

3-1989

Law School Examinations

Philip C. Kissam

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Philip C. Kissam, *Law School Examinations*, 42 *Vanderbilt Law Review* 433 (1989)
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ESSAY

Law School Examinations

*Philip C. Kissam**

"When man has grown accustomed to one course of thought, to one system universally accepted, it is not easy for him to adapt to several."

—Michael Kammen¹

I. INTRODUCTION	434
II. THE EXAMINATION	437
A. <i>Definition</i>	437
B. <i>Form and Content</i>	438
C. <i>Functions and Style</i>	440
D. <i>Grading Blue Book Exams</i>	444
E. <i>The Deep Structure of Blue Books</i>	452
1. <i>Speed</i>	453
2. <i>Surprise</i>	453
3. <i>Comprehensiveness</i>	454
4. <i>Oral Communication</i>	455
5. <i>Power/Dependency</i>	455
6. <i>Masculine Discourse</i>	456
F. <i>The Attributes of Blue Book Success</i>	457
III. BLUE BOOKS IN CONTEXT	461

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1. M. KAMMEN, *PEOPLE OF PARADOX: AN INQUIRY CONCERNING THE ORIGINS OF AMERICAN CIVILIZATION* 123 (1972).

A.	<i>Admitting Students, Hiring Faculty</i>	462
B.	<i>The Practical Consequences of Exams and Grades</i> .	463
C.	<i>From Classroom to Exam</i>	466
D.	<i>The Impact of Exams on Law School Work</i>	471
E.	<i>From Exams to Practice</i>	474
IV.	WHAT BLUE BOOKS DO TO PERSONS	479
A.	<i>Law Students</i>	480
B.	<i>Law Faculty</i>	483
V.	VALUES AND DISADVANTAGES	486
A.	<i>Values</i>	486
B.	<i>Disadvantages</i>	489
VI.	CHANGE	493
A.	<i>Practice and Feedback</i>	494
B.	<i>Different Grading Practices</i>	496
C.	<i>Different Kinds of Questions</i>	498
D.	<i>Different Sorts of Examinations</i>	500
E.	<i>A Note on Teaching Styles and Materials</i>	501
VII.	CONCLUSION	502

I. INTRODUCTION

This Essay explores the values, limits, and adverse effects of our system of law school examinations. Law school examinations encourage or require students to acquire certain knowledge while measuring a kind of knowledge as well. Importantly, this process occurs within a context of political relationships between law schools, law firms, the legal profession, and the state, as well as between law school administrators, faculty, and students. This system of "power/knowledge" relationships constitutes the law school's basic mechanism of self-regulation or, more generally, a mechanism of social control over legal education.² In this era of substantial uncertainty about purposes and methods in legal education,³ an inquiry into law school examinations and their political contexts is both timely and potentially fruitful.

Prior studies have developed important criticisms of law school examinations, but these studies have been partial or limited critiques.⁴

2. On the need to analyze knowledge systems in the context of their political relationships, see M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (A. Sheridan trans. 1977) [hereinafter M. FOUCAULT, *DISCIPLINE*] and M. FOUCAULT, *Two Lectures*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITING 1972-1977* (C. Gordon trans. 1980) [hereinafter M. FOUCAULT, *Two Lectures*].

3. See, e.g., Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251 (1986); Levinson, *Professing Law: Commitment of Faith or Detached Analysis?*, 31 ST. LOUIS U.L.J. 3 (1986).

4. See Coutts, *Examinations for Law Degrees*, 9 J. SOC'Y PUB. TCHRS. L. 399 (1967); Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 328-30 (1982); Feinman &

These studies have uncritically accepted conventional beliefs about law school practices and have overlooked certain values and disadvantages of the current examination system. This Essay provides a "systemic analysis" and a "total critique" by assessing the structure, contextual relationships, values, and adverse effects of law school examinations.⁵

This Essay seeks to improve our understanding of law school exams in three basic ways. First, Part II presents a new interpretation of what the modern law school examination requires and measures of student performance. This interpretation emphasizes the reading and grading methods that are used by most contemporary law professors, the implications of these methods for the thought and writing style of examination writers, and the personal attributes that are required for examination success. Second, Parts III, IV, and V consider the law school examination in context in order to assess the values, limits, and disadvantages of the examination system. This analysis focuses initially on relationships of law school exams with student admissions and faculty recruitment policies, with state licensure exams, and with law firm hiring practices. The analysis also considers the apparent disjunctions between classroom and examination work, the reasons for these disjunctions, and how these disjunctions serve the examination system and social interests. This analysis also discusses the several ways that examination practices influence the lives and work of students and faculty. Third, Part VI describes changes to our examination practices that could improve the quality of legal education without jeopardizing the main values of the present system.

This study reaches five major conclusions. First, the current examination system tests for several complex attributes. These attributes include the ability to internalize legal doctrine; the skill of "issue spotting" or, more precisely, "legal imagination"; and a "legal productivity" that is demonstrated by quickness and effectiveness at issue spotting, the specification of rules, and the application of rules to complex situations. Law school exams also test a person's capacity for self-study and self-learning in diffuse, complex, and uncertain situations over sustained periods of time. These attributes, especially the talents

Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 J. LEGAL EDUC. 528, 545-47 (1985); Motley, *A Foolish Consistency: The Law School Exam*, 10 NOVA L.J. 723 (1986); Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411 (1977); Rickson, *Faculty Control and the Structure of Student Competition: An Analysis of the Law Student Role*, 25 J. LEGAL EDUC. 47 (1973); Wood, *The Measurement of Law School Work* (pts. 1-3), 24 COLUM. L. REV. 224 (1924) [hereinafter Wood (pt. 1)], 25 COLUM. L. REV. 316 (1925) [hereinafter Wood (pt. 2)], 27 COLUM. L. REV. 784 (1927) [hereinafter Wood (pt. 3)].

5. On the sociological concept of "systemic analysis," see M. JANOWITZ, *THE LAST HALF CENTURY* 53-81 (1978). On the philosophical concept of "total critique," see R. UNGER, *KNOWLEDGE & POLITICS* 1-3 (1975).

of productivity and self-learning, are clearly important to the practice of law, and most employers, especially large corporate firms, presumably are quite interested in hiring lawyers who possess these qualities.

Second, the immediate function of law school grading practices is to establish a highly disaggregated class ranking system. This system is an efficient device, or at least a rational one, for sorting students in ways that serve the hiring purposes of many law firms. This system screens prospective employees for those employers who place a substantial premium on an individual's promise of productivity and self-learning. These employers most likely are the larger corporate law firms, which can provide specific on-the-job training for new associates and can more easily absorb or compensate for mistakes that are made in the training and hiring of new lawyers.

Third, while serving the recruitment interests of many firms, the examination system also promotes the learning of certain basic skills and doctrine. This process prepares students to take state licensure exams, which are modeled on the law school examination. In addition, the examination process encourages law students to acquire relatively extensive legal vocabularies that undoubtedly can benefit their initial practices.

Fourth, at the same time, the examination system has adverse effects that are not commonly recognized. The system's pervasive commitment to excessive objectivity (or objectivism) in writing, reading, and evaluating examination papers has adverse, if unintended, effects on teaching and learning practices, on the writing and thinking styles of future lawyers, and on a "law school philosophy" that unfortunately becomes the theory of law for many lawyers.

The objectivism of law school examinations allows professors to limit their engagement with both the teaching and evaluation of their students. The marked discontinuities between classroom work and examination work and the use of quantitative methods to read and grade law school examinations are the primary means by which professors achieve this disengagement. In addition, the use of grading curves with many gradations discourages law professors from providing much instruction or effective feedback to students on their performance of basic examination skills, for to provide this guidance would make it more difficult to impose such a grading curve. In sum, this disengagement frees law professors to pursue their nonteaching interests as scholars, consultants, or professional experts without giving much consideration to the provision of effective and democratic legal education. This disengagement also leaves law students largely without guidance in their attempts to acquire basic skills and doctrine. While this method helps to test the students' capacities for self-study and self-learning, it also re-

sults in poor education.

The severe time constraints on law school examinations, which test for productivity and help to generate grading curves with many gradations, also promote a paradigm of examination thinking and writing that I call "good paragraph thinking." This paradigm undoubtedly reflects some valuable intellectual skills, but as a paradigm of thought and writing this model has significant adverse effects on legal thought, legal writing, and legal practice. In essence, the paradigm of good paragraph thinking works for law school examinations, but it is too reductionist and too fragmentary to serve the varied intellectual demands of most legal practices.

The examination process also encourages thinking about law as the mere description of rules or facts. This mentality can help to generate many correct answers on law school exams, but it misrepresents the more complex processes of description, interpretation, evaluation, and prescription that characterize legal practice.⁶

Fifth, the adverse effects of the current examination system may be unnecessary. As proposed in Part VI, changes could be made to our teaching and examination practices to ameliorate these adverse effects at relatively low costs to law professors, law schools, and the major values of the current system. If such changes are possible, the current system should be reformed, primarily by developing and implementing certain preclinical or quasi-clinical methods for teaching and evaluating students in our basic law school courses.

II. THE EXAMINATION

This Part describes the nature of law school examinations and the reading, interpretation, and grading of these exams. This inquiry reveals the basic examination structure and the personal attributes that are necessary to succeed on law school exams. These insights set the stage for a subsequent look at the complex relationships between law school exams and their educational, social, and personal contexts.

A. Definition

In this Essay the term "Blue Book" refers to any end-of-the-semester examination that counts for most or all of a student's grade and lasts no longer than a standard working day of eight to ten hours. This

6. On the argumentative and interpretive aspects of legal practice, see R. DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter R. DWORKIN]. On the thrust of law school training towards thinking about law as the mere description of fact, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 38 (1977) [hereinafter R. DWORKIN, *SERIOUSLY*] and N. SIMMONDS, *CENTRAL ISSUES IN JURISPRUDENCE* 1-5 (1986).

concept includes a variety of forms, which can range from one- or two-hour short-answer exams to so-called take-home exams that last five, eight, or ten hours. Such examinations typically are used to evaluate law students in courses devoted to the study of legal doctrine.⁷ In law school clinics, simulated clinical courses, and seminars, other exercises are used to evaluate a student's performance, and there is a limited use of take-home examinations that last for longer periods of time.⁸ Generally, however, the multihour Blue Book exam is used as the law school examination.

B. Form and Content

Blue Book exams notoriously impose severe time constraints on student performance. In other words, these exams usually have a short duration relative to the work demanded, and virtually all students must work continuously throughout the examination period in order to achieve the best possible scores.⁹ Although some faculty members profess desires to avoid imposing time pressure on their students, a traditional rationale exists for imposing substantial time constraints on Blue Book exams. Time constraints, it is believed, are necessary if one is to test comprehensively while limiting the number of words that a faculty member must read.¹⁰ Many commentators also deem time constraints necessary to provide a "fair" distribution of grades between students¹¹ and to differentiate between "the good student and the very good student."¹² Thus, the concept of a time constraint is the most widely shared characteristic of law school exams, and it is, as will be seen later, an important aspect of both the values and adverse effects of these exams.

While the concept of a time constraint is common in law school exams, the form of Blue Book questions and answers is more variable. Many different examination problems are used, including the classic "issue spotter" essay question; advocacy-oriented questions that invite a more deliberate construction of complex arguments; various sorts of

7. See Nickles, *supra* note 4, at 432-36.

8. See Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 158-63 (1987).

9. See Bell, *Law School Exams and Minority-Group Students*, 7 BLACK L.J. 304, 305 (1981-82); Motley, *supra* note 4, at 736-37; see also Duke, *Rules for Success in Teaching and Examining*, 11 J. LEGAL EDUC. 386 (1959). The Duke article provides the following maxim: "Be certain that a four-hour examination cannot humanly be completed in less than six. Good lawyers must be able to work under pressure." *Id.*

10. See Nickles, *supra* note 4, at 451.

11. See *id.* at 452.

12. See Oliphant, *A Sample of the New Type of Law Examinations*, 6 AM. L. SCH. REV. 490, 491 (1929).

short-answer questions that test for issue identification, rules specification, or rule application; and questions that ask students to evaluate different aspects of legal doctrine.¹³ Various examination answers may be required including essay answers, short essays, short answers, or true-false and multiple-choice answers to so-called objective questions.¹⁴

The content of Blue Book exams, especially in first-year law courses, is characterized by an almost exclusive focus on the application of judicial doctrine to provide resolutions of hypothetical legal disputes.¹⁵ This result is understandable because the ordinary law school curriculum concentrates on the study of judicial doctrine. An important distinction exists, however, between the legal doctrine of the classroom and the legal doctrine that is employed on law school exams. Although there are some connections between these different uses of doctrine, these connections are neither close nor easily identifiable.

In casebooks and in the classroom, the study of law typically focuses on judicial decisions in "pivotal" or "test" cases in which an appellate court has established or recognized an important legal doctrine.¹⁶ Casebooks also may provide "deviant" judicial decisions that are subject to legal criticism or evaluation.¹⁷ Classroom work, we might say, is primarily concerned with the analysis of pivotal or test cases and the use of basic legal theory to understand, interpret, and evaluate legal doctrine.

On Blue Book exams, however, the student typically is expected to employ legal doctrine taught throughout the course to resolve or argue about "borderline" cases that tend to sit, as David Chambers has put it, "in nervous juxtaposition between the situations in cases discussed in class."¹⁸ Thus, Blue Book work calls for the use of a lawyer's conven-

13. See Nickles, *supra* note 4, at 433 nn.69-70.

14. See Atkinson, *The Use of True-False Examinations in Law Schools*, 6 AM. L. SCH. REV. 702 (1929).

15. See Bell, *supra* note 9, at 305; Chambers, *The First-Year Courses: What's There and What's Not*, in LOOKING AT LAW SCHOOL: A STUDENT GUIDE FROM THE SOCIETY OF AMERICAN LAW TEACHERS 39, 41 (S. Gillers ed. 1977) [hereinafter S. GILLERS]; Younger, *Examinations*, in S. GILLERS, *supra*, at 145. *But cf.* Macdonald, *Curricular Development in the 1980s: A Perspective*, 32 J. LEGAL EDUC. 569, 570 (1982) (claiming that in the 1980s "[t]he litigation hypothetical set in the context of adversarial adjudication no longer dominates classroom and examination").

16. On the distinction between test cases, in which lawyers argue about what doctrine is or should be, and borderline cases, in which lawyers contest the application of agreed-upon tests or rules, see R. DWORKIN, *supra* note 6, at 39-43.

17. *Cf.* Macaulay, *Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar*, 32 J. LEGAL EDUC. 506, 514 (1982) (noting that "[m]ost law professors have few heroes on the bench, and their classes are devoted to scoring points off appellate opinions").

18. Chambers, *supra* note 15, at 41.

tional methods of reasoning to apply recognized doctrine to borderline cases.¹⁹ There is, then, a marked discontinuity between the content of classroom work and the content of examination work in most law school courses.

C. *Functions and Style*

Blue Book exams generally require students to perform three or four intellectual functions. These exams also reward a particular style of thinking and writing that helps students perform these functions in a successful manner. In law schools these functions, and the style required to perform them, frequently are referred to rather loosely as "analysis" or "legal analysis."

The first of these examination functions is issue spotting or, more precisely, perceiving analogies between the stated facts of an examination problem and professionally recognized legal issues, standards, and precedents. This perception of analogies is necessary to characterize the aspects of a situation for the purposes of conventional legal reasoning. In philosophical or psychological terms, we might say that this function calls for the exercise of a skill in conventional "legal imagination," because this function, like the philosophical concept of imagination, requires one to perceive connections between general standards and particular instances.²⁰ This notion of legal imagination, unlike the more prosaic term "issue spotting," helps to emphasize the artistic and practical dimensions of this examination function. The term "issue spotting," by contrast, connotes some sort of scientific process, which this function definitely is not, at least as it is practiced on time-limited Blue Book exams.²¹

The second examination function requires the identification of relevant legal authorities or, in other words, a specification of legal rules and other relevant facts or holdings of precedents. This specification of authority also may include recognizing "policies" and "principles," especially if these latter concepts constitute the purposes behind concrete legal authority and can be used to argue for particular applications of legal rules and holdings in hard cases.²²

The third examination function requires the application of legal

19. See, e.g., Younger, *supra* note 15. For specification of the conventional methods of legal reasoning, see S. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (1985).

20. On this philosophical concept of imagination, see P. STRAWSON, *Imagination and Perception*, in *FREEDOM AND RESENTMENT* 45 (1974).

