage rate of its graduates, and the effectiveness of the law school's academic support program.

Compliance with Standard 316 is not alone sufficient to comply with the Standard.

Interpretation 501-2

Sound admissions policies and practices may include consideration of admission test scores, undergraduate course of study and grade point average, extracurricular activities, work experience, performance in other graduate or professional programs, relevant demonstrated skills, and obstacles overcome.

Interpretation 501-3

A law school having a cumulative non-transfer attrition rate above 20 percent for a class creates a rebuttable presumption that the law school is not in compliance with the Standard.

With more stringent standards, the ABA will require law schools to be more selective in their admissions criteria, admitting only those students who “appear capable of satisfactorily completing its program of legal education” or passing a bar exam.³¹ Under the revised Standard 501, law schools have an affirmative duty to adopt and publish admissions criteria aimed at admitting qualified students. The most controversial part of the proposal has been tightening the bar passage rates.³² But the revised Standard also now addresses academic attrition, and that warrants a close look, too. In a new interpretation to Standard 501, the ABA requires that law schools keep their non-transfer attrition rates below twenty percent.³³ Thus, a school with a non-transfer attrition rate greater than twenty percent in a particular class presumably violates Standard 501.³⁴

The stated purpose is, admirably, to create greater accountability in law school admissions. The attrition revision boldly gives teeth to Standard 501 with a clear, if generous, benchmark that law schools must meet. But one wonders if Interpretation 501-3 will have its intended effect. A skeptic might assume that this attrition benchmark will do little to change law school admissions when the pool of applicants remains small; instead, one might wonder whether law schools will circumvent Interpretation 501-3 by inflating grades or changing academic standing policies to avoid terminal failure, which in turn keeps the school below the twenty percent attrition rate.

31. AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017–2018, Standard 501(b), (2017).

32. These changes correspond with an uptick in “bar prep” courses in law schools designed to get students past the hurdle of the bar exam. Those courses, which offer exam-focused help rather than academic support in a more holistic sense, embody the technical-rational approach.

33. AM. BAR ASS'N, *supra* note 31, at Interpretation 501-3. Reportedly, the Committee initially considered an attrition threshold of ten percent. Under the initial draft of Interpretation 501-3, and based on the ABA's attrition data from 2014, fifty-eight law schools—or nearly thirty percent—would have been noncompliant based on their 2014 entering classes. Paul Caron, *McEntee: 30% Of Law Schools Would Fail Proposed New ABA 10% Attrition Accreditation*, TAX PROF. BLOG (Feb. 24, 2016), http://taxprof.typepad.com/taxprof_blog/2016/02/mcentee30-of-law-schools-would-fail-proposed-new-aba-10-attrition-accreditation-standard.html.

34. Of course, students leave law school for lots of reasons: some students fail out, while others transfer to another law school, withdraw from law school altogether to pursue another path, or withdraw temporarily to pursue a joint degree. Interpretation 501-3 targets only non-transfer attrition, or withdrawal from law school due to academic failure.

Interpretation 501-3, then, has the potential to create an even more difficult dynamic for law schools. Law schools that have historically considered themselves gatekeepers of the profession have recently found themselves competing for a shrinking pool of qualified students, while simultaneously facing external pressures to exercise “quality control” by failing students who are not competent to practice law—to gatekeep. These schools now also contend with an attrition threshold that perhaps inadvertently incentivizes schools to retain students, including students who otherwise might not meet the standards for satisfactory completion of the program.

When a student fails to satisfactorily complete a required course, such as the first-year legal writing course, most law schools require the student to retake the course. But, according to a survey of ABA-accredited law schools discussed in the next Part of this Article, many responding law schools provide no mandatory support for the student who retakes the course.³⁵ The student is simply required to try again. This sort of policy tips heavily toward the gatekeeper’s impulse to adhere to uniform standards, while accommodating the commodity provider’s interest in retaining customers and accepting tuition from the willing. This does a disservice to the students. Law students continue to invest resources—tuition and time—but don’t receive the tools to help them succeed. Part III describes current practices at a group of law schools surrounding failure.

III. A SURVEY OF REMEDIATION PRACTICES IN LAW SCHOOLS

To learn more about what law schools offer and require of students who fail a required course, I surveyed the failure policies at more than one hundred American law schools. I sought to learn whether and how law schools offered additional academic support to failing students. And I wondered how many programs would place a failed student back in the classroom with the original professor when the student retakes the course. I asked about the first-year legal writing course specifically for the sake of uniformity because every first-year program incorporates a legal writing course. I learned that at most of the law schools that

35. *Infra* pt. III.

responded to the survey, some form of academic support is available to failed students. However, this survey likely overstates the number of law schools that provide academic support. Self-selection could cause schools with a more robust academic support program to respond to a survey about academic support at higher rates than their counterparts who are not engaged in academic support. And based on the responses to the surveys, most schools do not *require* any additional support to improve the students' odds of success the second time around. Those students are largely on their own for their second attempt.

I received responses from 113 ABA-accredited law schools in the United States. As of the date of the survey, there were 204 ABA-accredited, JD-granting law schools.³⁶ Thus, my survey accounts for the policies at about 55% of law schools. The 113 responses I received represent a range across the U.S. News & World Report rankings, from top-ranked schools to unranked schools, and a mix of public and private institutions.³⁷ Though my sample size is relatively small, there's still much we can learn about policy trends regarding student failure and remediation from their responses.

A. Requiring Students to Retake the Course

Of the 113 law schools accounted for in the survey, 111 schools require students to retake the first-year legal writing course in their second year upon unsatisfactory completion of the course. Nineteen schools indicated that they require a student to retake the legal writing course even when the student earns a grade higher than an F. At one of these nineteen schools, the respondent noted that a student who earns a D or D+ may opt to retake the writing course but is not required to. At the remaining eighteen schools that set the threshold higher than an F, the threshold ranges from a C to a D- and sometimes depends on a student's overall first-year grade point average (GPA).