21. Cf. Kissam, *supra* note 3, at 260-61 (comparing the typical law school exam to "a jigsaw puzzle that can never be completed").

22. On the functions of principles and policies in legal argument and interpretation, see R. DWORKIN, *SERIOUSLY*, *supra* note 6, at 14-45, 81-130.

authorities to complex fact situations. As mentioned above, this process is often referred to as "analysis," but the more basic notion of "rule application" is probably a more accurate description of this intellectual function. The application of legal authority to a given situation can involve: (1) a straightforward integration or synthesis of a rule's complex elements to various facts; (2) the perception of ambiguity in the application of a general standard to specific facts, which allows for the construction of competing arguments about application of the rule; (3) the perception of ambiguous or contradictory facts, which also allows for constructing competing arguments; (4) the use of analogous fact situations in precedents to argue for a particular application of a general standard; and (5) the demonstration that a rule's purpose would be served by a particular application of the rule to the facts.²³

This rule application function can incorporate a significant amount of issue spotting, although the issue spotting involved at this juncture is more specific and more concrete than the initial issue spotting that serves to begin the analysis. The rule application function also may require the ability to recall and state specific elements of relevant legal rules and precedents with considerable precision, and this process often requires more specificity and concreteness than the mere identification of legal authority that may satisfy the rule specification function.

These three examination functions thus have overlapping characteristics, but it is the rule application function that typically calls for the greatest precision and organization in specifying relevant legal authorities and employing them in problem solving. We might say, then, that the rule application function places the greatest demands on law students for demonstrating the skills of legal imagination and legal productivity, which are evidenced by the effective application of rules to facts under substantial time constraints.

Some Blue Book exams require students to perform evaluative functions in applying certain external standards to help resolve particular legal disputes. These evaluative functions may include determining "the right answer" or "a good answer" in accordance with a consensus professional opinion; employing generally recognized or innovative policy arguments or principles to construct arguments for particular parties in "pivotal cases," in other words, cases involving issues of first impression, conflicting rules, or disputes with precedent; and employing principles, policy arguments, and more general doctrinal standards to evaluate and criticize particular legal authorities. Blue Book exams, however, are not likely to require these evaluative functions as often as

23. See Bell, *supra* note 9, at 311-12; Vold, *Types of Essay Law Examination Answers—Good and Bad*, 3 HASTINGS L.J. 85 (1951). See generally Younger, *supra* note 15.

they require the first three examination functions. The controversy, uncertainty, novelty, originality, and practical judgments that are involved in both constructing and grading evaluative arguments lead most modern law professors to avoid such questions in order to ensure "objectivity" in grading.²⁴

The literature on law school examinations suggests that Blue Books at times may require and test for other functions such as the "organization" or "control" of material,²⁵ "synthesizing" or "integrational" skills,²⁶ "legal planning,"²⁷ "constructive thought,"²⁸ and, more generally, "writing ability."²⁹ I doubt that these concepts represent independent functions that are required or tested by many Blue Book exams for several reasons. First, if we try to give specific content to these concepts in the context of time-limited exams, our discussion is likely to turn towards issue spotting, rule specification, and rule application, the basic functions already identified. Second, the form and content of most Blue Book exams suggest that these three basic functions probably exhaust the universe of common examination functions. Consider the traditional emphasis on "issue spotter" exams,³⁰ and the substantial and apparently increasing use of objective questions and other sorts of short-answer questions.³¹ These phenomena certainly suggest a limited set of examination functions. Third, the contemporary use of grading curves, which require that many grade distinctions be recognized within individual courses, also suggests that these more general functions probably are not present or required frequently. As with evaluative functions, it is difficult to make "quantitative" or "objective" measurements of student performance of these functions; yet such measurements seem necessary to implement grading curves with many

24. Cf. Coutts, *supra* note 4, at 402-03 (noting that law school examiners claim that they want to test for "[a]nalysis, [s]ynthesis and [e]valuation," but that "educationalists have so far told us comparatively little about" how to test for these functions as compared to "[k]nowledge, [c]omprehension, [and] [a]pplication").

25. See, e.g., A. VANDERBILT, LAW SCHOOL: BRIEFING FOR A LEGAL EDUCATION 98 (1981); Levine, *Toward Descriptive Grading*, 44 S. CAL. L. REV. 696, 703 (1971); Nickles, *supra* note 4, at 433 n.69; Younger, *supra* note 15, at 148.

26. See Coutts, *supra* note 4, at 402; Motley, *supra* note 4, at 725; Nickles, *supra* note 4, at 447.

27. See Macdonald, *supra* note 15, at 570.

28. See Atkinson, *supra* note 14, at 702.

29. See, e.g., Bell, *supra* note 9, at 311-12; Nickles, *supra* note 4, at 433 n.69; Younger, *supra* note 15, at 148.

30. See S. TUROW, ONE L 187-96, 289-93 (1977) (describing first-year issue spotter exams at Harvard Law School); A. VANDERBILT, *supra* note 25, at 97-98 (describing law school exams as issue spotter exams).

31. See Kissam, *supra* note 3, at 277-78; Motley, *supra* note 4, at 724; Nickles, *supra* note 4, at 434, 447-51. In 1945 a committee of the American Association of Law Schools endorsed the increased use of short-answer objective questions on law school examinations. See *id.* at 448 n.122.

gradations. Objectivity in grading is easier when students are tested only on their performance of the three basic examination functions.³²

The widespread belief among professors that Blue Book exams test for integrational ability, constructive thought, and writing ability does suggest a deeper truth about the style and content of Blue Book answers. This belief may reflect an inchoate and ill-defined perception of an implicit paradigm of successful Blue Book answers, a paradigm that I refer to as "good paragraph thinking." This paradigm combines the functions of issue spotting, rule specification, and rule application in a logical way so that, at least in essay answers, a good answer may (and usually does) consist of nothing more than a series of paragraphs in which each paragraph identifies a specific issue or subissue, identifies an appropriate authority in sufficiently precise terms, and applies this authority to the problem, often showing how to arrive first at one result and then the other.³³ In this paradigm it is not necessary that the paragraphs be well written as a formal matter, or that the paragraphs be carefully or coherently related to each other, or that any paragraph display sound practical judgment about which matters are more important, or that any paragraph show how a conflict between competing arguments might be resolved in a reasonable manner. Indeed, the best evidence for these latter claims may be that the paradigm of good paragraph thinking is equally useful in answering well-constructed short-answer questions that test for the same qualities as Blue Book essay questions. Nonetheless, the graders of Blue Book essays that are written in the style of good paragraph thinking, especially those who grade in a highly quantitative manner, are likely to believe that these essays represent relatively successful constructive thought or writing ability. These are the answers, after all, that appear to reflect our success as teachers, and it would be surprising if law professors did not think that successful Blue Book answers represent the many complex qualities of successful legal thought.³⁴

The paradigm of good paragraph thinking is not the only way in which successful Blue Book answers might be constructed. This para-

32. See *supra* note 24 and accompanying text. The modern emphasis of law professors on quantitative and objective grading methods is described in Part II D.

33. See A. VANDERBILT, *supra* note 25, at 97-98; Bell, *supra* note 9, at 311-12; Swisher, *Teaching Legal Reasoning in Law School: The University of Richmond Experience*, 74 *LAW LIBR. J.* 534, 539 (1981) (describing "good exam answers").

34. See Nickles, *supra* note 4, at 429 (reporting substantial law faculty agreement with the proposition that law school grades are "significant[ly] correlat[ed]" with "success as a practitioner"); cf. Coutts, *supra* note 4, at 403 (expressing astonishment at a report that "the majority of law teachers . . . were clearly satisfied with the present range of examining techniques" despite Professor Coutts's view of clear defects in law school examinations and numerous complaints by law professors about various aspects of the examination process).

digm, however, does describe the most common thinking/writing style of contemporary law school exam writers. Certainly the few descriptions of good examination answers reflect this paradigm.³⁵ Further, this paradigm is a logical approach to thinking about and writing effective examination answers under “quantifiable” or “objective” styles of grading Blue Books, and these styles have become the prevailing method of reading and grading Blue Book essays.

D. Grading Blue Book Exams

The methods of reading, interpreting, and grading Blue Books have a critical if tacit bearing on the kinds of examination questions that are asked, the ways in which student answers are interpreted, the qualities that are measured and encouraged by Blue Book examinations, and even the professor’s goals and methods in teaching law school courses. In recent decades the prevailing method of grading Blue Books apparently has shifted from a practical, open-ended, and experience-based method of reading and grading essay answers towards more quantitative or objective grading methods. These quantitative methods are applied alike to essay answers, short answers, and true-false or multiple-choice answers to objective questions. This shift has resulted from complex causes and has important implications not only for the writing of Blue Books but also for the basic quality of legal education. The causes and implications of this shift deserve analysis to help us determine the values, limits, and adverse consequences of the objective grading style in particular and of law school exams in general.

Reading, interpreting, and evaluating essay answers can be conducted in many different ways. Thus, this process must be the focus of an analysis of grading Blue Book exams. True-false and multiple-choice questions always have required answers that are demonstrably correct on the basis of some accepted, explicit, or “objective” authority such as a reported case or rule, a teacher’s statement in class, or perhaps a statement in some legal treatise. Other short answers, and probably short essays as well, also typically require this kind of correct answer because there usually is only one idea or one set of ideas—an issue, a rule, or a brief application of a rule to facts—that a faculty member should accept as a correct answer to these questions. Complex Blue Book problems that require lengthy essay answers, however, also can be graded on this “objective” basis. The faculty reader may evaluate essays by giving credit only for statements of specific elements of a “model answer” that can be demonstrated as the correct answer on the

35. See A. VANDERBILT, *supra* note 25, at 97-98; Bell, *supra* note 9, at 311-12; Younger, *supra* note 15.

basis of some accepted or explicit authority. Typically, the specific elements of this right answer will consist of issues that should be identified, the rules that should be specified, and the standard application of these rules to the given facts.³⁶ Of course, this approach is not the only way that one may read and evaluate Blue Book essays, but it is certainly a logical way to read and evaluate answers to the classic issue spotter essay exam. In addition, our modern concerns about objectivity, neutrality, and impersonality in grading exams and our contemporary use of "model answers," "answer keys," and "score sheets" to demonstrate the grading process to our students³⁷ suggest that today the objective grading model is employed pervasively in evaluating Blue Book essays.

There is little direct evidence of how law professors actually evaluate examination answers; this fact alone may suggest some troublesome aspects of professional power. The literature suggests, however, that in the late nineteenth and early twentieth centuries law school examinations were graded on an official A-B-C-D-F scale, with most grades in the A, B, and C categories.³⁸ Further, I suspect that in the past many Blue Book essays were read and graded under a general or holistic approach that gave considerable emphasis to a professor's practical judgment about the professional promise indicated by different student answers. Under this approach, the professor would make some overall judgment about what each answer demonstrated of the student's general understanding, inferential abilities, analytical abilities, and practical judgment concerning particular legal problems. This judgment, of course, was grounded in the professor's professional experience with legal problems of the same sort and in her reading of many similar examination papers. These judgments were translated into categories of very good or excellent, good, satisfactory, and less than satisfactory. These categories then were expressed symbolically by A, B, and C grades for the three groups of satisfactory papers, and Ds and Fs for less than satisfactory papers.

Significantly, this grading style allowed professors to assess their students' abilities at issue spotting, rule specification, and rule application while taking account of other skills as well. Other skills considered might have included the sound or imaginative interpretation of events and authorities; the demonstration of practical reason, judgment, and innovation in developing and reconciling competing arguments or mak-

36. See Doubles, *Law School Examinations*, 8 AM. L. SCH. REV. 254 (1935).

37. See *id.* at 258; Kissam, *supra* note 3, at 277; Motley, *supra* note 4, at 750-51.

38. See Grant, *The Single Standard in Grading*, 29 COLUM. L. REV. 920, 921-22 (1929) (describing Columbia's grading practices in the 1920s); see also Nickles, *supra* note 4, at 471 (reporting a similar situation at most law schools in 1975-76).

ing decisions; and the employment of rhetoric in forming well-constructed and persuasive arguments.³⁹ I shall call this holistic method the "Aristotelian model" of grading because of its capacity to take account of the skills of interpretation, conventional and creative imagination, practical reason, and practical judgment, all of which are associated with Aristotle's philosophy of ethical or normative decisionmaking.⁴⁰

The Aristotelian model seems to be a sensible way of evaluating the professional promise of law students on the basis of their written work, especially if the model includes (as it did not in the past) explicit qualitative standards to differentiate between grades. This method of reading and evaluation approximates many professional tasks: for example, the manner in which partners are likely to read draft memoranda and briefs of associates and the manner in which judges are likely to read the briefs of advocates. Importantly, this model allows faculty members to write many different kinds of examination questions; thus, the model could support pluralistic teaching methods and a greater variety of substantive emphases in law school courses.⁴¹ In addition, the model encourages faculty members to read and interpret Blue Book essays in a way that is consistent with generally accepted interpretive and critical practices. This method, unlike the objective grading style, invites professors to interpret and criticize student essays in the manner that we naturally employ to interpret and criticize works of art, social practices, and legal authorities—that is, first construing the work in a sympathetic way that provides the best possible interpretation of the work and then criticizing the work under explicit standards that pertain to a work of its kind.⁴² Sympathetic readings of essays are possible under the objective model of grading, but the piecemeal and fragmented nature of this method—as one searches for the many specific elements to a "right answer"—diminishes the likelihood of sympathetic interpretation. The objective model is more likely to produce unnatural interpretations, as professors read student essays in a negative state of mind in order to produce the many quantitative distinctions that are inherent in

39. See Wood (pt. 1), *supra* note 4, at 226-34; see also *supra* notes 25-29 and accompanying text (reporting that earlier generations of law professors believed that they were testing for such open-ended legal values, which implies that these professors were employing holistic grading methods).

40. On the application of Aristotle's concepts of practical reason and judgment to the practice of law, in particular to legal interpretation, see H. GADAMER, *TRUTH AND METHOD* (G. Barden & J. Cumming trans. 1975); Bodenheimer, *A Neglected Theory of Legal Reasoning*, 21 *J. LEGAL EDUC.* 373 (1969); Kronman, *Living in the Law*, 54 *U. CHI. L. REV.* 835 (1987); and Lehman, *Rules in Law*, 72 *Geo. L.J.* 1571 (1984).

41. See discussion *infra* Part VI.

42. See R. DWORKIN, *supra* note 6, at 49-53.

objective grading practices and that are desirable because of our needs to generate, justify, and explain a grading curve with many gradations.

Today, the Aristotelian model of reading Blue Books is an endangered species, the apparent victim of a combination of circumstances. These circumstances include the pervasive influence of the "scientific method," as it has been understood and applied by law professors in their testing philosophies and techniques; the vigorous competition for high grades in this paradoxical era of a "lawyer surplus" and lucrative employment opportunities for those who earn the best grades; and the rightful demands of students for at least some explanation of their law school grades. For understandable reasons these forces have caused us to abandon essay examinations in some instances and, when essay questions are employed, to replace the Aristotelian method with "quantitative" or "objective" methods of reading and grading essays. These latter methods necessarily reward a student's ability to give many specific right answers to examination questions. In other words, they reward a student's abilities to perform the basic functions of issue spotting, rule specification, and rule application quickly and productively. These quantitative methods, however, give little if any consideration to the broader, more practical, and professionally oriented skills that can be recognized by the Aristotelian method. Though little direct evidence of the relative use of these different grading methods exists, a pervasive shift from the Aristotelian to the objective model can be inferred from the indirect evidence of contemporary practices.

This shift in grading methods has been caused by both external and internal influences on the modern law school. External influences include "the science of testing," which emphasizes objective examination methods and criticizes the use of essay questions because they entail unduly subjective, unreliable, and invalid evaluation methods.⁴³ Another outside influence has been the experience of both law professors and law students with the pervasive objective and standardized testing practices at all levels of American education.⁴⁴ One internal cause of this shift is the increasing emphasis on teaching rules in law school classes.⁴⁵ This practice encourages examination makers to focus

43. See, e.g., Doubles, *supra* note 36; Nickles, *supra* note 4, at 443-51.

44. See A. BASTIAN, N. FRUCHTER, M. GITTELL, C. GREER & K. HASKINS, CHOOSING EQUALITY: THE CASE FOR DEMOCRATIC SCHOOLING 72-75 (1986) (challenging "the extraordinary legitimacy now vested in standardized testing and competitive test scores"). See generally D. OWEN, NONE OF THE ABOVE: BEHIND THE MYTH OF SCHOLASTIC APTITUDE (1985) (indicting standardized tests used in American education).