Two programs do not require a student to retake the first-year legal writing course after failing. But the schools' approaches

36. This survey was conducted from May 2017 through November 2017.

37. Representatives from an additional seventeen schools replied anonymously. To avoid counting any school twice, those seventeen schools are not accounted for in this Part. However, of those seventeen schools, it is notable that thirteen schools reported that students are offered no academic support after failing a required course.

diverge significantly here. At one school, a student who fails the legal writing course is not required to retake the course or to take any substitute course to demonstrate mastery of the skills taught in that course.

In the other program, a student who fails the first-year legal writing course does not take that course again; however, the student would be required to take either an academic support course or an advanced legal analysis course. In the former course, the curriculum focuses on exam-taking skills and study habits. In the latter, the curriculum is geared toward bar examination preparation and writing under time pressure. Both serve as writing-focused remedial courses and are designed to address a student's particular weaknesses to improve the odds of the student's future success.

B. Required Versus Optional Academic Support

Most of the law schools that responded to the survey require a student to retake the first-year writing course upon failure, but with what additional support? Thirty-five schools among the 113 surveyed indicated that they offer no additional support to a student who retakes the course—that is 31% of the surveyed schools. Of course, this is not to say that students are not offered any support in these programs. Some survey respondents noted that their schools offer failed students time with student tutors or additional office hours with the professor. But they further noted that those resources would be made available to any student in the course upon request or to any struggling student at the professor's discretion. Thus, failed students at 31% of the surveyed schools are not offered any more or different support than what was available to them in their first year.

A significant number of schools—thirty of them—reported that they do offer additional support after a student fails a course, but the student has to opt-in. The type of support offered varies. At some of these schools, students are invited to participate in programs like optional workshops, extra one-on-one meetings with a professor or tutor, meetings with academic support professionals, or scheduling preferences on appointments with writing specialists.

Of the remaining programs, forty schools reported mandatory academic support for students who fall below a certain cumulative

GPA or class rank. Of course, that means a student who fails legal writing but does well enough in every other class to avoid academic probation wouldn't be eligible for academic support.

Several respondents noted, however, that a student earning a failing grade in legal writing is likely to fall within the GPA or class rank range that triggers the required support. In effect, they guessed that most students who fail a single course end up receiving required academic support, but that's based on the luck of numbers, not policy. Thus, again, a student who failed the legal writing course but managed to avoid academic probation would not be required to participate in academic support. Although those schools consider their academic support program mandatory, it would be just as reasonable, at least in some cases, to count those schools among the programs that offer no additional support to students upon failure.

Among the forty schools that reported having mandatory academic support programs, the nature of academic support varies. Some schools require students to attend mandatory planning meetings with a faculty member or an academic support advisor. Some have more formal requirements, from a workshop series to a support course. However, several respondents noted that the required support probably would not help a student with the substance of any particular failed course, including legal writing, because the workshops focus on study skills like exam-taking and outlining.

Only six schools reported mandatory academic support for a student who fails a required course, regardless of the student's cumulative GPA. Two of those schools require students to attend tutoring sessions when retaking a course to review assignments with student writing assistants or a writing specialist. Another school hosts a series of required writing workshops for failed students. A fourth school takes a more institutionalized approach, requiring every student who fails any first-year course or who falls below a particular GPA to meet with academic support staff, complete a third-semester doctrinal course that focuses on improving writing and test-taking skills, and complete a sixth-semester course focused on bar examination preparation.

C. Faculty Reassignment

Finally, I sought data on whether law schools placed students back in the classroom with their original professor after failing the professor's course. Of the 111 law schools that require a student to retake a failed course, forty-six require a student to take the course with a new professor. While these schools might make an exception under some circumstances, no exceptions were noted in the survey responses. At seventeen more schools, the policy favors reassignment to a new professor unless the new course presents a genuine scheduling or other conflict.

By contrast, at twelve schools, the formal policy disfavors reassignment. In these programs, which made up only 10.8% of the survey, a student would stay with the same professor when retaking the course, unless there was a genuine scheduling conflict or a particularly acrimonious relationship between the student and the professor.³⁸

At the remaining thirty-six schools, the reassignment policy is more agnostic. Respondents from these schools reported that students "sometimes" switch professors, that reassignment "depends," and that it "could go either way." At nine of those schools, the student decides whether to stay in the original professor's class or shift to another section, though one respondent noted that students almost always choose a new professor. Of these thirty-six schools, sixteen respondents reported that their schools had no formal policy on reassignment. Combining these thirty-six schools where a student could be assigned to the same professor with the twelve schools that aim to keep a student with the same professor, 43% of the surveyed schools would allow a student to retake a failed class with the same professor.³⁹

In sum, the majority of law schools do *something* for their students. Many make some form of academic support mandatory, though very few described a customized support program for their students. With respect to placing a failing student with the original professor, many have rules in favor of reassignment, fewer have

38. At one of these twelve schools, the respondent noted that students are typically granted an "Incomplete" rather than a failing grade and will work with the same professor to complete the work.

39. The number might actually be higher. One can imagine that among the fifty-three schools that favor reassignment, scheduling conflicts and other variables might lead to a student retaking the course with the same professor.

rules against reassignment, and a surprisingly large number have paid so little formal attention to the question of reassignment that they have no policy at all. Each of these practices impacts failed students; Part IV examines some of the implications and how institutions might take psychology into account when crafting their post-failure policies.

IV. RETAKING A COURSE DOES LITTLE TO HELP A FAILING STUDENT

Students who experience academic failure suffer a psychological, emotional, and practical toll. That toll can make the path to success for those students much more challenging than before their initial failure. Law schools should understand the effect of failure on students and craft policies that best position the students for success going forward.

A. Attribution Theory & Self-Efficacy

Attribution theory and a student's sense of self-efficacy can help educators predict how the student will respond to failure. Attribution theory is backward looking; people use attributions to explain an event after it has happened. For example, a person might say, "I failed that test because I didn't study." In that statement, the person attributes failure to lack of study. According to attribution theory, people will seek either an internal or external explanation for these types of events. A person who makes an internal attribution would believe that personal characteristics—such as personality, intelligence, or beliefs—caused an event or behavior.⁴⁰ By contrast, a person who makes an external attribution would assign the cause to some outside force, like a third-party or the situation or circumstance.

In academics, a student's attributions will determine where they place the blame for their failures and in turn, whether they will remain optimistic about future success. Though many external forces may be at work in determining a student's success or failure, students who attribute success to external forces tend to believe that success and failures are attributable, at least in part, to one's own effort. Even though effort is personal to the student, it is

40. Rogers, *supra* note 4, at 116.

external because effort is a non-constant and volitional characteristic.⁴¹ These students believe they can change their effort at their will; by working harder or less hard in the future, they can change their outcome.⁴² Although a student who believes success and failure are tied to effort might feel guilty after failing because they will believe they didn't try hard enough,⁴³ they will remain optimistic. They will remain optimistic because of their feeling of agency and control.⁴⁴ Because they remain optimistic, these students will likely set more ambitious goals for themselves and engage in more positive visualizations.⁴⁵ And students who remain optimistic are more likely to persevere.⁴⁶ Goal setting, positivity, and perseverance tend to lead to greater achievement.⁴⁷

Educators tend to think of students who externalize as making excuses for their negative outcomes. Excuse-making has a negative connotation, but it can be productive. An "excuse" is an attempt to decentralize the cause of a bad outcome from something innate in a person.⁴⁸ So, a person who fails might excuse that failure by attributing it to an external cause like a difficult situation, a bad teacher, or a missed instruction, rather than to their own intelligence or ability. Even attributing failure to one's own lack of effort is decentralizing because, as discussed above, effort is an unstable characteristic.⁴⁹ Students who blame failure on their own lack of effort are likely to do better on subsequent attempts at similar work.⁵⁰ Further, students who make excuses for their failure tend to feel less stress about it, which will increase their odds of success later.⁵¹

By contrast, students who make internal attributions will attribute their successes and failures to their ability or lack thereof.⁵² Students who attribute failure to their own lack of ability

41. *Id.* at 115–16.

42. *Id.*

43. *Id.*

44. *Id.*

45. ALBERT BANDURA, SELF-EFFICACY: THE EXERCISE OF CONTROL 117 (1997).

46. *Id.*

47. *Id.*

48. C.R. Snyder & Raymond L. Higgins, *Excuses: Their Effective Role in the Negotiation of Reality*, 104 PSYCHOL. BULL. 23, 23 (1988).

49. *Id.* at 23–24.

50. *Id.* at 27.

51. *Id.* at 25.

52. The correlation between attribution and self-efficacy isn't perfect. Some students with higher senses of efficacy might make internal attributions while also believing that ability is a mutable characteristic. People in this category believe that a person can become

will be less likely to persevere in the face of challenges.⁵³ These students will be less likely to persevere because they believe ability and intelligence are stable and uncontrollable; that is, they hold an entity view on intelligence. Unlike effort, these seemingly innate characteristics cannot be changed volitionally.⁵⁴ These students tend to underestimate the amount of effort that goes into others' successes, believing instead that a skill must come naturally to high-achieving students.⁵⁵

Internalizing can be a blessing and a curse. Students who internalize are less likely to feel guilty for their failures; after all, a person shouldn't be to blame for his or her immutable characteristics.⁵⁶ But these students are more likely to believe that future failures are inevitable because, according to their entity view of intelligence, their ability and intelligence are immutable and apparently limited.⁵⁷ Because their abilities are fixed, they will set less ambitious goals for themselves.⁵⁸ They might become hopeless and depressed.⁵⁹ And therefore, they will be more likely to disengage.⁶⁰

There is an old adage that "we learn from failure." But internalizing students do not learn as well from past performance as their externalizing colleagues.⁶¹ Students who internalize failure fear negative feedback, perceiving it as a threat to their intelligence.⁶² Fearing confirmation of their inability, they are less likely to engage with feedback from professors. Even positive feedback feels threatening, so internalizing students resist opportunities to learn about their strengths, too.⁶³

Moreover, after failing, internalizing students might even show a deteriorating aptitude for performing certain tasks—they will actually become worse at a task after failing. Researcher Carol

more intelligent or capable with effort. They'll remain as motivated as their externalizing counterparts. BANDURA, *supra* note 45, at 123–24.

53. Hinett, *supra* note 14, at 177.

54. Rogers, *supra* note 4, at 116.

55. BANDURA, *supra* note 45, at 119.

56. Rogers, *supra* note 4, at 116.

57. Carol S. Dweck & Ellen L. Leggett, *A Social-Cognitive Approach to Motivation & Personality*, 95 PSYCHOL. R. 256, 258 (1988).

58. BANDURA, *supra* note 45, at 116.

59. Snyder & Higgins, *supra* note 48, at 25.

60. Hinett, *supra* note 14, at 177.

61. BANDURA, *supra* note 45, at 118.

62. *Id.*

63. *Id.*

Dweck found that children who held an entity view—or, in her study, “a helpless affect”—showed a decline in strategy after experiencing failure.⁶⁴ After failing, students could no longer employ problem-solving skills at the same level as they had before experiencing failure, and they began to demonstrate new, ineffective strategies that would not lead to future success.⁶⁵ They also started to act anxiously and displayed an aversion to the task after failing, even where they had enjoyed the task before failing.⁶⁶ For them, failure beget failure.

For those who hold an entity view, ability feels more valuable than effort, and it is inextricably tied to self-worth. Students with an entity view will go to greater lengths to protect perceptions of their intelligence, even if it means sabotaging their own efforts.⁶⁷ They would prefer to look lazy but intelligent than hard-working and unintelligent.⁶⁸

Self-efficacy, in contrast with attribution theory, is a forward-looking concept that describes one’s own sense of agency, or a belief in one’s ability to control their own outcomes.⁶⁹ People with a higher sense of self-efficacy believe they have the potential to bring about their own success in a specific task.⁷⁰ For example, “The Little Engine That Could” had a terrific sense of self-efficacy. By contrast, people with lowered self-efficacy might feel more doomed; they would head into a task questioning their capability.⁷¹ People assess their own efficacy in part from judging their own past performance.⁷² Thus, historically high performers tend to be more efficacious, while lower performers will have a lowered sense of self-efficacy.