45. The modern emphasis on "explaining" or "covering" rules in the law school classroom has been described and analyzed by many observers. See, e.g., T. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 162-68 (1977); Cramton, *supra* note 4, at 328; Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL EDUC. 1, 3 (1964); Kissam, *supra* note 3, at

their Blue Books on issue identification, rule specification, and rule application, for otherwise their exams would bear little relationship to classroom work. This narrow focus lends itself to objective grading. The increasing use of short-answer questions on contemporary law school exams⁴⁶ is undoubtedly another cause of quantitative grading of Blue Book essays because these so-called objective questions have created an attractive model that allows professors to explain grades on essay answers as well. A third internal cause is the contemporary law students' demand for "grading due process," or at least some explanation of their law school grades.⁴⁷ This demand, of course, is satisfied most easily by a method of grading that demonstrates objectively the "points" a student got and did not get in an examination answer; thus, a model answer or scoring key that indicates different grade points allocated to the particular elements of a right answer is an efficient means of grading and explaining essay answers as well as short answers.

Perhaps the most important cause of the shift from Aristotelian to objective methods of evaluating Blue Book essays is the dual trend in contemporary law schools towards employing grading scales with many gradations and imposing mandatory grading curves on individual law school courses. Many law schools in recent decades have modified the traditional A-B-C-D-F grading scale by adding plus and minus letter grades or by replacing the traditional scale with numerical scales that provide for a veritable host of final grades.⁴⁸ These "more refined"

265-66, 290-93; Vukowich, *Comment: The Lack of Practical Training in Law Schools: Criticisms, Causes, and Programs for Change*, 23 J. LEGAL EDUC. 140 (1971).

46. See *supra* text accompanying note 31.

47. On changes in grading due process at American law schools during the past two decades, see Doniger, *Grades: Review of Academic Evaluations in Law School*, 11 PAC. L.J. 743 (1980) (describing a general increase from the 1950s to the 1970s in the rights of law students to inspect their exams, the encouragement of students to review their exams, and the availability of appeal procedures for contesting examination grades). Compare Spies, *Examination Review, Dismissal, and Readmission: Some Specific Practices*, 9 J. LEGAL EDUC. 473, 476-77 (1957) (noting that in the 1950s, among 28 law schools surveyed, students were able to see their exams as a matter of right at only 4 schools) with Nickles, *supra* note 4, at 437-38 & n.91 (noting that in 1975-76, among 98 law schools responding, 60% reported that students are "encouraged to discuss individually the results of their examinations with their teachers").

48. See Nickles, *supra* note 4, at 471 & nn.199 & 201 (reporting that as of 1975-76 more than one-half of 102 responding law schools had expanded the number of officially recognized grades beyond the five in the traditional A, B, C, D, and F scale). As of 1987-88, a review of available catalogues in the University of Kansas School of Law's admissions office revealed that 32 of 38 national and regional law schools had expanded the number of their recognized grades beyond the five grades of the traditional scale. See also Belot, *Law School Grades and Curriculum Revised*, KU LAWS, Summer 1967, at 1 (explaining the University of Kansas School of Law's addition of two grades, B+ and D+, to its grading scale in 1967 as a means of refining the faculty's measurement of students' skills); Epstein, *Grade Normalization*, 44 S. CAL. L. REV. 707 (1971) (explaining the Southern California Law School's change in 1971 from a traditional grading scale to a more discriminating one of 100 points as a means of refining the measurement of legal skills and of alleviat-

grading scales have been accompanied by strong expectations among many law school faculties—in some cases resulting in rules—that grades in individual courses must reflect many levels of performance.⁴⁹ These practices require that the final grades for satisfactory performance in each course be divided into many different categories. This imposition of multiple grade distinctions surely discourages the qualitative evaluation of Blue Book essays under the Aristotelian model.

Quantitative grading of each examination question, including essays, generates the many different grades that must be awarded in an efficient manner. Quantitative grading also constitutes an efficient means of explaining or justifying these grades to inquiring students. What better basis could there be to explain authoritatively and quickly to an angry, defensive, or hostile student the differences between grades of, say, 88, 86, 83, 78, and 72, than a brief comparison between the points of a “model answer” and the fewer points received for the student’s answer? Thus, our complex grading scales and our express or implicit mandatory grading curves appear to be both a cause and an effect of a modern shift to objective methods of reading, interpreting, and evaluating Blue Book essays.

The contemporary discourse among law faculty about law students and Blue Book exams provides additional evidence of the shift to an objective method of grading Blue Book essays. Law faculty today do not talk much about “A exams,” “B exams,” and “C exams,” or “A students,” “B students,” and “C students,” as they apparently once did.⁵⁰ Instead, our discourse is about the theological niceties of point scales for grading essay answers; about “score sheets,” “answer keys,” and “model answers”; about “high and low C grades” or “near As and near Bs” (distinctions within distinctions); and about “excellent,” “average,” and “weak” students, whom we tend to characterize exclusively by examination scores and class ranks rather than by statements about

ing pressure on individual faculty members to explain grades to disappointed students).

49. As of 1975-76 only 9% of American law schools had established an explicit mandatory grading curve for at least some of their courses. See Nickles, *supra* note 4, at 426 n.35. This study, however, did not inquire about the extent of implicit norms that prescribe a particular distribution of grades for individual courses in order to achieve grading fairness between different sections and between different professors. The existence of these implicit norms in today’s competitive law school world, in which both faculty and students display substantial concern about grading fairness, is probably widespread. See generally Grant, *Justice in Grading*, 9 J. LEGAL EDUC. 186 (1956) (arguing that each law school should establish a schoolwide standard for the grade distributions in individual courses). For a description and evaluation of mandatory grading curves that have been established by implicit norms in American colleges and schools, see J. HOLT, *WHAT DO I DO MONDAY?* 255-58 (1970).

50. For an example of earlier talk, see Grant, *supra* note 38, at 926 (discussing “A scholars” and “B scholars”).

their professional promise.⁵¹ The modern examination discourse among law faculty, in other words, connotes credentials, quantitative measures, the many specific elements that are necessary for good Blue Book answers, and a student's relative standing among her peers. This discourse is in stark contrast to the more absolute and standard-bound judgments that were implied by the examination discourse among law faculty in the past.

Of course, the Aristotelian and objective models of grading can be combined in an individual professor's grading style. This hybrid model includes practices such as: (1) the award of extra credit for a student's good or superior classroom performance; (2) the award of additional points on exam answers for well-organized or thoughtful essays; (3) the award of a large number of exam points for identifying major issues or making particularly insightful arguments; and (4) grading some but not all essay answers by the Aristotelian method.⁵² With this hybrid model, however, the essence of the evaluation process still is likely to be the objective method for all the reasons that have caused the rise of the objective method in the first place.

The immediate effect of grading essay answers under the objective model is to make performance on these questions similar to performance on short-answer and objective questions. Under the objective model, examination questions are likely to test essentially for issue identification, rule specification, and rule application in order to make the model work. Law professors, however, disagree vigorously in their opinions about the values of different kinds of examination questions. Some law professors, who believe in the science of testing, believe that the only significant difference is that essay questions are less reliable measures of the basic examination functions. In other words, they believe that essay questions are less capable than short-answer questions of providing a consistent measurement of these functions over many student answers.⁵³ In this view, the failure of law professors to use more short-answer questions can be explained only by the forces of inertia and lack of time for, skill at, or interest in learning to construct effec-

51. Cf. Feinman & Feldman, *Pedagogy and Politics*, 73 *Geo. L.J.* 875, 879-81 (1985) (describing the dismal perspective on most students' potential abilities as lawyers that results from a professor's reading of examination papers); Motley, *supra* note 4, at 723-24 (making a similar point as described in the Feinman and Feldman article).

52. See Doubles, *supra* note 36, at 256-58 (advocating different grade points for the recognition of issues of different difficulty or importance); Trelease, *Criteria of Grading*, 23 *Rocky Mtn. L. Rev.* 118, 121 (1950) (recommending that grade points be awarded for class participation). I owe the general point in the text to my colleague Bob Jerry.

53. See, e.g., Motley, *supra* note 4, at 726-29; Nickles, *supra* note 4, at 443-51; Weihofen, *Types of Questions*, 23 *Rocky Mtn. L. Rev.* 110, 112 (1950).

tive short-answer questions.⁵⁴

Other professors continue to believe that short-answer questions cannot replicate the often confusing and complex conditions of professional situations, and that the essay exam is necessary to test for complex kinds of issue spotting and imaginative rule applications.⁵⁵ A third group might maintain that the essay exam is valuable because it offers law students some opportunity to write about the law. In this view, writing Blue Book essays is valuable simply because law students otherwise would have little opportunity to write or to learn by writing while they are in law school.⁵⁶

These latter views about the value of Blue Book essay answers would be more plausible if the proponents of these views could make some showing that an Aristotelian method of grading is employed in order to measure complex or imaginative rule applications, or a student's writing ability, rather than a student's professional promise; unless the Aristotelian method is used, students will not have particular incentives to focus on complexity or to write polished answers to Blue Book essay questions. For the reasons indicated, I do not believe that this showing of an Aristotelian method can be made. It follows that objectively graded Blue Book essays are merely less reliable and less valid tests of basic legal skills than well-constructed short-answer questions. That is, the two kinds of questions test the same skills, and essay questions are more difficult to read and grade in a consistent manner.

In any event, the quantitative grading of Blue Book essays converts essay questions into "objective" questions. This consequence creates disadvantages. First, if all or most law school examinations focus merely upon measuring the quantity of issues, rules, and rule applications that a student can perform under substantial time constraints, it is likely that the paradigm of good paragraph thinking will be imprinted effectively in the consciousness of most students as the way to deal with legal problems.

Second, if we are testing only or mainly for issue spotting, rule specification, and rule applications in borderline cases, what does this suggest about the learning that occurs in legal education during the rest of the academic semester? Will not teachers have an incentive to limit their courses to establishing the many objective bases, the rules and holdings of precedents, for scoring the final examination?⁵⁷ Will not students have an incentive to spend their semesters concentrating on

54. See Nickles, *supra* note 4, at 448-50.

55. See, e.g., Doubles, *supra* note 36, at 255.

56. I owe this point to my colleague Bill Westerbeke.

57. See Kissam, *supra* note 3, at 277-78.

the preparation of extensive examination outlines rather than on careful daily reading or other class preparations that the myth of the case method and Socratic dialogue would lead one to expect?⁵⁸ Further, might not student outlining tend to focus excessively on the specification and memorization of rules and holdings, which constitute the certain bases for one's performance under the objective grading model?⁵⁹ Under this scenario much student outlining may ignore the richer learning and insights that can result from outlining, review, and practice that are focused on developing new connections between the different elements of complex subjects. These connections, of course, are necessary to help the law student construct imaginative interpretations of complex authority and innovative, persuasive arguments that would help clients in unique situations. The different adverse effects of the objective grading model should be of substantial concern to anyone who is interested in the quality of American legal education. Before considering these consequences in full perspective, however, we must examine some additional aspects of the examination experience.

E. The Deep Structure of Blue Books

The foregoing discussion described the surface aspects of Blue Book exams. This subpart considers the deeper structure of law school examinations, a structure which consists of several related patterns that represent the major purposes, functions, and consequences of these exams. This inquiry is necessary to develop an effective understanding of the functions and disfunctions of the current examination system.

The structure of Blue Book exams can be described by six principles. These principles are the emphasis on speed in Blue Book exams, the surprise element in most Blue Book questions, the comprehensive qualities of the Blue Book exam process, the demand for a kind of thinking that typically is associated with oral rather than written communication, the enhancement of professorial authority and domination, and the inherent masculine code of Blue Book thought and language. Besides many direct interrelationships, these principles appear to have a common grounding in a conservative law school politics or, as Duncan Kennedy would put it, in the center-right politics of private law doc-

58. See A. VANDERBILT, *supra* note 25, at 85-91; Younger, *supra* note 15, at 146-47. Both authors recommend that law students develop outlines throughout the semester in order to prepare themselves for Blue Book examinations.

59. Cf. Motley, *supra* note 4, at 729, 737 (stating that law students spend excessive time memorizing in preparation for exams); Comment, *Anxiety and the First Semester of Law School*, 1968 Wis. L. Rev. 1201, 1208-09 (noting that the memorization of rules as preparation for law school exams provides a degree of needed personal or psychological certainty).

trine.⁶⁰ A conservative politics, then, provides the foundation for the deep structure of the contemporary Blue Book system.

1. Speed

Blue Book exams clearly emphasize speed in performance. With some law professors this emphasis stems from the time constraints they impose on Blue Book exams for no particular reason, other than tradition. This emphasis also may stem from a conscious belief among many law professors that speed or quickness is important to many legal situations and therefore should be measured by Blue Book exams.

In major part, however, this emphasis on speed stems from a more obscure source, which suggests that the Blue Book demand for speed often is excessive as a matter of good educational and testing practices. This source is the perceived need of many schools and professors to impose grading curves with many distinctions on examination performances in individual courses.⁶¹ Multiple grade categories can be generated and explained to students most easily by establishing the final exam as a race and then observing the order in which contestants cross the finish line. The race is created by establishing relatively complex problems for the time allowed—"overfacting" as some students say—and by using objective grading methods for essay questions. Indeed, this sort of examination is almost mandated by the expectations of law faculties that each individual course should result in many different grades. Yet, treating Blue Book exams as a race, while possibly a good test of speed, is unsound as educational practice and may even fail to measure accurately the qualities that it purports to measure. The principle of speed rewards students for answers that merely identify a maximum number of issues and specify precisely many different rules. This principle tends to de-emphasize, discourage, and penalize student writing that involves coherence, depth, contextual richness, and imagination.⁶²

2. Surprise

Blue Book exams also are based on surprise. This principle requires that exam questions be essentially different from any problems that the students may have studied during the semester. To be sure, many ex-

60. See Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1 (1983). In other words, quickness, surprise, comprehensiveness in lieu of depth, a reliance on oral communications to deflect serious questions, and an aggressive division and separation of ideas and issues into many parts are methods of conserving power, of listening without hearing, that persons with interests in any status quo are certain to favor.

61. See *supra* text accompanying notes 48-49.

62. See Motley, *supra* note 4, at 736-37; Nickles, *supra* note 4, at 452-53.

amination issues in particular courses are repeated from year to year and other issues may be hinted at in class discussions. Surprise, however, still can be achieved on an exam by disguising the legal issues in a welter of complex facts and detail. The explicit rationale for this principle is the purported need to test students on gross issue spotting (the first exam function). In addition, many professors appear to believe that all good lawyers must have the poise and quick wit to deal with continuous surprises because good appellate advocates are believed to possess these qualities. Professors believe in the benefits of these qualities, of course, because they showed such poise and quick wit on their own Blue Book exams.⁶³ Nevertheless, the more obscure basis of the surprise principle, the perceived need to spread students out along a grading curve with many gradations, suggests that this principle is also used to excess on Blue Book exams. For example, although the surprise principle is perhaps necessary to test for gross issue identification, the combined factors of surprise and speed severely diminish the possibilities of testing for the more discrete and complex kinds of issue identification that are involved in rule application. In this latter process, the analyst often must develop detailed analogies and make careful distinctions between particular cases in the course of applying general rules. Both the surprise and speed principles of Blue Book exams surely defeat the possibility of testing for this important aspect of legal imagination.

3. Comprehensiveness

Blue Book exams tend to be comprehensive in two ways. First, most examinations purport to test students comprehensively on the subject matter of the course, to provide a "fair chance" for students to deal with questions in areas of their relative interests or strengths, and to enforce comprehensive study and review by students.⁶⁴ In view of the time constraints on Blue Book exams, this thrust towards comprehensiveness suggests that most exams will reward the comprehensive consideration of issues more than the depth or complexity of a student's analysis.

Second, Blue Book exams in the aggregate constitute the focus of most learning and writing by students while they are in law school, with the notable but limited exceptions of law review, clinics, and research seminars or workshops. This comprehensiveness seems to leave many law students with the mistaken impression that Blue Book work is the paradigm of good legal analysis. Thus, the students may leave with a

63. See Kissam, *supra* note 8, at 163; Motley, *supra* note 4, at 731-32.

64. See Nickles, *supra* note 4, at 432 n.65.

correspondingly poor education in the areas of serious writing, complex and theoretical legal analysis, client planning, or any other skill that could be emphasized by law school courses featuring different kinds of writing and evaluation.⁶⁵ One might conclude that the comprehensiveness of Blue Book exams in these two ways tends to produce superficial analyses by all participants, including those who do quite well and those who do less well in their examination grades.