Though the two concepts of efficacy and attributions capture different cognitive processes, the characteristics tend to overlap in students. Students with high self-efficacy tend to make external attributions, and, as a result, are more likely to persevere through failure.⁷³ And on the other end, students with a lowered sense of

64. Dweck & Leggett, *supra* note 57, at 258.

65. *Id.*

66. *Id.* at 257.

67. Rogers, *supra* note 4, at 116–17.

68. *Id.*

69. BANDURA, *supra* note 45, at 11.

70. Dale H. Schunk, *Self-Efficacy and Academic Motivation*, 26 *EDUC. PSYCHOLOGIST* 207, 208 (1991).

71. *Id.*

72. *Id.*

73. BANDURA, *supra* note 45, at 117.

efficacy tend to make internal attributions. These students are less likely to rebound after failure.⁷⁴ We draw motivation to persevere—increasing our efficaciousness—when we receive positive feedback for our efforts; we lose motivation when our efforts earn negative feedback.⁷⁵ Thus, failure itself can create a lowered sense of self-efficacy in students, creating a spiraling effect.⁷⁶

B. Students' Psychological Evolution

Not all students fit firmly or permanently in one category or the other, and effects on students can change. Students might begin their course of study believing that effort dictates success. However, after repeated failures, they might adopt an entity view. If, after repeated effort, they cannot succeed, they will begin to believe that the cause of their failure is a stable lack of ability or intelligence.⁷⁷

Students who believe they have failed an “easy” task will be more likely to adopt an entity view after failure. Students might think a task should be easy if they see others succeeding where they are failing. In a small law school course, particularly a curved course, students are usually keenly aware—even if incorrect about their assumptions—of how they stack up against their classmates. With frequent assessments, small-group work, and class participation, failing students will receive constant reminders of their inadequacy, while everyone around them sees to “get it.” Further, students who believe they have exerted significant effort yet still fail at an easy task, or who have received extensive support and still fail, will begin to attribute their failure to lack of ability.

Students who retakes their legal writing course after failing might experience all of this in a counterproductive downward spiral. First, students who must retake a failed course cannot engage as easily in excuse-making. Requiring a student to retake the course sends the clear message that the institution believes: “it’s not me, it’s you.” An institution need not explicitly indulge

74. Dweck & Leggett, *supra* note 57, at 258.

75. Schunk, *supra* note 70, at 208.

76. *Id.* at 208.

77. Rogers, *supra* note 4, at 116.

students' fantastical excuses for their failure,⁷⁸ but requiring students to take a new course under new conditions with a new professor might allow the student to preserve their external excuses, and thus retain their sense of self-efficacy.⁷⁹ This might seem counterintuitive, as many educators might believe students must be realistic about their abilities and the causes of their failure, but some degree of positive delusion can have positive consequences for students' persistence, motivation, and performance.⁸⁰ By contrast, making a student try again under the same conditions, thus dispelling many of their excuses, can cause the student to internalize the failure, which could lead to increased stress levels, depression, and withdrawal.⁸¹

Next, for students who make internal attributions to explain their failure, exerting more effort and seeking help will seem futile. Instead of expending more effort, the student will give up.⁸² If those students failed the first time despite receiving support from their professor, they will be less inclined to seek out the same support on their second attempt, believing it didn't help the first time. So rather than expending more effort or seeking additional support to improve, they will retreat and adopt or sink deeper into an entity view, attributing their failure to lack of ability.

To compound the problem, students with lowered confidence are less likely to seek help because they are embarrassed. When a student gets stuck, the student must be able to admit they are stuck before they can get themselves unstuck.⁸³ That requires confidence and courage.⁸⁴ In law school, getting unstuck usually means raising a hand in class to ask a question or going to a professor's office hours. Admitting a lack of understanding seems to embarrass even high-performing law students. Consider how much more embarrassing it might feel for the second-year student

78. Though in one study, students who had earned low grades in their first year of undergraduate school were given "excuse training" in the form of information suggesting that the causes of poor performance are variable, rather than stable. Those students performed better both in the short-term and long-term reassessments than their counterparts who had received no "excuse training." Snyder & Higgins, *supra* note 48, at 28.

79. *Id.* at 32.

80. *Id.*

81. *Id.* at 26.

82. Palmer, *supra* note 17, at 689.

83. Mike Ollerton, *Redesigning Success and Failure*, in *FAILING STUDENTS IN HIGHER EDUCATION* 124, 130 (Moir Peelo & Terry Wareham eds., 2002).

84. *Id.*

sitting amongst first-year students to confess, “I don’t get it.” Instead of reaching out for help, these students will likely feel isolated and alienated.⁸⁵ They might have more confidence to get themselves unstuck in a remedial course. Though some educators fear the stigmatizing effect of remedial courses on lower-performing students, a remedial course might feel liberating in contrast to the stigma of being the lone second-year student in a first-year course, afraid to ask questions for fear it will prove to the classmates and the professor that the student is falling behind.

Not only might the awkwardness of retaking a first-year course make the course less productive, students will be worse off if the course they retake is curved.⁸⁶ Students with a lowered sense of efficacy will be more prone to experience depression when they see their colleagues outperforming them.⁸⁷ So, in academic programs where the first-year legal writing course is curved, having a student retake that course will not yield the best outcome for the student. Curved classes build confidence in the students at the top of the curve at the expense of the students at the bottom.⁸⁸ As weaker students are outperformed, they lose confidence; lack of confidence typically begets further failure. Therefore, by simply placing failed students back into a course where they find themselves competing with classmates on a curve, the administration has lessened their odds of success in the course.

Failure can be destructive for students, but it can also be instructive with appropriate course design. For failure to be instructive, a remedial course should focus on the student’s self-efficacy and not solely on the legal skills or material from the previously failed course. For students to free themselves from a cycle of failure, they likely need to change their view of themselves—and of success and failure.⁸⁹ Students with a low sense of efficacy might be able to change their orientation when they are persuaded that they can acquire ability, as opposed to it being innate.⁹⁰

To help students do that, a professor working with a failed student should help to reorient the failed student away from

85. *Id.*

86. BANDURA, *supra* note 45, at 155.

87. *Id.*

88. Rogers, *supra* note 4, at 122.

89. Hinett, *supra* note 14, at 183.

90. BANDURA, *supra* note 45, at 123–24.

performance goals, which emphasize academic success relative to others, and toward learning goals, where the goal is personal progress and improvement.⁹¹ A proper remedial course is the most likely setting for that kind of curricular work to occur. In that remedial course, relieved of the curve, students can address their entity view and refocus their learning goals on improvement and skill acquisition.⁹²

Second, for students to respond positively to failure, they should be appropriately challenged and encouraged to risk making mistakes.⁹³ Students who have experienced failure will engage in more constructive learning behavior if they are faced with moderate challenges than if they are given easy challenges or very difficult challenges.⁹⁴ And, importantly, a once-failed student will fare better if the teacher creates an environment in which the student can risk future failures without the threat of serious consequences.⁹⁵ A student who has failed should be refocused on skill improvement, even if it means suffering interim failures.⁹⁶ But students who are thrust back into the course that they failed, placed again on a curve where they previously sunk to the bottom, will likely not feel safe focusing on skill improvement. They will most likely employ behaviors that focus on attaining minimum competency, simply to pass.⁹⁷ And the deficiency that led them to fail in the first place will not be addressed.⁹⁸

Requiring students to retake a course assumes that students enter the class with a blank slate. It assumes that students with equal levels of skill will perform equally well—if the once-failed student can acquire the skills, they can pass. But, in fact, skill can be overridden by low self-efficacy.⁹⁹ Students will perform below their skill level if they do not believe they are capable of successfully performing the task.¹⁰⁰ Because we know that a

91. Rogers, *supra* note 4, at 118–20.

92. Hinett, *supra* note 14, at 183.

93. Ahyoung Kim & Margaret M. Clifford, *Goal Source, Goal Difficulty, & Individual Difference Variables as Predictors of Responses to Failure*, 58 BRIT. J. OF EDUC. PSYCHOL. 28, 28 (1988).

94. *Id.* at 41.

95. *Id.*

96. Rogers, *supra* note 4, at 118–20.

97. Kim & Clifford, *supra* note 93, at 41.

98. Moira Peelo, *Struggling to Learn*, in FAILING STUDENTS IN HIGHER EDUCATION 160, 164 (Moira Peelo & Terry Wareham, eds., 2002).

99. BANDURA, *supra* note 45, at 37.

100. *Id.*

student's initial failure can lead to a lowered sense of self-efficacy, having a student retake the course, then, puts the student in a worse position than in the initial attempt. That's like strapping ankle weights onto an amateur runner competing in the Olympics.

C. Self-Sabotage & Destructive Behaviors

The urge to engage in destructive behaviors after failure makes retaking a course counterproductive for some failed students. As discussed above, students who tie their self-worth to intelligence will seek to protect perceptions of their intelligence. For some students, protecting themselves means engaging in destructive behaviors to rationalize future failure or engaging in academically dishonest behaviors to avoid it.

The former group of students might engage in self-sabotage to protect their sense of self. Students who have failed a course once and find themselves back in the same course will fear a second failure. Fearing that the second failure will indisputably prove their lack of ability or intelligence, they will go to greater lengths to self-handicap. To set up excuses for their failure, they will engage in destructive behaviors like skipping classes, skipping reading, and waiting until the night before to study for an exam or to start a paper.

Alternatively, failed students might be more likely to cheat.¹⁰¹ Weaker students and those who have experienced failure tend to have academic characteristics that make cheating more likely. For instance, cheating is more common among students who hold performance goals as opposed to learning goals.¹⁰² Their concerns about grades or creating an image of success for themselves can drive them to cheat.¹⁰³ Moreover, lowered self-efficacy correlates with a proclivity to cheat.¹⁰⁴ Further, failed students tend to feel alienated from their professor and the grading process, which makes them more likely to cheat.¹⁰⁵ And finally, past performance makes a difference: students who have earned lower grades in the

101. Hinett, *supra* note 14, at 182.

102. Helen Marsden et al., *Who Cheats at University: A Self-Report Study of Dishonest Academic Behaviors in a Sample of Australian University Students*, 57 *AUSTL. J. PSYCHOL.* 1, 7 (2005).

103. ERIC M. ANDERMAN & TAMARA B. MURDOCK, *PSYCHOLOGY OF ACADEMIC CHEATING* 2 (2007).

104. Marsden, *supra* note 102, at 8.

105. *Id.*

past are more likely to cheat going forward.¹⁰⁶ That is because, as discussed above, students who have failed become more focused on grades than learning for learning's sake, tend to be concerned about their image, and are prone to lowered self-efficacy.

For these failed students, the enhanced sense of competition when retaking a course and the desire to “look smart” after failure can drive them toward academic dishonesty.¹⁰⁷ In contrast to the students who self-sabotage to bring about an assured but justifiable failure, these failed students seek to protect their ego by guaranteeing a success, even if it means plagiarizing or collaborating in violation of a course policy.

Designing a remedial course where the student feels adequately challenged but supported, without the threat of competition on a curve, will help alleviate the risk of a student engaging in unethical behavior. A new course might also reduce the students' ability to cheat. Practically, cheating is easier and perhaps more tempting for a student who has already taken the course once and who is familiar with the material. For both types of destructive behavior—self-sabotage and academic dishonesty—a curriculum focused on improving students' self-efficacy would help steer them toward more productive academic behavior.