4. Oral Communication

The style and substance of the thought and writing required by Blue Book exams—good paragraph thinking and writing—appear to be closer in nature to the thought process that is typically used in oral communication rather than serious writing. Blue Book writing about issues, rules, and rule application must be done quickly, with little time for the critical organization of materials and ideas, the reflection, and the feedback from one's own written words that constitute the heart of most effective thinking and writing about complex matters.⁶⁶ In other words, Blue Book thinking and writing must be performed in a relatively precise but simple style, a style that is surely a hallmark of oral communication rather than serious writing. Thus, Blue Book thinking and communication approximates a strange, one-sided conversation or, at best, a superficial kind of "instrumental writing" that translates a student's instant thoughts about complex matters into written form immediately.⁶⁷ Blue Book communication does not approximate the good "critical writing" that can help writers develop the analytical abilities demanded by legal interpretation, evaluation, and planning.⁶⁸ Thus, it is a mistake to suggest that Blue Book essays offer any valid test of writing ability or any valuable practice in legal writing, unless we understand these claims to be merely arguments for the values and style of good paragraph thinking and writing.

5. Power/Dependency

The Blue Book system artificially enhances power/dependency relations between law faculty and their students. Of course, all examinations must be set and evaluated by persons in a position of authority, but law school exams enhance the authority of law professors and the

65. For an argument in favor of clinical as opposed to traditional legal education, see Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

66. For a good description of the process of serious writing, which includes the benefits of reflection, feedback from initial writing, and critical organization of ideas through outlining and sequential drafts, see P. ELBOW, *WRITING WITH POWER* (1981).

67. See Kissam, *supra* note 8, at 138-41, 143 n.21.

68. See *id.*

deference paid them in significant and unnecessary ways. First, the students receive alphabetical or numerical symbols as the basic if not exclusive evaluation of their work, and these symbols rarely if ever are accompanied by institutionally specified standards of performance.⁶⁹ Students are thus left with an inexact and mysterious communication from their professors about the quality of their work, and these symbols can be given a definite meaning only by comparing one's grades to the grades of other students or by considering employment opportunities that might be opened or foreclosed by such grades. Given this situation it is not surprising that many students overvalue and misinterpret the significance of law school examinations and grades.⁷⁰ It also is not surprising that law students learn to defer to professors as experts with unchallengeable authority who possess the priestly power of dispensing these mysterious symbols.⁷¹

Second, the use of one examination in each course, the lack of much instruction and practice for, or feedback on, a student's performance of the basic examination functions,⁷² and the marked discontinuity between course work and exam work noted previously,⁷³ produce additional mysteries about what is expected on these examinations and about what factors determine the grades.⁷⁴ These substantive mysteries, which seem to be dissipated only marginally by a student's experience with law school courses and examinations, surely encourage the extraordinary deference given by law students to law professors, who seem to be perceived as ideal judges or idealized professional experts.⁷⁵ This deference, of course, serves to enhance the professors' rather natural feelings of authority, dominance, and expertise that go with the role of university teacher in the first place.

6. Masculine Discourse

Finally, the discourse of Blue Book exams is predominantly a masculine discourse—one that employs values, techniques, and concepts that are more widely shared among men than women. Following Professor Carol Gilligan, we might say that our contemporary Blue Book lan-

69. Nickles, *supra* note 4, at 425.

70. See Motley, *supra* note 4, at 731; see also discussion *infra* Part IV A.

71. On the excessive deference that law students pay to law professors, see Pickard, *Experience as Teacher: Discovering the Politics of Law Teaching*, 33 U. TORONTO L.J. 279 (1983); Shaffer & Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME LAW. 190 (1976); and Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 411-12 (1971).

72. See generally Motley, *supra* note 4.

73. See *supra* text accompanying notes 16-19.

74. See Mohr & Rodgers, *Legal Education: Some Student Reflections*, 25 J. LEGAL EDUC. 403, 416 (1973); Comment, *supra* note 59, at 1208.

75. See Kissam, *supra* note 3, at 258-59; Pickard, *supra* note 71, at 284-89.

guage is a male code that employs rules, boundaries, game playing, speed, and numbers in order to characterize and divide many matters, interests, and persons into separate and disconnected elements. This discourse ignores the more distinctively feminine patterns of thought, moral discourse, and judgment that feature an ethic of caring or a morality of the web—in other words, thinking and caring about complex relations and interdependencies among persons, ideas, and situations.⁷⁶ Alternatively, as a French feminist might say, our examination language seems phallogentric in its construction of lines of rules and loosely related issues that attempt binary divisions between reason and chaos, objective fact and subjective value, or orderly rules and unruly contexts. In this view, the language of Blue Books disadvantages women by ignoring the inherent wholeness, diffuseness, contextuality, and complexity of an ideal female or prephallogentric language.⁷⁷

Women are certainly capable of mastering the masculine code of law school examinations. Many women obtain the highest law school grades, although some evidence suggests that women students may not obtain as many high grades as male students who enter law school with the same credentials.⁷⁸ In any event, this principle of a masculine code suggests that our current examination system is insufficiently pluralistic as a means of student evaluation and as the basic experience through which most law students perceive legal practice and thought. Some resistance to the status quo and change towards a more pluralistic process seem appropriate.

F. *The Attributes of Blue Book Success*

The examination functions, our quantitative grading methods, our complex grading scales and curves, and the deep structure of Blue Book exams suggest that certain attributes are necessary to obtain successful law school grades. Examination of these attributes is necessary for three reasons. First, although issue spotting, the specification of rules, and

76. See C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); see also Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U.L. REV. 1141 (1985) (applying Professor Gilligan's ideas to legal education in general).

77. See Jones, *Writing the Body: Toward an Understanding of l'Ecriture Feminine*, in *THE NEW FEMINIST CRITICISM* 261 (E. Showalter ed. 1985) [hereinafter E. SHOWALTER]; Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987) (arguing that existing equality doctrine is phallogentric).

78. See Zenoff & Lorio, *What We Know, What We Think We Know, and What We Don't Know About Women Law Professors*, 25 ARIZ. L. REV. 869, 891-92 (1983); see also Teitelbaum, *Feminist Theory and Standardized Testing*, in *GENDER/BODY/KNOWLEDGE: FEMINIST RECONSTRUCTIONS OF BEING AND KNOWING* (A. Jagger & S. Bordo eds.) (forthcoming 1989) (arguing that standardized college board tests may disadvantage women).

rule application under severe time constraints may constitute a relatively insignificant aspect of most legal practices, these functions may reflect and measure more general talents or skills that are of direct importance to the practice of law. Conversely, these general attributes or talents may throw light on the limits and adverse consequences of the current examination system. Finally, from a humanistic perspective, this inquiry will help us to understand what Blue Book exams do to persons—both students and faculty—and how the Blue Book experience should be interpreted by individuals.

Successful performance on Blue Book exams appears to require some imprecise combination of four complex but general attributes. I call these attributes the internalization of doctrine; conventional legal imagination; the quality of legal productivity; and the capacity for self-study and self-learning in diffuse, complex, and uncertain situations.

The internalization of doctrine requires at least some memorization of rules. More significantly, it requires understanding legal doctrine in two different ways. First, the student must understand, tacitly or otherwise, how the rules in a particular subject are applied conventionally to given types of situations. For example, in constitutional law, one must understand that the “rational basis” test frequently is applied by speculating about possible government purposes for a challenged regulation, and one must understand the various sorts of speculative purposes that plausibly can be advanced to defend different kinds of economic regulation.⁷⁹ Second, the internalization of doctrine requires understanding how the rules in a particular subject relate to each other. One must recognize which rules may overlap or conflict in common situations, which rules are always separate, and which rules are important subrules of others.⁸⁰ These aspects of doctrinal internalization—memorization, a tacit understanding of rule application, and understanding the organization or framework of the rules—seem to be necessary, though not sufficient, conditions to engage in successful issue spotting, rule specification, and rule application on time-limited Blue Book exams. In addition, to accomplish doctrinal internalization successfully, some aptitude

79. See, e.g., Bennett, *“Mere” Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979); Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

80. For example, the successful exam writer in a constitutional law course must understand how to disentangle and order the often related due process and equal protection issues under the fourteenth amendment; the relationship between the “state action” subissue and these more general issues; and the clear differences between the commerce power doctrine, which affects Congress’s power to regulate interstate commerce, and the “dormant” or “negative” commerce clause doctrine, which limits the power of state governments to regulate interstate commerce.

for repetitive work with complex intellectual details probably is a very helpful if not necessary condition.⁸¹

A second attribute that leads to success on Blue Book exams is the skill of conventional legal imagination. Without this skill, a student writing Blue Book exams will not see as many issues as other students and will fail to develop as many relevant connections between authorities and the facts in applying rules to complex situations.⁸² This quality of conventional legal imagination can be developed by the internalization of doctrine, repeated practice at identifying issues in similar situations, and the acquisition of a tacit sense of the analogies that the profession considers acceptable in a given field.⁸³ The exercise of this imagination, however, also seems to require a substantial degree of natural talent or "vision." We might say, then, that this attribute rests fundamentally on some sort of special legal vision, which can be developed in part (but only in part) by a careful, sometimes frustrating, sometimes mysterious, and ideally reflective process of practice, feedback, and experience.⁸⁴

A third attribute is "legal productivity" or, in other words, the ability to spot issues, specify rules, and apply rules effectively under substantial time pressure. Specifically, this skill involves recalling specific rules, organizing one's thoughts about possible connections between rules and facts, and writing precisely and quickly in a way that convinces the reader of the exam writer's ability to perform conventional legal analysis of new situations. This productivity clearly requires prior internalization of doctrine and the exercise of legal imagination combined with considerable speed in the writer's execution of conventional analysis. The paradigm of good paragraph thinking/writing (issue, rule, and rule application, with quick and frequent repeats) provides an apt description of this intellectual process. Thus, this paradigm is a sufficient if not necessary style for writing effective Blue Book essays and answering other Blue Book questions.

The exercise of examination productivity, especially in view of the speed required, appears to involve a significant degree of natural talent,

81. See Woodard, *Progress and Poverty in American Law and Legal Education*, 37 SYRACUSE L. REV. 795, 814-19 (1986) (stating that law schools contributed to the rise of the corporate bar in the late nineteenth century by providing law review editors who, by reason of their high grades, had demonstrated a capacity to perform the routine but complex work that corporate law firms were beginning to demand of young attorneys).

82. See *supra* text accompanying notes 20-23.

83. See Boyle, *The Anatomy of a Torts Class*, 34 AM. U.L. REV. 1003, 1053-54 (1985) (advising new law students on the need to focus on the analogies that the legal profession currently deem acceptable in particular fields).

84. Cf. Motley, *supra* note 4, at 747-60 (describing a regime of practice, feedback, and repetition as a means of employing the law school examination as an instrument of education).

like the exercise of legal imagination. This is not to say that simulated practice at issue spotting, rule specification, and rule application under time pressure—particularly when the issues, rules, and facts are similar to those on the final exam—might not help everyone improve their examination performances. On the contrary, the limited evidence available suggests that supervised practice can have this effect.⁸⁵ It remains true, however, that some law students simply are faster than others at performing conventional examination analysis. Thus the time constraints of Blue Book exams are likely to generate the grade distributions for our mandatory grading curves with little difficulty, especially if practice with the same or similar issues and individualized feedback are not provided to law students in some organized and effective way.

The fourth attribute of Blue Book success is admittedly a residual category. This attribute is the capacity for self-study and self-learning in complex, diffuse, and uncertain situations. This concept recognizes the importance of a student's ability to acquire and exercise the skills of doctrinal internalization, legal imagination, and legal productivity largely on her own, without much effective instruction, organized practice, or supervised feedback from the professor. This capacity includes an ability to work effectively over relatively sustained periods of time, whether the period includes the entire semester or a more condensed examination review period. The nature and importance of this attribute will become clearer in Part III, when the relationships between law school course work and examinations are considered. We are in a position at this point to note two important dimensions of this attribute.

One dimension is the ability to understand, respect, and pay deference to the diffuse authority of appellate cases, casebooks, treatises, and the professor's classroom discussion about legal doctrine. The student must draw from this authority some sense of the appropriate ways to internalize doctrine, to articulate issues, rules, and rule applications, and to write Blue Book answers that communicate an understanding of complex legal materials to examination readers.

A second dimension of this capacity for self-study and self-learning concerns the student's ability to acquire various kinds of tacit professional knowledge. The first three attributes of Blue Book success each rest in substantial part on certain kinds of tacit knowledge or, in other words, on the knowledge of things "we know but cannot say."⁸⁶ Tacit knowledge appears to be a major factor in all kinds of professional

85. See Feinman & Feldman, *supra* note 4; Roberts, *Methods for Review and Quiz in "Case System" Law Schools*, 1 AM. L. SCH. REV. 222, 224 (1904).

86. See M. POLANYI, *THE TACIT DIMENSION* (1966); D. SCHON, *EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS* 22-26 (1987); Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1773-78 (1987).

work,⁸⁷ and it should not be surprising that performance on law school examinations requires a substantial amount of this stuff. Yet little explanation is available about the nature of this knowledge or how individuals acquire it. What can be said, however, is that the ability to obtain tacit knowledge appears to rest on some combination of inherent talent and a person's repeated practice with, reflection on, and experience with similar or recurrent situations.⁸⁸ Recognition of this hidden element in successful Blue Book writing may help us understand the enigma of why some students succeed and others fail at obtaining good or "the very best" law school grades.⁸⁹

III. BLUE BOOKS IN CONTEXT

This Part examines the social context of law school exams. Several relationships between Blue Book exams, other law school practices, and professional practices that influence or are influenced by law school work are considered. Some of these relationships reinforce our examination practices and help to explain the current system. Others will help indicate some of the values, limits, and adverse effects of our Blue Book system.

I analyze this context in five subparts. The first two subparts examine entrance to the law school community and the direct practical consequences of examinations and grades. These practices establish the preconditions (or predispositions of the participants) of our examination system. The last three subparts consider some more subtle relationships between Blue Books, law school course work, and legal practices.

This inquiry reveals that Blue Book exams have a mixture of manifest and latent functions.⁹⁰ The manifest functions include the preparation of students to pass state bar exams, the screening of students for employers (especially larger corporate law firms), and the teaching and evaluating of students in the performance of some basic skills, though these latter functions are accomplished in only limited ways. This multiplicity of purposes for a single instrument, the examination, suggests that none of these purposes, especially the teaching function, is likely to

87. See generally D. SCHON, *supra* note 86; D. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

88. See D. SCHON, *supra* note 86, at 22-79; D. SCHON, *supra* note 87.

89. While some faculty and some students undoubtedly believe that they can say why some students do well on Blue Book exams and others do not, upon careful examination these statements are either too general to be useful or merely explanations of right and wrong answers on examinations already taken. These faculty and students are thus unable to say how one can perform to obtain A grades on Blue Book exams.

90. On the distinction between manifest and latent purposes or social functions, see R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 114-18 (1968).

be achieved in its full measure.⁹¹

In addition, our examination system serves some latent and darker functions, which include the reaffirmation of both conservative legal ideology and professorial prowess. Placing Blue Book exams in context, then, like our analysis of the examination itself, indicates that the modern examination system has several adverse educational effects and is insufficiently pluralistic—at least if we actually seek to achieve pluralistic educational objectives.

A. *Admitting Students, Hiring Faculty*

Law schools constitute themselves by their decisions to hire new faculty members and to admit particular kinds of students. Today, these practices clearly reinforce the quantitative grading, objectivism, and competition that pervade the modern law school's examination system. Law schools, in other words, become committed to these practices by inviting into the community persons who are most likely to be adept at and comfortable with competitive and quantitative measurements.

Other factors influence the hiring of new faculty, but acquiring high grades on law school examinations seems to be a necessary condition for appointment at most schools.⁹² Thus, most law professors are likely to have a significant attachment to the modern examination system based on instinct and emotion as well as rationality. Their success with the Blue Book system will be associated with, and perhaps is a cause of, their subsequent professional and economic successes. Because the Blue Book examination proved beneficial for many law faculty, it is unlikely that they would entertain substantial criticisms of the system. Indeed, we might say that a subtle reason (if not an intended one) for hiring most law professors is their implicit interest in maintaining the status quo on law school examinations.

Students are admitted to law schools today primarily on the basis of their prior successes with competitive and objective examination systems. The Law School Aptitude Test (LSAT) is a competitive and objectively scored exam, and LSAT scores are one of two major bases for admissions decisions at competitive and prestigious law schools.⁹³ The undergraduate grades of applicants are the other element;⁹⁴ these

91. See generally J. TIMBERGEN, *ON THE THEORY OF ECONOMIC POLICY* (1952).

92. See Fossum, *Law Professors: A Profile of the Teaching Branch of the Profession*, 1980 *AM. B. FOUND. RES. J.* 501, 509; Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 *U. CIN. L. REV.* 91, 107 (1968); Zenoff & Barron, *So You Want to Hire a Law Professor?*, 33 *J. LEGAL EDUC.* 492, 495 (1983).

93. See, e.g., Erlanger, *Toward a Sociology of Law School Admissions*, 34 *J. LEGAL EDUC.* 374, 381 (1984).

94. See *id.*

grades also are likely to have been earned largely on the basis of competitive and objectively scored examinations given the pervasive influence of standardized tests and "scientific testing methods" in American schools, colleges, and universities.⁹⁵ Thus, most contemporary law students probably enter the law school community with an inherent appreciation for competitive and quantitatively scored exams that approximate those examinations which served as the basis for their admission in the first place. Although this appreciation may lessen during one's stay in law school, we shall see that the expectation of students for some kind of objective evaluation system appears to play an influential role throughout the course of law school work.⁹⁶

B. *The Practical Consequences of Exams and Grades*

The direct functions of law school examinations are to prepare students to pass state bar examinations and to generate a highly disaggregated class ranking system. Law school grades and class ranks are used to select students for the law school's prestigious extracurricular activities such as law review, moot court programs, and clinic directorships. Most significantly, legal employers use class ranks and law review status to screen and select law students for the more prestigious and lucrative employment opportunities that the legal profession has to offer. These practical consequences impose significant constraints on the nature of law school examinations and constitute a possible justification for the present system. As will be shown, however, these consequences probably could be obtained through modified examination practices that would help to establish more effective and more democratic forms of legal education. Thus, the practical consequences of exams and grades help to explain the Blue Book system, but do not justify it.

Historically there has existed a close relationship between law school examinations and written state licensure examinations. Originally, written state bar examinations were modeled on or influenced by the written examinations that Dean Christopher Columbus Langdell introduced to Harvard Law School in 1870.⁹⁷ State bar exams have con-

95. See *supra* note 44 and accompanying text.

96. See discussion *infra* Part III C (describing incomplete and mystifying relationships between classroom work and examinations, with many students concentrating on studying the objective bases of examination answers); see also discussion *infra* Part IV A (suggesting that law students often misinterpret law school grades as a valid or objective measure of their abilities as lawyers).

97. See J. HURST, *THE GROWTH OF AMERICAN LAW—THE LAW MAKERS* 261-63 (1950); cf. R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 94, 105 n.20 (1983) (noting that Professor Langdell may have introduced written examinations at Harvard because Harvard students had done poorly on written licensure exams introduced by some Massachusetts counties in 1870).

tinued to reflect, as well as influence, the form and substance of law school exams throughout the twentieth century.⁹⁸ In the late nineteenth and early twentieth centuries, law schools supported the establishment of written licensure examinations because these exams made law schools more attractive as providers of training for prospective lawyers.⁹⁹

Today, law schools employ evidence of their students' abilities to pass state licensure exams as a measure of the school's quality and as an inducement for students to attend their school.¹⁰⁰ The similarity between Blue Book exams and state licensure exams thus is not surprising. This similarity surely means that a student's experience in taking twenty-five to thirty Blue Book exams in the course of a law school career will constitute effective, if not the most appropriate, preparation for taking bar exams.¹⁰¹ This connection between examination systems, however, does not demonstrate that Blue Book exams should be the only or even the primary method of testing student performance in law school. Perhaps experience with ten or so Blue Book exams on basic subjects would constitute sufficient preparation for bar exams, especially if law schools were to improve their teaching of the basic analytical skills of doctrinal internalization, conventional legal imagination, and legal productivity.

Law students historically have been screened for employment opportunities on the basis of highly disaggregated class ranking systems based on the cumulative grade point averages of students in each law school class. In the 1880s, New York City law firms began to realize

98. Compare Reed, *Present-Day Law Schools in the United States and Canada*, in 21 CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING REPORT 46-49 (1928) (reporting on law school-bar examination relations in the 1920s) with Adams, *New CUNY Dean to Face Pressure to Move School into the Mainstream*, Nat'l L.J., June 8, 1987, at 4, col. 3; and Margolick, *At the Bar: CUNY Law School, a Trail-blazer in Legal Education, Finds itself at a Crossroad*, N.Y. Times, Feb. 19, 1988, at B7, col. 1 (reporting that the low pass rate of its graduates on the New York bar exam may force reforms of the innovative curriculum, teaching, and examination practices at the City University of New York Law School at Queens College). Note that the increase in the use of short-answer questions on Blue Book exams, see *supra* note 31 and accompanying text, has accompanied an increasing reliance by state bar examiners on the short-answer Multistate Bar Exam, which was introduced in 1973 and is used today by 46 states, the District of Columbia, and several territories. See Tarpley, *NCBE Introduces New Feature to Bar Exam*, A.B.A. SYLLABUS, March 1988, at 8.

99. See Reed, *supra* note 98, at 48.

100. Why, for example, do the deans and faculty of state and local law schools care so much about the pass rate of their graduates who take the local bar examination? Cf. Margolick, *supra* note 98 (reporting pressure from university administrators on the CUNY Law School to improve the pass rate of CUNY's graduates on the New York bar exam).

101. Cf. Kleinberg & Barnes, *CUNY Law School: Outside Perspectives and Reflections*, 12 Nova L.J. 1, 1-25 (1987) (describing CUNY's innovative curriculum, which de-emphasizes Blue Book exams, and noting that a low pass rate of CUNY graduates on the state bar exam has created pressures for a more traditional law school curriculum).

that the highest grades on Blue Book exams at Harvard Law School might be a good indicator of a law student's ability to excel at the complex but routinized work that new corporate law firms were beginning to demand of their younger lawyers.¹⁰² Since then most law schools have developed exam systems that generate highly disaggregated class rankings, which serve the interests of both corporate law firms and students who are interested in working for these firms.¹⁰³ This screening system, moreover, appears to be a relatively efficient and effective device to the extent that these firms seek to hire persons with a general promise of productivity and capacity for self-learning in diffuse and uncertain situations. These attributes are measured by Blue Book exams in a rough and general way.¹⁰⁴

Less clear, however, is whether the preparation of students for state bar exams or the screening of students for prospective employers requires the objectivism and multiple grading distinctions of our current Blue Book system. One presumably could construct an adequately disaggregated class ranking system, provide for fair grading between professors, and afford due process to individual students without employing grading scales that require so many diverse categories. After all, Harvard Law School apparently is able to generate adequate class rankings with a traditional grading scale of A-B-C-D-F.¹⁰⁵ Similarly, one could achieve a disaggregated class ranking, fairness between professors, and due process by using different kinds of law school examinations and by using the Aristotelian rather than the objective grading method, though law professors might have to work harder at evaluating students and explaining their grades under the Aristotelian model.¹⁰⁶ Thus, the practical consequences of law school exams and grades help to explain our current examination system, but these consequences are an inadequate justification for the system's more prominent features, such as its emphasis on a limited kind of productivity and the exclusive use of time-limited Blue Book exams. Our current practices may be justified on other grounds; but before considering these grounds, subparts C, D, and E examine the more complex relationships between law school exams, law school course work, and legal practices in general.

102. See Woodard, *supra* note 81, at 814-19.

103. See, e.g., A. KANTER, KANTER ON HIRING: A LAWYER'S GUIDE TO LAWYER HIRING 33-37 (1983); D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 26-70 (1983).

104. See *supra* text accompanying notes 85-89.

105. See S. TUROW, *supra* note 30, at 232-33 (describing an apparent implicit grading curve for first-year students at Harvard Law School as one that produces about 20 percent As, 60 percent Bs, and 20 percent Cs, "with a smattering of Ds and Fs").

106. See discussion *infra* Part VI.

C. *From Classroom to Exam*

The relationships between the classroom work of law school courses, the studies of students outside the classroom, and Blue Book exams are complex and murky. To understand these relationships, we must explore in some detail the nature of daily law school work, its connections and disconnections with examinations, and the influence that law school exams have on the work of students and faculty. This inquiry shows how the Blue Book system accomplishes, distorts, and contradicts its ostensible purposes of teaching and evaluating the acquisition of legal skills and doctrine. At the same time, this inquiry will show, though tacitly, the kind of self-study and self-learning that is required for students to perform well on Blue Book examinations.

Law school course work and its relationship to exams can be characterized by two themes: fragmentation and discontinuity. Fragmentation results from the texts that law students are expected to read, from the texts that they read on their own, and from classroom discourse. This fragmentation enhances the substantial discontinuities that exist between a student's course work and her work for final exams. The fragmentation and discontinuity serve some complex functions and have various consequences. On the one hand, this situation may approximate the nature of much professional work, for it certainly places a premium on a student's capacity for a limited kind of self-study and self-learning. On the other hand, the fragmentation and discontinuity violate several principles of effective learning, including repetition, practice at complex tasks, and obtaining effective feedback from more experienced supervisors that is aimed at improving performance rather than explaining grades. In other words, the fragmentation and discontinuity in law school work deny to most students the opportunity to practice and then reflect with more experienced persons about professional work involving tacit knowledge.¹⁰⁷ Fragmentation and discontinuity also promote the private interests of law faculty in scholarship and consulting work by encouraging law professors to acquire and demonstrate a mastery of doctrinal knowledge at the expense of affording their students a more effective education in the practical skills and basic doctrines of lawyering.

Let us consider first the fragmented array of texts that students are expected to read in most law school courses. The typical casebook

107. See Motley, *supra* note 4, at 747-60; see also D. SCHON, *supra* note 86 (analyzing the nature of practical or clinical education of "reflective practitioners"); Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 J. LEGAL EDUC. 167 (1986) (noting that only individualized teaching methods, in particular computer-aided instruction that provides feedback on the work of individual students, have been demonstrated capable of improving the performance of law students on law school exams).

presents appellate court opinions as the staple reading assignment, but it presents only excerpts of these opinions that typically deny students access to the full range of historical facts, doctrinal and political reasons, and prior texts that a court has relied on in making and justifying a particular decision. Appellate court opinions respond directly to the briefs of parties to the suit and typically rely heavily on prior authoritative texts of statutes, legislative history, and precedents as justification for a particular decision. Students who read only casebook excerpts (and many students have time to do little else if they read carefully) will have only indirect reports of the prior texts, which must be understood in order to understand and interpret effectively any text that forms part of a written tradition.¹⁰⁸

The judicial opinions in casebooks also are interpreted and employed by the legal profession as part of yet another text, the text of current law. This text is described in most casebooks, if at all, only in the partial and subterranean forms of opinions that emphasize prior doctrine and the "notes and questions" that typically accompany the excerpts of appellate opinions. Unsurprisingly, the student's awareness of this subtext of contemporary doctrine encourages prolific reading by students in legal treatises, hornbooks, and commercially published case outlines, which supplement or replace the assigned readings in casebooks.¹⁰⁹

Another critical text for those who wish to do well on Blue Book exams is the text of the professor's views on the subject in question. This text frequently can be obtained only by taking voluminous notes of everything the professor says, together with meticulous review and replication of these notes at exam time.¹¹⁰ This text, however, is often very fragmentary because it is delivered in the classroom, and it can become even more fragmented and less coherent as understood and re-

108. On the need to understand the tradition of relevant prior texts, including interpretations of these texts, in interpreting a particular text, see H. GADAMER, *supra* note 40.

109. See S. TUROW, *supra* note 30, at 46-48, 80, 167, 180 (describing the use of law review articles, treatises, and commercial outlines by first-year Harvard law students); A. VANDERBILT, *supra* note 25, at 80-83 (noting the availability of commercial outlines and legal treatises as means that may help students to understand their casebook readings); Feinman & Feldman, *supra* note 4, at 542 (recognizing a "subculture of law school learning" in which students supplement their assigned readings by "a variety of sources, from scholarly articles to commercial outlines").

110. Cf. Dickson, *Dilemmas*, *STUDENT LAW*, Jan. 1988, at 44, 45. The article notes: John Gardner, the late novelist and critic, suggests that the best, most important writing invariably has one indispensable quality: the writer seeing with his or her own eyes. In law exams, that's exactly what doesn't happen. Instead of seeing with our own eyes, we spend our limited time desperately trying to see with the eyes of our teachers. There are exceptions, but for most of us, the underlying aim is to write down what we fondly imagine our professors want to hear.

Id.

peated by many of our beginning students of the law.

In the classroom, law professors can be divided into two categories: the "lecturers," who attempt to cover and explicate lots of doctrinal rules; and the "challengers," who try to raise provocative questions about specific aspects of cases, problems, doctrinal rules, and more fundamental legal and social theories.¹¹¹ In either case, the classroom text that is developed will shift frequently and implicitly between assigned and unassigned texts such as casebook excerpts, the social and doctrinal contexts of the casebook opinions, and the professor's (or profession's) explanations, interpretations, and evaluations of these multiple texts.¹¹² Further, the limitations on classroom time and the basic nature of oral discourse in large groups, which requires an essential simplicity and repetition for effective communication, limit the possibilities for developing complex law school texts in an integrated or a comprehensible fashion. To be sure, many of us may assay painstakingly careful lectures over complex doctrine and believe that our lectures are understood by our listeners. But the only good evidence of this understanding is in the Blue Book exams we read, and this evidence surely contradicts these beliefs.

Thus, it appears that the student of legal language, unlike most students of foreign languages, is faced with the bewildering task of mastering many fragmented, disjunctive, and subterranean texts as the basic means of preparing for final examinations, as well as the practice of law. Some students, by nature or prior training, may have an instinct for organizing these texts into a structure that will support effective issue spotting, rule specification, and rule application on Blue Book exams. Many students, however, do not have this capacity, especially at the beginning of their legal studies. Yet legal education continues to create, indeed appears to celebrate, the confusions and mysteries that students experience as a result of the fragmentation and disjunctions in basic law school texts.¹¹³

The multiplicity of fragmented texts is complicated further because

111. See, e.g., Rutter, *Designing and Teaching the First-Degree Law Curriculum*, 37 U. CIN. L. REV. 7, 26-36 (1968).

112. Cf. K. LLEWELLYN, *THE BRAMBLE BUSH* 76-77 (1960) (describing five levels of case discussion in law schools and advising readers to be clear about the shifts between levels); S. NOAKES, *TIMELY READING* (1988) (arguing that literary critics often fail to maintain a clear distinction between the exegesis of a literary text, which attempts to understand an author's intentions, and the interpretation of a text, which presents the interpreter's meaning, in the discussion and criticism of literature); Bergman, *The War Between the States (Of Mind): Oral Versus Textual Reasoning*, 40 ARK. L. REV. 505 (1987) (contrasting the relatively straightforward qualities of a "text-free" mode of reasoning with the more complex qualities of the lawyer's "text-bound" mode of reasoning).

113. See, e.g., D. KENNEDY, *supra* note 103, at 15-17.

students and professors tend to read these texts in radically different ways. We can begin perhaps to appreciate the radical diversity of readings by noting three basic ways of reading a text.¹¹⁴ Some readers "dominate" a text by merely trying to incorporate bits of the text into their pre-existing frameworks of knowledge. Others "submit" to a text by simply absorbing the words and storyline of the text without applying critical thought. Still other, more sophisticated readers appear to read texts "dialogically" in an attempt both to understand and learn from the text and to relate this learning to the reader's more general knowledge; in other words, this reader attempts both to interpret and to evaluate the text in some critical fashion. These dialogic readers perhaps can be further divided into two categories that are suggested by Jerome Bruner's distinction between "bottom up" readers, who concentrate on the concrete narrative of a text, and "top down" readers, who focus on analyzing a text from some theoretical perspective.¹¹⁵ In Bruner's view, both modes of reading and thought are invaluable to understanding and action, yet these two quite different modes of thought may be irreducible to any common denominator.¹¹⁶

Another complicating factor in the reading of complex texts is that each reader will bring her specific perspectives, frameworks, and information to bear in understanding the text. These perspectives, frameworks, and information are based on diverse factors such as the individual's cultural background, previous education, and gender.¹¹⁷ Comparably diverse readings of law school texts might be expected as a natural result. In sum, different ways of reading and understanding texts and the many fragmented and discontinuous texts in law school work create the danger of a radical or incoherent pluralism in law school communication and knowledge.