D. Cue-Deafness

A student's ability to decode curricular cues can also impact the student's success in a course. Students can be divided into categories according to whether they seek out and interpret cues from their professors; they are either cue seekers, cue conscious, or cue deaf.¹⁰⁸ These categories describe how students tend to pick up the hidden curriculum of a course and, accordingly, how they understand and conform to a professor's expectations on an assessment task.¹⁰⁹ The hidden curriculum is made up of the information or skills that a professor will assess and value. The hidden curriculum can be found in the course readings, the professor's lectures, or the professor's areas of scholarship.

106. ANDERMAN & MURDOCK, *supra* note 103, at 19.

107. Hinett, *supra* note 14, at 182.

108. C.M.L MILLER & ROLAND PARLETT, UP TO THE MARK: A STUDY OF THE EXAMINATION GAME 51–52 (1974).

109. ROLAND MEIGHAN & CLIVE HARBER, A SOCIOLOGY OF EDUCATING 198 (5th ed. 2007).

Cue-seekers go out of their way to find the hidden curriculum to boost their performance.¹¹⁰ they will ask a professor for a grading rubric, talk to past students about assessments and grading, or ask teaching assistants what the professor values most. They also better understand the impression they make on professors, and therefore build more productive relationships.¹¹¹ One cue-seeking student described his strategy this way:

The technique involves knowing what's going to be in the exam and how it's going to be marked. You can acquire these techniques from sitting in the lecturer's class, getting ideas from his point of view, the form of his notes, and the books he has written – and this is separate to picking up the actual work content.¹¹²

That is, in addition to doing the regular coursework, this cue-seeking student proactively hunts for hints about what the professor will value. Cue-seekers also tend to externalize failure. If they performed poorly, they would attribute it to a fault in the system.¹¹³

Cue-conscious students will also detect much of the hidden curriculum. They will not go out of their way to find it, as a cue-seeker would, but they perceive a professor's cues.¹¹⁴ They will pick up on the professor's hints about which information and skills the professor values and believes to be important.¹¹⁵ These students also perceive that the impression they make on a professor matters for their own achievement, which leads to improved relationships with their professors.¹¹⁶

One could consider cue-seeking and cue-consciousness to be maladaptive learning strategies because these students can become overly reliant on a professor's guidance and seem to be motivated more by performance than mastery of the material.¹¹⁷ Because of their focus on performance, these students could pursue a superficial understanding of the material—just enough to earn

110. *Id.*

111. MILLER & PARLETT, *supra* note 108, at 62.

112. *Id.* at 61.

113. *Id.* at 65.

114. *Id.* at 52.

115. MEIGHAN & HARBER, *supra* note 109, at 198.

116. MILLER & PARLETT, *supra* note 108, at 52.

117. Corwin Senko et al., *Achievement Goals, Study Strategies, & Achievement: A Test of the "Learning Agenda" Framework*, 24 LEARNING & INDIVIDUAL DIFFERENCES 1, 2 (2013).

sufficient points for a high grade. And because they rely heavily on professorial guidance, they might not learn to be sufficiently independent for effective self-regulation.¹¹⁸ The very idea of “gaming the system” by seeking out the hidden curriculum to maximize performance sounds manipulative. One might imagine that professors would perceive these students as overly focused on points instead of progress, or that they would do well with detailed instructions but lack skills to perform well with less guidance.

However, cue-seeking and cue-consciousness are more appropriately considered adaptive strategies that focus students on a professor’s learning objectives to lead to a positive effect. Understanding a professor’s objectives inspires these students to adapt their own learning strategies to achieve greater success.¹¹⁹ Accordingly, these students will engage in superficial learning when it benefits them, but they will also have greater flexibility to pursue deeper knowledge when it’s appropriate, as the course demands.¹²⁰ Instead of thinking of these students as manipulating the system, we should see them as more effective at understanding the system and adapting to succeed within it.

Cue-deaf students, on the other hand, are oblivious to the hidden curriculum. They do not hear guidance offered in class and do not seek it out.¹²¹ Many educators can relate to the experience of meeting with cue-deaf students who seem lost in the course, despite the professor’s instructions, rubrics, and in-class guidance. As a result of their obliviousness, cue-deaf students tend to earn lower grades than their cue-seeking and cue-conscious counterparts.¹²²

118. *Id.*

119. *Id.* at 5.

120. *Id.* at 5.

121. MEIGHAN & HARBER, *supra* note 109, at 198.

122. Peelo, *supra* note 98, at 167; MILLER & PARLETT, *supra* note 108, at 55. But interestingly, despite the conclusion that cue-deaf students are likely to perform less well academically, they might be characterized as students with a strong mastery orientation, as opposed to a performance orientation. Students with a performance orientation are motivated by the extrinsic reward of high achievement, which can lead to superficial learning. Students with a mastery orientation, on the other hand, engage with material for the sake of learning and development, which can lead to deeper learning. Liisa Myyry & Taina Joutsenvirta, *Open-Book, Open-Web Online Examinations: Developing Examination Strategies to Support University Students’ Learning & Self-Efficacy*, 16 ACTIVE LEARNING HIGHER EDUC. 119, 120–21 (2015); see also Tomas Chamorro-Premuzic & Adrian Furnham, *Personality, Intelligence & Approaches to Learning as Predictors of Academic Performance*, 44 PERSONALITY & INDIVIDUAL DIFFERENCES 1596, 1598 (2008) (describing the

Cue-deaf students tend to be mastery-oriented in their learning goals, which can be a positive learning attribute.¹²³ These students will pursue material that they find interesting in greater depth.¹²⁴ However, they are less likely to focus on material that they find dull.¹²⁵ Thus, they set their own learning agenda.¹²⁶ That pursuit can lead to a deeper understanding of the studied material than a performance-driven student would achieve.¹²⁷ But though these cue-deaf students might be more prone to deeper learning, which is certainly positive, they are also more prone to focusing on material that is not “instructionally important.”¹²⁸ And thus, they tend to perform less well academically.

Imagine how this dynamic can play out in a legal writing classroom. In legal writing courses, professors will often instruct students to focus on a single legal issue for an assignment and will warn students not to pursue other tangential issues. The cue-seekers and cue-conscious students will pursue the single issue, as instructed. The cue-deaf students, however, are more likely to go off track if they find the tangential issues more interesting or germane. The cue-seekers, who have researched the proper area of law and focused their writing efforts there, will be better prepared to engage in classroom discussions and will write a paper that conforms with the professor’s expectations. Those students will invariably earn higher grades than the cue-deaf students who pursued less relevant paths.

Cue-deaf students, who tend to perform least well academically, often also tend to develop ineffective working relationships with their professors because they are less concerned about or aware of the impression they make.¹²⁹ As a result, their cue-deafness can create a failure spiral for them.¹³⁰ These students tend to ask more of their professor and require more resources, such as extra time in class, extra one-on-one help, and extensions on assignments. Cue-deaf students will spend more time than their

inconsistency among researchers linking deep learning and superficial learning to academic success).

123. Senko, *supra* note 117, at 2.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. MILLER & PARLETT, *supra* note 108, at 52, 55.

130. Peelo, *supra* note 98, at 166.

more cue-adept classmates asking questions that the professor answered in the syllabus, on an assignment, or in class, which will frustrate the professor.

All of this can lead to the professor feeling overtaxed by the cue-deaf student, which creates an uncomfortable dynamic between the student and professor.¹³¹ Because of the strained relationship, misunderstandings can arise between student and professor—comments, requests, and feedback can be misinterpreted in both directions.¹³² The professor perceives the student as difficult, and the student perceives the professor as unfair.¹³³ The weak student then spirals further into failure. And, unsurprisingly, in contrast with their cue-conscious classmates, cue-deaf students exhibit lowered self-efficacy.¹³⁴ Thus, they tend to internalize failure, blaming it on their own intellectual or academic inability, which, as discussed above, can lead to anxiety and depression.¹³⁵

For cue-deaf students, retaking a course without additional support will do little to improve that student's performance in the course. Students who failed to pick up on implicit and explicit cues for successful completion of the course on their first attempt are not significantly more likely to pick up cues the second time around. One can imagine that even study support in extra office hours with a professor or teaching assistant would not help the cue-deaf student much, particularly given the ineffective relationships they tend to develop. The student will continue to miss cues, and the student and professor will likely continue to talk past each other.

For cue-deaf students to achieve a better outcome after failure, they need academic support that addresses more than the substance of the course. These students need to change the way they approach learning altogether, from the way they interpret and respond to an instructor's learning agenda and subjugate their own learning agenda, to the way they build relationships with instructors. With proper academic support, cue-deaf students could learn to seek cues or at least become conscious of the hidden curriculum. These students also need the clean slate of a new

131. *Id.*

132. *Id.*

133. *Id.*

134. MILLER & PARLETT, *supra* note 108, at 65.

135. *Id.*

professor who can work with them without the baggage of past interactions and mutual frustrations.

E. Failure as a Self-Fulfilling Prophecy

For many of the reasons discussed above, future failure can become a self-fulfilling prophecy for failed students. But faculty play a role in that prophecy as well. Placing a student back into a class with the same professor after failure will more likely beget future failure not only because of the student's dispositions and behaviors, but also because of the teacher's expectations for future failure.

Teachers tend to exhibit biases against weaker students that increases the likelihood of the students' future failure.¹³⁶ When teachers interact with students, they form opinions not only about students' current work and behavior, but about their future potential as well.¹³⁷ As part of that prediction process, teachers engage in "selective perception" whereby they expect failure from students who have previously failed.¹³⁸ Thus, student failure lowers the professor's expectations for that student.

Once a professor has identified a student as weak, the professor will tend to notice behaviors that confirm that belief.¹³⁹ Meanwhile, the professor will not notice or screen out contradictory behaviors or explain them in a way that is consistent with that belief.¹⁴⁰ Because professors tend to expect repeat failures, they are unable to recognize successes.¹⁴¹ One study revealed that professors tended to provide disproportionate feedback to students based on past achievement: high-achieving students were more highly praised, while lower-performing students received more negative feedback than was due.¹⁴² In one study, researchers found that teachers praised low-performing students half as often as higher-performing students for a correct

136. ROWNTREE, *supra* note 6, at 38–39.

137. JERE E. BROPHY & THOMAS L. GOOD, *TEACHER-STUDENT RELATIONSHIPS: CAUSES & CONSEQUENCES* 27 (1974).

138. ROWNTREE, *supra* note 5, at 38–39.

139. *Id.*

140. *Id.*

141. *Id.*

142. BROPHY & GOOD, *supra* note 137, at 98–99.

response and criticized them three times more often for an incorrect response.¹⁴³

Students who have failed also tend to receive less support in the classroom than their higher-achieving peers.¹⁴⁴ A professor who holds an inflexible view about a student's abilities will likely lower the expectations, engage that student less in classroom discussion, and exhibit reduced patience with questions.¹⁴⁵ Thus, a student who has failed will be more frequently silenced in classroom discussions.

Professors tend to favor stronger students in classroom discussions, which leaves weaker students disengaged.¹⁴⁶ And professors tend to interact more frequently and positively with higher-achieving students than weaker students.¹⁴⁷ Further, professors are less willing to do more to help failing students when they perceive their weakness as unchangeable.¹⁴⁸ By engaging less with the student, these professors create a self-fulfilling prophecy for failing students; they fall further behind and confirm the professors' beliefs that they cannot succeed in the course.¹⁴⁹

To make this dynamic more destructive, students tend to respond to their professors' expectations.¹⁵⁰ Not only will student get less valuable educations due to lack of engagement and professor attention, once students know what the professor thinks of them, the students will perform to that level.¹⁵¹ Students will rise to high expectations and sink to low expectations. Thus, students who return to the classroom with a professor who has failed them will not exert as much effort. They will likely feel apathetic and defeated and will give up more easily.¹⁵² And,

143. *Id.*

144. *Id.* at 35–36.