A major purpose of classroom work, of course, is to shape these multiple texts and multiple readings in ways that can help to establish the legal profession's shared understandings of legal doctrine, conventions, and skills. More specifically, we might say that a primary purpose of classroom discussions is to develop some integrated or coherent text from which students can learn and prepare for Blue Book exams. Certainly students interested in earning high grades and law professors trying to establish objectively fair examinations should share this

114. See Flynn, *Gender and Reading*, in *GENDER AND READING* 267, 267-70 (E. Flynn & P. Schweikart eds. 1986).

115. J. BRUNER, *Two Modes of Thought*, in *ACTUAL MINDS, POSSIBLE WORLDS* 11, 12-13 (1986) [hereinafter *ACTUAL MINDS*].

116. *Id.* at 11.

117. See Crawford & Chaffin, *The Reader's Construction of Meaning: Cognitive Research on Gender and Comprehension*, in *GENDER AND READING*, *supra* note 114, at 3.

perspective.¹¹⁸

Ironically, our classroom texts are probably much less coherent than we think because of our failure to appreciate the fragmented nature of law school texts and the many ways of reading texts. In effect, an identical starting line in the race for law school grades is simply not possible in view of this fragmentation, discontinuity, and diversity. Moreover, our attempts to create shared understandings about legal doctrine, skills, and conventions are based heavily on oral communication in classrooms with many students, which is an ineffective way of establishing understandings about complex and tacit professional knowledge. The professor's oral presentation in the classroom must be aimed at a general and relatively simple level in order to be effective communication. Any understanding of the more complex and more controversial aspects of legal thought is likely to be ignored, suppressed, or misunderstood by law faculty and students alike, because complex and controversial thought is best expressed and understood by careful individual reading and writing about such thought.¹¹⁹ Unfortunately, despite our intentions, our classroom work tends to ignore and destroy the complexity, controversy, contradiction, imagination, and individuality that are so valuable to the practice of law.¹²⁰

Importantly, the classroom text provides only some of the information and few of the skills that a student needs for Blue Book exams. As noted earlier, the assigned readings and classroom discussions in most law school courses are concerned with the explanation, interpretation, and evaluation of pivotal cases that establish contemporary doctrine, while the final exam is typically concerned with the conventional application of doctrine to new and unexpected "borderline" situations.¹²¹ The daily work in most law school courses thus fails to provide models, instruction, or practice for the issue spotting and rule applications required for Blue Book exams. The classroom text provides the objective bases for an examination, the doctrinal rules and case holdings that may be used as relevant legal authorities; the students, however, are left largely on their own to acquire the skills of issue spotting and rule application in particular fields.

To be sure, some instruction, practice, and feedback to help prepare for Blue Book exams can be provided by the "problem method" of

118. See Kissam, *supra* note 3, at 277-78.

119. See Kissam, *supra* note 8; see also *supra* text accompanying notes 111-13.

120. See D. SCHON, *supra* note 87, at 14-18; Amsterdam, *supra* note 65; Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1948); Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 250-52.

121. See *supra* text accompanying notes 15-19.

teaching or by discussion of "hypotheticals" in the classroom.¹²² These approaches, however, though more promising than others, also have significant limitations. First, class discussion of problems and hypotheticals rarely tests students in issue spotting because the major issues usually will be clear from the context of related assignments and class discussions. Second, class discussion of these problems is oral, which limits the possibilities for complex discussion or dialogue and for effective feedback on individual performances. Third, it appears that these methods in any event are not employed in a systematic or pervasive way in modern legal education. The use of hypothetical problems as part of the case method is a time-honored tradition, but our modern emphasis on covering rules, often by professorial monologue,¹²³ suggests that the use of hypotheticals has declined considerably. The problem method is a more recent invention, but little evidence exists to suggest that this method has become pervasive or that it is employed frequently with writing exercises.¹²⁴ In sum, fragmented law school texts and discontinuities between these texts and Blue Book exams suggest that most law students face their examinations with substantial uncertainty about what they should know and do.

D. The Impact of Exams on Law School Work

Let us now consider the relationships that run from Blue Book exams backwards to law school course work and forward to subsequent exams. This analysis also uncovers substantial discontinuities and hidden relationships, and these relationships, like those discussed above, violate basic learning principles and serve the private interests of law faculty.

Law students receive little feedback about their performance on law school examinations, and they receive almost no feedback about how they might be able to spot issues, specify rules, and apply rules more effectively and more quickly on future examinations. The feedback received by most students consists of their grades in particular courses and perhaps the general distribution of grades in these courses. These abstract symbols fail to provide a specific explanation of the

122. See, e.g., Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654 (1984); Zarr, *Learning Criminal Law Through The Whole Case Method*, 34 J. LEGAL EDUC. 697 (1984).

123. See *supra* note 45 and accompanying text.

124. See R. STEVENS, *supra* note 97, at 215; *supra* note 45, 123 and accompanying text; see also Ogden, *supra* note 122 (urging more extensive use of the problem method, in part to train students in examination skills, but noting that this method is probably of limited value in large classes). The modern emphasis on doctrinal explication in the classroom reduces the possibilities for frequent or pervasive use of either hypothetical cases or the problem method.

quality of one's performance, other than providing some rough indication of a student's place in the school's class ranking hierarchy and her relative skills at issue spotting and rule application under time constraints.¹²⁵ Of course, students are free to ask faculty members for instruction on examination skills and for more substantive feedback on their examination performances, but these opportunities are likely to be limited for several reasons.

First, relatively few law students actually ask for this kind of assistance.¹²⁶ This behavior is consistent with the law school tradition of substantial student deference to law professors,¹²⁷ and with the psychological need of many students to guard against the demonstration of any "unprofessional" lack of expertise.¹²⁸ This situation is also consistent with the intuitive sense of many students that the basic examination skills rest mostly on natural talents and that these skills are not directly important to the practice of law.¹²⁹

Second, when students do seek our help, the conversations are frequently diverted into channels that fail to provide effective feedback to the student, despite our best intentions. Most of these conversations probably result in the professor explaining or defending a grade in terms of the student's relative "point scores" on particular questions, or in understandable if nonproductive expressions of anger and hostility by the student about a disappointing grade, or in guarding against any demonstration of an "unprofessional" lack of expertise by either professor or student. Productive conversations characterized by a genuine appeal for help and a discussion of the skills of internalizing doctrine, identifying issues, and applying doctrine are likely to be rare because these conversations require a substantial investment of time and substantial risks for both participants.

Third, the successful writing of law school exams requires a substantial amount of tacit knowledge; this is something professors know and do but cannot say.¹³⁰ Thus, law professors are not in a good position to say much at all about how individual students might perform more effectively on law school exams. What professors can say concerns only the explanation of doctrine and the explanation of how they applied their "objective" grading scales. These explanations, however, are not the same as educating a student in issue spotting or applying rules

125. See Nickles, *supra* note 4, at 425, 454-59, 463-66.

126. See *id.* at 426, 437-38, 463-64.

127. See *supra* text accompanying notes 69-71.

128. See Stone, *supra* note 71, at 398-401, 423-27; Watson, *supra* note 92, at 124, 131; Comment, *supra* note 59, at 1202-04.

129. See Mohr & Rodgers, *supra* note 74, at 416.

130. See *supra* text accompanying notes 86-89.

to unexpected fact situations.

Law professors could offer students practice and more practice, especially in the form of writing exercises, on the same rules and issues and same kinds of fact situations with which we ultimately test and evaluate our students.¹³¹ This process will appear to most professors (and to many students) to be too time consuming and too costly, particularly in view of the large classes that dominate the law school landscape. Further, most law professors may be unwilling or unable to employ teaching assistants, peer review of student work, and other less formal kinds of writing exercises and feedback, either because of funding shortages or because of their belief that these less formal procedures would constitute an unprofessional delegation of faculty authority to less experienced persons.¹³² In sum, most law schools are unlikely to provide much if any practice or individualized feedback to their students on basic examination skills as long as the Blue Book system controls our thinking about legal education and legal thought.

Despite the absence of useful feedback, Blue Book exams do influence the daily work of students and professors. The students' excessive attention to treatises, case outlines, and the classroom texts of their professors' words, at the expense of learning by careful reading of assigned texts and participation in classroom dialogue, has been noted or decried by many observers.¹³³ This phenomenon, however, is understandable, if not entirely rational, in view of the lack of instruction, practice, feedback, and student knowledge about what is expected on final exams. It is also understandable in view of the incoherent qualities of assigned readings and classroom discussions from a Blue Book perspective, which is the student's primary perspective. The student understands, if implicitly, that Blue Book exams require something more than what is provided by daily course work; this understanding is translated into treatise reading, extensive outlining, and memorizing rules. If we want students to engage in the more individualized, risky, and frustrating process of carefully reading complex texts and enthusiastically participating in classroom dialogues, we need to develop a more pluralistic examination system that encourages and rewards this sort of

131. See Feinman & Feldman, *supra* note 4, at 528-44; Motley, *supra* note 4, at 749-60; see also Bean, *Writing Assignments in Law School Classes*, 37 J. LEGAL EDUC. 276 (1987); Kahn, *Proposal for a Modified Casebook Technique*, 25 J. LEGAL EDUC. 475 (1973); Kissam, *supra* note 8, at 164-68 (describing and recommending the use of short, ungraded writing exercises to help teach doctrinal courses).

132. See Kissam, *supra* note 8, at 165-66.

133. See, e.g., S. Turow, *supra* note 30, at 46-47 (describing typical negative reactions to or a pretended ignorance of student use of treatises and commercial outlines by Harvard law professors); A. VANDERBILT, *supra* note 25, at 80-82 (warning law students against relying too heavily upon commercial course outlines).

behavior.

Law professors often seem indifferent about the value of Blue Book exams for the purpose of actually learning law. We tend to think that we teach many things that cannot be tested or will not be covered on our Blue Book exams, and we certainly have considerable distaste for reading examination essays.¹³⁴ This indifference, however, may disguise some rather strong relationships between Blue Book exams and the daily work of law professors. If the modern professor contemplates the kind of teaching that will generate many distinct grades that can be explained easily and quickly to inquiring students, she is likely to invent a teaching style that concentrates on covering the many objective bases, such as the doctrinal rules and case holdings, that form parts (but only parts) of answers to possible examination questions. This style will allow the faculty member to write wide-ranging examination questions and then point to the objective bases covered in class as the authoritative basis for each of the right answers demanded by a comprehensive exam. In other words, this desire to "prepare" students for the Blue Book process is likely to cause the extended lecturing and rule coverage that apparently has become the norm in the modern law school classroom.¹³⁵ This Blue Book connection thus reinforces the faculty member's interests in developing a specialized doctrinal knowledge and earning favorable student evaluations, which interests are also served by providing a clear explanation of doctrine in the classroom.¹³⁶ Unfortunately, at least for students, the explanation of doctrine covers only the objective bases of Blue Book answers. Law professors thus avoid the frustrating, more individualized, and time-consuming process of instructing students on the skills that are required for Blue Book exams, to say nothing of avoiding the teaching of more sophisticated legal skills.

E. From Exams to Practice

As noted previously, relationships between Blue Book exams and the practice of law include preparing students to take state licensure exams and screening students for employers.¹³⁷ Some more complicated

134. See, e.g., Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1086 (1986); Christie, *The Recruitment of Law Faculty*, 1987 DUKE L.J. 306, 310, 315; see also Vernon, *Ethics in Academe—Afton Dekanal*, 34 J. LEGAL EDUC. 205, 205 (1984) (describing Professor Afton Dekanal, a much traveled and much respected law professor, who "was killed by a bolt of lightning immediately after having taught the last class of the semester and before he had the opportunity to write or to grade the final examination, achieving the dream most of us have").

135. See *supra* note 45 and accompanying text.

136. See Kissam, *supra* note 3, at 265-66, 271-75.

137. See *supra* notes 96-105 and accompanying text.

relationships also deserve attention. One is the idea that Blue Book exams are necessary, or at least helpful, to ensure that students acquire the doctrine and skills needed to begin the practice of law. A second relationship concerns the limited use of the examination functions in most legal practice. A third is that Blue Book exams teach a model of thinking and writing, the paradigm of good paragraph thinking, that may prove detrimental for many lawyers, their clients, and the public at large.

At the start of their careers, lawyers should understand the law's basic grammar (*i.e.*, conventional reasoning skills) and its basic vocabulary (*i.e.*, major doctrines) in order to practice effectively. Blue Book exams require, or at least encourage, most students to engage in comprehensive reviews of the rules and cases in many subjects; thus, one might believe that the Blue Book system is necessary to prepare students for the practice of law.

This belief, however, is questionable. Does this review process enable most students to acquire an adequate understanding of the law's basic grammar and vocabulary for the purposes of legal practice? Faculty assessments of general student performance on Blue Book exams suggest that most students do not acquire an effective understanding of the law's basic grammar and vocabulary from the Blue Book system.¹³⁸ Although this review process might generate an adequate practical understanding that simply is not shown on Blue Book exams, proliferating complaints about unskilled new lawyers and the development of law school clinics to improve the students' practical training suggest that this is not the case.¹³⁹ Furthermore, analysis of Blue Book exams and classroom work suggests that pre-examination reviews cause many students to concentrate excessively on acquiring a vocabulary of doctrinal rules (the objective bases of examination answers) without obtaining an adequate understanding of the law's basic grammar.¹⁴⁰ The review process created by the Blue Book system thus distorts the student's acquiring a proper balance of grammar and vocabulary that would best support effective law practice.

Could alternative educational techniques promote the acquisition

138. See, e.g., Feinman & Feldman, *supra* note 51, at 881-82; Motley, *supra* note 4, at 723; see also Mudd & LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 MONT. L. REV. 11, 26-27 (1988) (reporting with some surprise that practitioners had awarded new lawyers in Idaho and Montana relatively "low marks" on the new lawyers' knowledge of substantive law).

139. See *Lawyer Competency: The Role of the Law School*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B. 1; Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695; Mudd & LaTrielle, *supra* note 138.

140. Cf. Motley, *supra* note 4, at 729, 737 (noting that Blue Book exams are teaching the skill of memorization with a special intensity, especially to weaker students who are likely to concentrate on memorization in the absence of effective feedback).

of a proper balance between grammar and vocabulary? Careful daily readings, for example, especially "critical reading" in which the student reads with some external perspective,¹⁴¹ might be sufficient to develop an adequate vocabulary for the initial practice of law.¹⁴² These readings could be encouraged by changing the structure of class discussions,¹⁴³ and they also might be supplemented by employing frequent, short, and ungraded writing exercises.¹⁴⁴ Written exercises also could be used to focus student attention on the acquisition of basic reasoning skills.¹⁴⁵ In sum, any claim that the current Blue Book system is necessary or even helpful to prepare students for the practice of law is unsubstantiated. This claim carries the weight of tradition perhaps, but little else.

A deeper problem in the relationship between Blue Book exams and practice results because the basic examination skills (doctrinal internalization, issue identification, rule specification, and rule application under time constraints) are only a small part of the knowledge and skills upon which lawyers rely in the practice of law.¹⁴⁶ As a result, most law school training, especially exam preparation, constitutes limited education for the practice of law. Although this training may be an efficient or inexpensive way to educate beginners, students may misinterpret the relationship between exams and the practice of law and fail to reap optimal benefits from present legal education.

Most students understand, at least intuitively and perhaps explicitly after clerking in law firms, that Blue Book skills are not closely related to the day-to-day work of most law practices, despite the importance of these skills in the practice of law overall. If this understanding causes students to surrender their attempts at mastering examination skills or, more simply, to abandon the careful reading of assigned

141. See generally Grinols, *Critical Reading and Learning in College*, in *CRITICAL THINKING: READING ACROSS THE CURRICULUM* 21-31 (A. Grinols ed. 1985).

142. See White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be*, 36 *J. LEGAL EDUC.* 155, 164 (1986). The author argues:

The first assumption that should go is that everything of importance in the field, or for the exam, will be covered in class. We should feel free to treat our students as grown-ups, able to read and think on their own. We should give them books and articles they might read before the course begins (and perhaps even examine them on that reading as a kind of qualification for the course); we should identify material we expect them to read on their own during the course, including casebook material; we should offer them guidance to useful summaries of doctrine and the like.

Id.

143. See Kissam, *supra* note 3, at 319-20; Kissam, *supra* note 8, at 152-57 (describing possible classroom techniques to help generate critical thinking and reading by law students in both basic doctrinal courses and seminars).

144. See Kissam, *supra* note 8, at 157, 164-65.

145. See Bean, *supra* note 131.

146. See, e.g., K. LLEWELLYN, *supra* note 112, at 105-22; F. ZEMANS & V. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981); Macaulay, *supra* note 17, at 506-12.

materials and careful reviewing prior to examinations, much of the educational value of the Blue Book system will have been lost. Unfortunately, the evidence of considerable burn-out, despair, and malaise among second- and third-year students, including many high-ranking students,¹⁴⁷ suggests that this misinterpretation is pervasive. Moreover, a simple exhortation to students to work harder or a professor's administration of company punishment by lowering a course grading curve is unlikely to produce any desirable results. Students are likely to perceive that harder work will neither produce higher grades—the mystery and mandatory grading curve of Blue Book exams ensure this result—nor prepare them directly for the practice of law.¹⁴⁸ To reduce the malaise of law students instead requires change in the law school's basic system of social control, and this change should include modifications to both our examination practices and our classroom practices.¹⁴⁹

We also must consider the consequences of good paragraph thinking. If legal education has a lasting impact on the minds and hearts of lawyers, what might this be? This impact is likely to include the thinking and writing style that students have employed to survive or succeed on Blue Book exams, for Blue Book exams certainly represent the major focus and major traumatic experience of law school life for most students. This thinking and writing style, the paradigm of good paragraph thinking, may work well for writing Blue Books, but it appears to have some substantial adverse effects on other kinds of legal practice.

Consider first the heavily criticized styles of lawyers' writing in appellate briefs, memoranda, law review articles, and legal treatises.¹⁵⁰ Might not these styles be associated with Blue Book writing, especially the writing of our more successful students? For example, appellate briefs often seem to labor on endlessly, raising issue after issue, often in the conclusory or one-sided manner that many lawyers mistake for persuasive rhetoric, without making the critical attempt to identify and emphasize the important and difficult issues that a court must consider in making its decision in a hard case.¹⁵¹ Similarly, a common style of law review writing is single-minded comprehensiveness and exhaustiveness. This style features long, loosely related paragraphs; lengthy, com-

147. See, e.g., Cramton, *supra* note 4, at 328-29, 332; Stone, *supra* note 71, at 424-26.

148. See Cramton, *supra* note 4, at 329; Comment, *supra* note 59, at 1204-10.

149. See discussion *infra* Part VI.

150. See, e.g., Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317 (1985); Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431 (1986); Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984).

151. Judge Richard Posner made this point in a recent discussion with the University of Kansas law faculty. Cf. Pregerson, *supra* note 150, at 433-37 (noting that appellate briefs often suffer from excessive length, boring qualities, incoherence, string citations, and abusive language that is mistaken for good rhetoric).

plex sentences seeking endless precision about everything; and lengthy, complex “textual footnotes” to tie up loose ends.¹⁵² The apparent purpose of this writing style is to prove that the writer has researched every possible doctrinal source for resolving a legal issue, has thought of every possible argument about an issue, and has constructed unimpeachable resolutions of each imaginable issue.¹⁵³ There is, undoubtedly, a value in thinking this way about legal problems, at least in part or initially; but this thinking/writing style is quite difficult to read and often obscures or simply misses the insights that might persuade a thoughtful reader of the writer’s position. In effect, this style of thinking/writing generates a boredom and tedium quite similar to the boredom and tedium about which law professors complain in reading Blue Books.¹⁵⁴ Thus, is not the examination prose of students, the words by which future lawyers work out and express their initial understanding of law, the best available explanation for the ponderous thinking/writing style of so many lawyers?¹⁵⁵

Consider next the inclination of many practicing lawyers to rely on specific facts—the facts of cases, precedents, or legislative histories—at the expense of more general ideas, principles, values, and contexts that also have an important role to play in the construction of arguments to help solve the complex problems of life and law.¹⁵⁶ This orientation to-

152. See, e.g., Nowak, *supra* note 150 (describing the excessive length and doctrine-laden style of most law review writing); Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936) (describing the two things wrong with law review articles, their style and substance, and characterizing law review writing as “spinach”).

153. See Farber, *The Zapp Complex*, 5 CONST. COMMENTARY 13, 14-16 (1988) (noting the propensity of law review writers to try to say the last words on subjects, to silence all conceivable critics, and thus necessarily to write exhaustively); cf. Stone, *supra* note 71, at 403 (stating that law professors “have internalized a legal standard of perfection which requires that they anticipate every possible counterargument before they advance a positive thesis of any sort”).

154. See *supra* note 134 and accompanying text.

155. See *supra* text accompanying notes 33-35.

156. See, e.g., B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* 227-39 (1977) (reporting substantial perceptions among clients, including multiple users and clients satisfied with their services, that lawyers needlessly complicate problems, are indifferent to and ineffective at communicating with clients, and are indifferent to ethical matters); R. DWORKIN, *SERIOUSLY*, *supra* note 6, at 14-45 (claiming that many lawyers misunderstand law as a model of empirically based rules); Griswold, *Law Schools and Human Relations*, 1955 WASH. U.L.Q. 217 (stating that lawyers are often deficient in human relations skills and law schools should provide training in these skills); Pregerson, *supra* note 150, at 435-36 (noting that appellate advocates often misunderstand their audience and fail to provide the most helpful arguments for resolving appellate cases); Amsterdam, *supra* note 65, at 612-13. One commentator has suggested that

[l]egal education at the end of the twentieth century was too narrow . . . because it failed to develop in students ways of thinking within and about the role of lawyers—methods of critical analysis, planning, and decisionmaking. In the twenty-first century . . . a major function of law school is to give students systematic training in effective techniques for learning law from the experience of practicing law.

Id.

wards concrete facts has a substantial value, but it is often excessive. Such excess is shown, for example, in the legendary practice of "string citations" in both briefs and the footnotes of scholarly writing.¹⁵⁷ It is also shown by the overfidelity of many lawyers to the words of doctrinal authorities, by lawyers' simultaneous inattention to the contexts or embedded principles of these authorities, and by the general and pervasive misunderstanding of law as an empirical rather than interpretive and argumentative enterprise.¹⁵⁸ This overreliance on fact and disdain for complex and less certain values is, of course, embedded in the Blue Book paradigm of good paragraph thinking.

Consider finally the fragmentation of thought and analysis that is required by the paradigm of good paragraph thinking. This model requires the law student to break down examination problems into many fragments in light of the conventional rules—the smaller the fragments and the larger their number the better. This paradigm, however, does not require much attention to the integration or interpretation of complex authorities or complex facts, nor does it require the student to think much about a client's possible range of values or alternative legal solutions to adjudication.¹⁵⁹ Is it surprising, then, that common refrains in the modern criticism of practicing lawyers are that we are "too legalistic," too rarely appreciative of the personal or social values that are implicated in our work, and too often incapable of integrating complex materials in innovative, imaginative, and persuasive ways?¹⁶⁰ Again, is not the best available explanation of these characteristics—to the extent they are explained by legal education—the paradigm that generates successful Blue Book answers?

IV. WHAT BLUE BOOKS DO TO PERSONS

This Part considers the personal context of the Blue Book system, or, in other words, the ways in which individuals react to and interpret their Blue Book experiences. This Part examines first the relationships between Blue Book exams and students and then the quite different and more permanent relationships between Blue Book exams and law professors.

157. See Pregerson, *supra* note 150, at 435-36 (on string citations in appellate briefs); Rodell, *supra* note 152, at 40-41 (on string citations in law review footnotes). See generally Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131 (1987); Barrett, *To Read This Story in Full, Don't Forget to See the Footnotes*, Wall St. J., May 10, 1988, at 1, col. 4 (describing the practice of and motivations for legal footnoting).

158. See R. DWORKIN, *supra* note 6; R. DWORKIN, *SERIOUSLY*, *supra* note 6, at 14-45, 81-130.

159. See discussion *supra* Part II C.

160. See, e.g., Himmelstein, *Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514, 516-30 (1978).

A. *Law Students*

"[T]he body becomes a useful force only if it is both a productive body and a subjected body"

—M. Foucault¹⁶¹

Student interpretations of the Blue Book experience have three dimensions. The most obvious is to interpret law school grades and class rank as indicators of a student's general employment opportunities. A second is to interpret the examination experience as a model for law practice and as an indicator of the student's general abilities to perform as a lawyer. Finally, for some students Blue Book exams affect the student's sense of personal identity and development. These dimensions are intertwined, of course, but they should be examined separately in order to understand the impact of the Blue Book system on the lives of individual students.

Law students quickly become aware, if only in a general way, of the importance that law school grades and class ranks have for employment opportunities.¹⁶² The range of these opportunities, to be sure, varies considerably between national, regional, and local law schools; and individual students place varying weights on the value of different employment opportunities. Nonetheless, at most schools students probably interpret the employment consequences of grades and class ranks according to three categories of achievement. The "winners" are students who obtain the highest grades, or law review status, and are thus eligible for the most remunerative and prestigious opportunities that are available to graduates of that school. The "journeymen" or "role players" are students with grades in the middle range of the school's class ranking system; these students are eligible for a relatively broad range of employment opportunities, but not those most honored by the school's faculty and students. The "losers" are those students with relatively low grades and class ranks who must struggle to find any professional employment or, in the case of national schools, to find professional employment that is commensurate with their expectations.¹⁶³

Many students, perhaps most, seem to interpret the Blue Book experience only in terms of this employment dimension. This result is understandable for several reasons: the honors that law schools and the

161. M. FOUCAULT, *DISCIPLINE*, *supra* note 2, at 26.

162. See Cramton, *supra* note 4, at 328-29; Comment, *supra* note 59, at 1209.

163. Cf. D. KENNEDY, *supra* note 103, at 49-55 (describing the law school's "hierarchical structuring" of prospective lawyers); Cramton, *supra* note 4, at 328-29 (stating that "[f]irst-year grades control the distribution of goodies: honors, law review, job placement, and, because of the importance placed on these matters by the law-school culture, even the student's sense of personal worth").

legal profession formally and informally award to those with the highest grades;¹⁶⁴ the emphasis on interviews for summer clerkships, which for many will begin during the first year of law school;¹⁶⁵ and the non-specific career expectations of most law students, which can produce an intense concentration on grades as the only apparent means to position oneself for the very best opportunities.¹⁶⁶ The consequences of this focus on the employment dimension, however, are unfortunate. On the one hand, winners sometimes can adopt an attitude of "presumptuous self-importance"¹⁶⁷ and, because of a realization that they have mastered the Blue Book paradigm, an attitude of considerable indifference to daily classroom work, clinics, and seminars in upper-class years that could provide a more sophisticated development of their skills.¹⁶⁸ On the other hand, many disappointed members of the journeyman and loser classes develop attitudes of hostility, isolation, emotional detachment, and malaise.¹⁶⁹ This disappointment reinforces the lack of interest in legal studies that appears to result from the mystification and frustration of the examination experience.¹⁷⁰ These attitudes, like the very different attitudes of winners, lead many students away from the rigors of daily classroom work, clinics, and seminars that could promote the development of their skills.

The competitive grading and material consequences of the Blue Book system also work to produce a strong sense of individualism and isolation from others in each of the three categories of student achievers. The individualism and isolation result from the sense that one's grades have been obtained by one's own efforts (for neither the professors nor assigned readings will be perceived to have helped one do well on Blue Book exams) and the understanding that law school grades result from an individual's competition with her opponents in a law

164. See sources cited *supra* note 163.

165. See A. KANTER, *supra* note 103, at 97-101.

166. See Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 258-59 (1974); Stone, *supra* note 71, at 398-401, 423-28 (describing law students at the Ericksonian stage of resolution of their personal identities and the related stresses on law students that are produced by law school teaching methods, competition, and grades).

167. Cf. Freeman, *A Critical Legal Look at Corporate Practice*, 37 J. LEGAL EDUC. 315, 316 (1987) (promising a denunciation of the "presumptuous self-importance" that is associated with the corporate practice of law).

168. Cf. Rosenkranz, *Law Review's Empire*, 39 HASTINGS L.J. 859, 899-911 (1988) (stating that the law review experience of high-ranking students is an illusory though time-consuming experience).

169. See, e.g., Cramton, *supra* note 4, at 328-29, 332; Stone, *supra* note 71, at 415-16, 424-27. A student once described these feelings to me, sadly, as "the field hand mentality."

170. See *supra* text accompanying notes 106-49.

school class.¹⁷¹ The isolation and individualism tend to limit collaborative work among students and between students and faculty in clinics, seminars, and workshops.¹⁷² These characteristics also help to engender the individualistic ideologies of legal doctrine and practice.¹⁷³

Probably all students, either consciously or unconsciously, also interpret their examination experience and grades as a model of good legal practice and as an evaluation of their abilities to practice law. This dimension of interpreting Blue Book exams undoubtedly bears some relationship to the realities of legal practice and may serve certain values, but it also seems subject to pervasive misinterpretation by students. The winners of examination contests, and many journeymen as well, appear to develop strong if implicit attachments to the various mental tendencies that can be associated with the paradigm of good paragraph thinking. In other words, students who succeed on Blue Book exams are likely to develop an instinct for division, order, and logic as the model for all legal practice. These students discern that quick, narrow thinking is viewed as superior ability and can provide access to opportunities and the applause of others in the profession. These instincts, of course, can be valuable in some situations, but they will be less helpful in many others.¹⁷⁴

At the same time, many students among the journeyman and loser classes develop considerable doubt about their potential qualities as practicing lawyers as a result of their Blue Book experiences. In some cases this doubt may be justified, but in many cases it is not. This doubt occurs because students understandably interpret their grades as a kind of absolute statement about overall professional ability rather than as a statement of relative examination productivity, which is what law school grades represent. These doubts may not survive law school, but while they persist they are unfortunate psychological features of the law school experience and probably affect the students' learning in many adverse ways. In particular, these doubts may corrode the self-confidence, self-awareness, and reflective capacities that professional practice demands and that effective legal education should be promot-

171. See Mohr & Rodgers, *supra* note 74, at 420; Rosenkranz, *supra* note 168, at 865; cf. Stone, *supra* note 71, at 415-16 (attributing the "unpleasant quality of interpersonal relations among students" to the autocratic nature of the law school's Socratic method).

172. See, e.g., D. KENNEDY, *supra* note 103, at 65; Pickard, *supra* note 71, at 283; Rosenkranz, *supra* note 168, at 865; Comment, *supra* note 59, at 1202-04.

173. See generally D. KENNEDY, *supra* note 103.

174. See *supra* text accompanying notes 150-60; cf. Riesman, *Law School: Critical Scholarship vs. Professional Education*, 32 J. LEGAL EDUC. 110, 116 (1982) (stating that law school at its worst provides training in an "omnicompetent arrogance" about the quick learning abilities of lawyers).

ing rather than defeating.¹⁷⁵

Finally, many students appear to interpret law school grades as an implicit measure of self-worth and personal identity. Professor Alan Stone has described an "identity crisis" that is faced by many young law students.¹⁷⁶ This crisis appears to result from both the general process of maturation and the special law school environment that features limited knowledge about professional practice and roles, ambitious but general student expectations, and an intense competition for the highest law school grades.¹⁷⁷ In this situation it is not surprising that many students focus solely on the employment dimension of grades, experience large amounts of stress (no matter what their grades are),¹⁷⁸ and implicitly misinterpret their law school grades and indicated professional roles as measures of personhood and self-worth.

In sum, an excessive focus on the employment dimension and misinterpretations of law school exams and grades may serve the social function of legitimizing hierarchies in the legal profession and in our law schools.¹⁷⁹ Of equal importance, in my view, is that this focus and these misinterpretations often turn law schools into grim and inhumane institutions that are much less conducive to effective learning than other kinds of educational institutions.¹⁸⁰

B. Law Faculty

"You are or become what you read"
—H. Bloom¹⁸¹

Law professors also interpret the Blue Book experience. We do this explicitly by expressing views about student performance and about our own personal experiences in reading and grading Blue Books. We interpret the Blue Book experience implicitly in the course of writing, administering, reading, grading, and explaining law school exams and grades. Moreover, because professors engage in this process over longer periods of time, their interpretations may have more profound consequences, both personally and socially, than the interpretations of students.

Law professors generally hold dismal views of student performance

175. See Himmelstein, *supra* note 160, at 590-91.

176. Stone, *supra* note 71, at 398-401, 423-27.

177. *Id.*

178. See Benjamin, Kaszniak, Sales & Shanfield, *The Role of Legal Education in Producing Psychological Stress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225.