145. *Id.* Note, however, that teacher expectations are normal and don't necessarily lead to negative consequences for a student. A teacher who has low expectations of a lower-performing student might be correct. But if that teacher maintains a flexible view of the student's potential, the relationship can still be effective. Some teachers might expect less from a weaker student and then spend more time engaging the student. That effort wouldn't constitute a self-fulfilling prophecy of failure, even if the student does ultimately fail. *See id.* at 34 (explaining how the effect of teacher expectations depends on the accuracy of the expectation and how the teacher uses such information).

146. *Id.* at 15.

147. *Id.* at 16.

148. *Id.* at 34–36; ROWNTREE, *supra* note 5, at 40.

149. ROWNTREE, *supra* note 5, at 40.

150. BROPHY & GOOD, *supra* note 137, at 31–32, 39.

151. *Id.*

152. *Id.* at 40.

recalling the times when the professor ignored or failed to praise the student for his successes, he will feel alienated and will be less likely to seek help from the professor.¹⁵³ For that student, because he has little hope of convincing the professor that he is capable of success, he will disengage.¹⁵⁴ After all, he has already proven to himself and to the professor that he is incapable.¹⁵⁵ By the end of the course, due to the professor's and the student's own lowered expectations for his success, the student will have performed below the level he would have been capable of under better circumstances.¹⁵⁶

Of course, weaker students might have to contend with this dynamic regardless of the course they take. Even a new professor who knows that the student is retaking the class because of an initial failure might come to expect less of the student. Teachers tend to form quick judgments of a student's potential for future success based on limited information, which could inform the teacher-student relationship for the rest of the course.¹⁵⁷ Of course, putting a student back into the course with the original professor removes any benefit the student might have gotten from a fresh start with a new professor.

For professors to overcome the risk of creating self-fulfilling prophecies for students, professors need to become aware of their own tendency toward biases, recognize when they treat students differently because of those biases, and develop tools to communicate expectations effectively and work with students individually.¹⁵⁸ That is a worthy goal for every professor, but one that requires training and considerable teaching time. Given the constraints on professors in their typical course load, the best alternative for the student is to take a substitute course with an academic support professor who is trained to recognize and overcome biases against weaker students. Even if the student's new academic support professor has lowered expectations for the student, the professor will have greater capacity to adjust the

153. *Id.* at 36–40.

154. David Cannon, *Learning to Fail: Learning to Recover*, in *FAILING STUDENTS IN HIGHER EDUCATION* 73, 74 (Moirra Peelo & Terry Wareham eds., 2002).

155. *Id.*

156. BROPHY & GOOD, *supra* note 137, at 37.

157. *Id.* at 27 (citing a study in which teachers formed specific and enduring impressions of students' behaviors and potential for academic success after just three days of class).

158. *Id.* at 364.

teaching methods for the individual student to help the student avoid the self-fulfilling prophecy of failure.

V. CONCLUSION

Part IV of this Article addressed several concerns that an institution should consider in crafting its policies. For example, students will fare better in a remedial course removed from the law school curve. For a student to increase the odds of future success, that course should attend to more than doctrine and skills, but on the pastoral concerns of the student, fostering self-efficacy, motivation, and a reorientation toward learning goals. But what should that class look like?

For a remedial course to be most effective, it should be tailored to address the failed student's particular weaknesses. Courses that teach and assess multiple skills present a conflation problem for crafting a post-failure solution.¹⁵⁹ For example, in a legal writing course, where professors assess multiple skills throughout the course, does a final F grade indicate that the student cannot write clearly, analyze the law, research the law, and act professionally? Requiring a student to retake an identical course assumes the student failed at every skill. Unless that is true, relearning each skill is a waste of the professor's and student's time.

A customized remedial course, on the other hand, would focus students only on those skills where they initially lacked proficiency. Customizing the course would present students with a more appropriately challenging curriculum, and it would prevent them from masking a lack of proficiency in weak skills with higher cumulative scores. For example, a student who had been initially proficient in research might earn even higher scores the second time around, which could balance out and mask stagnant writing scores. Thus, students could pass the course the second time around without improving their weakest skills.

Customizing the course for a returning student will increase the likelihood of the student's success. Simply redoing the class is an oversimplified solution to a complex problem. It is unlikely, however, that a professor teaching a first-year legal writing course has the training and capacity to customize the curriculum for returning students. If the student does retake the same course, the

159. ROWNTREE, *supra* note 5, at 227–28.

student should be required, at a minimum, to engage in complementary academic support that coincides with the course. Better yet, the student should be challenged to learn the skills from the first-year course in a new context.¹⁶⁰ Of course, creating a customized curriculum for each student who fails requires significant resources.

But from a philosophical perspective, requiring a student to simply redo a course without providing additional support unduly prioritizes the rational-technical view, according to which learning is simply a means to some external end—earning a diploma and finding employment—over the humanistic view, according to which learning is a means to personal and intellectual growth. In the longer run, that kind of policy does a disservice to those external stakeholders the law school serves. The law school might ward off lower attrition numbers by retaining students and passing them through, but it will have produced lawyers who are less capable of passing the bar or finding employment. That trade-off makes the reallocation of resources toward promoting each student's academic success seem awfully worthwhile.

Committing appropriate resources to promoting each student's academic success would align with a law school's ethical obligations as well. A requirement that a failed student redo a course without providing support surely has real ethical implications, regardless of which philosophical approach a school follows. First, if one adopts a commodity view of legal education, a law school that accepts a student's tuition ought to provide a valuable good to the student. Arguably, a curriculum in which a struggling student is provided an inadequate opportunity for future success is of limited value. Second, to the extent law schools consider themselves gatekeepers to the profession, they have an obligation to train capable lawyers. In service to the profession, rather than passing a student who ekes out a passing grade on a second attempt, law schools that allow failed students to continue with their course of study must provide adequate support to those students to ensure they have learned the necessary skills to be competent practitioners.

160. See generally Peelo, *supra* note 98, at 161–66 (explaining the benefits and difficulties of providing individualized academic support to failing students).