179. See generally D. KENNEDY, *supra* note 103.

180. See generally Himmelstein, *supra* note 160.

181. H. BLOOM, *KABBALAH AND CRITICISM* 96 (1975), quoted in Kolodny, *A Map for Rereading: Gender and the Interpretation of Literary Texts*, in E. SHOWALTER, *supra* note 77, at 59.

on Blue Books.¹⁸² This perspective breeds a corrosive negativism, or at least pervasive skepticism, about the general intellectual and professional abilities of most students.¹⁸³ Perhaps this negativism is a kind of defense mechanism that disguises personal and collective insecurities about the quality of our teaching, which after all is reflected in if not recorded by student performance on our exams.¹⁸⁴ Perhaps this negativism stems from the law school ideology that professors are "ideal judges" who must judge many things deficient in order to reaffirm this ideology and the related desire to be recognized as professional experts.¹⁸⁵ Whatever the cause, our negative attitudes towards the intellectual and professional qualities of most students can hardly be a good thing for either democratic or effective legal education. With this attitude, we are more likely to disempower students with the brilliance of our own discourse than we are to listen with care and respect to the expressions of most students, who as beginners in a professional practice are likely to (and should) make mistakes frequently.

With this negative attitude, law professors seem to reify law school grades, which represent only the relative speed and ability of students at basic legal analysis, as symbols of more general intellectual, imaginative, and prudential qualities. This reification, of course, serves as a powerful self-affirmation of our personal worth and talents because we bestow accolades upon an elite group of students who reflect ourselves by earning the highest grades on Blue Books. If we judge students in this fashion, however, are we not also likely to confuse quick and productive conventional analysis with many of the broader qualities that the entire legal community should be looking for in future lawyers?¹⁸⁶

As law professors, we also interpret Blue Books by incorporating the experience into our own lives, values, and character. These interpretations are expressed in a limited way by the common professorial complaint of "tedium" or "boredom" in reading so many essays on so many similar questions.¹⁸⁷ Implicit interpretations are indicated by profes-

182. See, e.g., Feinman & Feldman, *supra* note 51, at 881-82; Motley, *supra* note 4, at 723.

183. See Feinman & Feldman, *supra* note 51, at 881-82; Watson, *supra* note 92, at 107-08, 111-12.

184. On the insecurities of contemporary law professors about the quality of their teaching, see Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968); Luhan, *Against Autarky*, 34 J. LEGAL EDUC. 176 (1984); Levinson, *supra* note 3; and Shaffer, *Moral Implications and Effects of Legal Education: Or, Brother Justinian Goes to Law School*, 34 J. LEGAL EDUC. 190 (1984).

185. See Kissam, *supra* note 3, at 259; Macaulay, *supra* note 17, at 514.

186. Cf. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221 (1988) (contrasting the richly pluralistic genres of modern legal scholarship with the quick, productive, and conventional doctrinal analysis that remains the favorite of many academic legal scholars and their paradigm for the evaluation of all legal scholarship).

187. See *supra* note 134 and accompanying text.

rial behavior concerning Blue Book exams. For example, the move by many modern professors to substitute short-answer questions for essay questions¹⁸⁸ may simply be a recognition that Blue Book essays are overwhelmingly boring to read, of little consequence to the practice of law, and thus simply not worth assigning. Similarly, our marked distaste for and defensiveness in explaining grades to students¹⁸⁹ appear to represent an implicit statement of personal insecurity about the values of either the Blue Book process or our general teaching philosophies and methods.

These interpretations of the Blue Book experience may even reflect something about a law professor's personal character. Professor Anthony Kronman has recently argued that a process of practical judgment is essential to good legal practice and that this process may help to constitute the personal character of lawyers.¹⁹⁰ Similarly, could not the evaluative aspects of the Blue Book experience form an essential aspect of the professorial role and help to constitute our character? We do, after all, spend large amounts of time preparing and reading Blue Book exams,¹⁹¹ and these exams also influence the daily law school work of assigned readings and class discussions.¹⁹² Could it be that our boredom in reading Blue Books, our corrosive negativism about the intellectual and professional qualities of most students, and our defensiveness in explaining examinations to students reflect parallel tendencies in our own character—tendencies of boredom, corrosive negativism, and deep insecurity?

More fundamentally, law professors tend to read casebooks, Blue Book essays, appellate court opinions, legal treatises, and articles analyzing appellate court opinions. If Harold Bloom's aphorism, recounted at the beginning of this section, is taken seriously, then reading these fragmented, partial, and relatively autonomous texts may be shaping our character and the paradigms of our thought into similarly fragmented, partial, and autonomous forms. As law professors, we should work to avoid these potentially severe consequences of the Blue Book experience.

188. See *supra* note 31 and accompanying text.

189. See *supra* text accompanying notes 125-32; cf. Stone, *supra* note 71, at 403-04 (noting the special vulnerability of law professors to criticism of any kind).

190. Kronman, *supra* note 40; cf. Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988) (suggesting that an advocate or judge presents herself as a certain kind of character and seeks to have listeners identify with that kind of character).

191. See Christie, *supra* note 134, at 315.

192. See discussion *supra* Part III C.

V. VALUES AND DISADVANTAGES

This Part summarizes the positive and negative aspects of the current Blue Book system. The analysis indicates that Blue Book exams serve important values and powerful interests, but it also suggests that these values and interests can be served by modified examination systems. This analysis also indicates substantial disfunctions of the Blue Book system that constitute good reasons for modifying our present practices.

A. Values

The law school class ranking system provides employers with an approximate measure of the relative productivity and capacity for self-learning of different students. This measurement constitutes the primary social value of the Blue Book system. Class ranks appear to provide a sensible means by which legal employers can screen prospective employees in ways that limit the employer's search costs and hiring mistakes. This value, however, is probably much greater for large corporate firms than for other legal employers. The large firm can obtain greater economic savings by relying heavily upon class ranks in its hiring practices for several reasons. First, the large firm engages in extended hiring practices, which require general screening methods. Second, the large firm places a premium on complex but routine cognitive work by its younger lawyers,¹⁹³ and Blue Book exams are particularly effective at measuring a law student's aptitude for this kind of work.¹⁹⁴ Finally, the large firm has the resources to risk potential mistakes in screening prospective employees largely on the basis of law school grades, and the large firm also can provide graduate training for new associates in order to compensate for the limited quality of Blue Book-oriented law school training.

Conversely, smaller firms and other legal employers tend to suffer from a Blue Book-oriented legal education and an exclusive evaluation of students based on grades and class ranks. These employers have economic and professional interests in hiring law graduates who have received more intensive training in legal skills than that which is provided at most law schools today.¹⁹⁵ These firms also have more substantial interests in obtaining individual evaluations of the quality of students' practical judgment, common sense, and ability to apply legal skills.

As noted earlier, an adequate class ranking system for the purpose

193. See F. ZEMANS & V. ROSENBLUM, *supra* note 146, at 130-35; Schwartz, *The Reach and Limits of Legal Education*, 32 J. LEGAL EDUC. 543, 553-54 (1982).

194. See discussion *supra* Part II.

195. See, e.g., Schwartz, *supra* note 193, at 554.

of sorting law students for large firms probably can be generated by examination systems that employ fewer Blue Book exams and grading scales with fewer gradations than those currently used at most schools.¹⁹⁶ Thus, the value of Blue Book exams in serving the interests of prospective employers is overstated; this value could be served by a testing system which is less restrictive of good educational practices.

A second value of the current Blue Book system is that it prepares students for state licensure exams.¹⁹⁷ It is doubtful, however, that law students must take so many Blue Book exams during their law school careers in order to prepare adequately for state bar examinations. Certainly it is the process of Blue Book exams, quickly amassing large amounts of complex information and applying the information productively under time constraints—and not the specific information that is learned for each Blue Book exam—that primarily prepares students for state licensure examinations. Thus, fewer Blue Book exams should constitute sufficient practice and preparation for state examinations, at least for most students.¹⁹⁸

A third value of Blue Books lies in their effect as a regulatory mechanism. Blue Books force law students to acquire extensive doctrinal knowledge and some instinct for analysis; this knowledge can be useful in subsequent practice, especially in a lawyer's beginning years. Such knowledge certainly has value to new lawyers and their employers, but the importance of Blue Books as a regulatory mechanism in producing this knowledge is probably overstated. First, the doctrinal knowledge acquired by most students as a result of Blue Books is distorted towards the memorization of rules, holdings, and concepts. In other words, it is distorted towards the acquisition of a vocabulary with neither adequate grammar to employ this vocabulary nor adequate understanding of the vocabulary, its uses, and limits.¹⁹⁹ Second, alternative means are available through which students could better acquire doctrinal knowledge and the skill of legal analysis. An alternative teaching and examination system could encourage more careful reading of

196. See *supra* text accompanying notes 105-06.

197. See *supra* text accompanying notes 97-101.

198. *But cf. supra* notes 98, 100, 101 (noting the relative absence of Blue Book exams in the curriculum of CUNY Law School, the low pass rate of CUNY graduates on the New York bar exam, and the resulting pressures on CUNY law faculty and its administration to increase the pass rate of its law graduates). Note, however, that CUNY's admissions policies favor opportunities for minorities and other non-traditional students; these students may have neither the time to study for the bar exam nor the pre-law school exam-taking experience and expertise that are enjoyed by most traditional law students. These latter factors could also explain the low pass rate of CUNY graduates on the New York bar exam. See Kleinberg & Barnes, *supra* note 101, at 29-30.

199. See *supra* text accompanying notes 57-59.

legal doctrine by individual students²⁰⁰ and improve instruction in analytical skills by offering written exercises with individualized feedback.²⁰¹ Thus, the regulatory values of Blue Book exams do not justify the present system of Blue Book examinations.

A fourth value of the current Blue Book system lies in the relationships between Blue Book exams and the personal interests of law faculty and those students who obtain the highest grades. The social value of these relationships, however, is questionable. Blue Book-oriented education allows law professors to teach relatively large classes with a minimum level of commitment and maximum demonstration of their expertise in doctrinal specialties.²⁰² These consequences clearly support the scholarship, consulting, and other professional or personal interests of faculty. These interests may help to enhance an institution's reputation, which could serve the interests of all members of the law school community. Similarly, the Blue Book system promotes the interests of students who obtain the highest grades. These students will find the system relatively easy to manage and will receive the attractive employment opportunities and professional recognition that are bestowed on the "very best" law students as a consequence of their high grades.²⁰³

Should these personal interests be taken into account in assessing the social values of the Blue Book system? These interests are clearly relevant, but most claims about the broader social values accompanying these interests (especially the claim that faculty scholarship promotes the employment of law students) do have an air of easy self-rationalization about them.²⁰⁴ Moreover, these interests are achieved largely at the expense of the interests of many students (including those with high grades) who receive a deficient education as a result of Blue Book dominance over current law school practices. In addition, law professors may suffer subtle negative effects from administering the Blue Book system. Therefore, these personal interests should not be given much positive weight in assessing the social value of Blue Book exams.

200. See *supra* note 142 and accompanying text.

201. See *supra* note 131 and accompanying text.

202. See Kissam, *supra* note 8, at 145-48.

203. See *supra* text accompanying notes 102-04.

204. See Vernon, *supra* note 134, at 206, 210-11. According to Vernon, law professors are adept at "self-delusion via rationalization." *Id.* at 206. One rationalization is the self-serving claim that students benefit materially from institution-building, prestige-enhancing law faculty scholarship. *Id.* at 210-11.

B. Disadvantages

The Blue Book system also has several disadvantages. First, the system overemphasizes memorization and internalization of doctrine at the expense of developing students' skills by providing supervised practice and feedback on the performance of these skills.²⁰⁵ Second, opportunities for other kinds of training are foregone by our commitment to a monolithic Blue Book system that emphasizes doctrine and rudimentary skills. Law schools could provide more pluralistic learning in doctrinal courses if the examination and grading practices were varied. These opportunities are possible even for large classes and without the commitment of many additional resources.²⁰⁶

Third, particular kinds of students suffer as a result of the system's objectivism and its relentless "norm referencing" instead of "criterion referencing" in grading.²⁰⁷ Our mandatory curves and objective grading methods have caused criterion referencing to be abandoned.²⁰⁸ With this abandonment have gone most attempts to measure a student's common sense or judgment, her imaginative qualities, her abilities as a coherent or contextual thinker and writer, and even whether her exam performance meets some basic criterion of acceptable professional performance. In other words, B, C, D, and F grades today are not determined by reference to external standards of performance or professional promise, but instead are determined by the relationships between the "points" earned by A papers and the "points" earned by all other

205. See *supra* text accompanying notes 105-45.

206. See discussion *infra* Part VI.

207. "Norm referencing" measures an individual's examination performance in relation to the performances of other individuals on the same exam; "criterion referencing" measures examination performances by reference to external standards or criteria of desirable performance. See, e.g., Nickles, *supra* note 4, at 433 n.68. These concepts are not synonymous with the concepts of objective and Aristotelian grading methods, even though there appear to be both significant conceptual overlap and a practical association between objective grading and norm referencing, on the one hand, and Aristotelian grading and criterion referencing on the other. One could implement norm referencing by Aristotelian methods and criterion referencing by objective methods, but these approaches to grading would involve extra stages or steps for the grader and thus would appear to be more complicated. In contrast, the objective grading style, which yields relative point scores, can be used easily and directly to implement norm referencing, and the Aristotelian method, which necessarily incorporates conceptual standards of performance, would seem to be much more easily fitted to criterion referencing.

208. Compare Feinman & Feldman, *supra* note 4, at 546-47 (noting that law school grading succeeds in ranking students along a scale, but typically provides only a limited evaluation by means of a "minimum competence" criterion for "performance at a C level") with Nickles, *supra* note 4, at 432-33, 454-59 (noting and criticizing the general absence of criterion-based standards for evaluation of law school students) and Shaffer, *supra* note 184, at 192. In that article, the author states that "American law teachers grade students according to what is called a curve. A student's grade is not based on what *he* does, but on what *other* students do." *Id.* (emphasis in original).

papers on a particular examination.²⁰⁹

This norm referencing of Blue Book exams disadvantages at least two kinds of students. First, some students, perhaps many, are adept at the practical skills of judgment, imagination, coherence, and contextual thinking, but do not possess the relative quickness at issue spotting and rule specification that Blue Book exams demand. These students will earn law school grades that understate their abilities to practice law effectively.²¹⁰ Second, other students may engage quite effectively in practical skills, but are likely to wind up at the lower end of the mandatory curves that we apply to issue spotting Blue Book exams.²¹¹ If these students are given failing grades in several courses simply because of their relative performance of the limited Blue Book skills and are denied the benefit of a criterion-based judgment of their overall knowledge and potential professional performance, these students will be excluded from law schools and law practice systematically and unfairly.²¹²

209. See Shaffer, *supra* note 184, at 192 (describing pure norm referencing as the practice of American law teachers); cf. Nickles, *supra* note 4, at 432-33 (reporting that as of 1975-76 only a bare majority of law professors believed that law school exams were "criterion-referenced" and that a substantial majority of the student leaders surveyed believed that these exams were "norm-referenced").

210. In my anecdotal experience these students are frequently women. Cf. Teitelbaum, *supra* note 78 (suggesting that women students may be disadvantaged by male-centered standardized tests); Worden, *supra* note 76 (arguing that legal education disadvantages the "female voice"); Zenoff & Lorio, *supra* note 78, at 891-93 (describing women students' apparent underrepresentation in achieving academic honors at national law schools); see also Menkel-Meadows, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 44-48 (1987) (suggesting that "women may come to apprehend reality in different ways or ask different questions of reality," and that "women's knowledge might contribute to different ways of reconfiguring the legal system"); Project, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1248-51 (1988) (providing some empirical evidence from Stanford women law students that supports Professor Gilligan's thesis about the differences between "masculine" and "feminine" voices). Minority law students, who bring a special experiential knowledge and a considerable passion for justice to their law school classes, also may frequently be members of this disadvantaged group. See Skillman, *Misperceptions Which Operate as Barriers to the Education of Minority Law Students*, 20 U.S.F. L. REV. 553, 556 (1986).

211. These students often include, though they are not limited to, minority students, who frequently have been admitted to law schools with lower Law School Aptitude Test (LSAT) scores than most of their classmates. See Romero, *An Assessment of Affirmative Action in Law School Admissions After Fifteen Years: A Need for Recommitment*, 34 J. LEGAL EDUC. 430, 433-35 (1984). Low LSAT scores constitute merely a statistical prediction of relatively low scores on Blue Book exams, especially in the first year of law school, and they do not measure one's capacity or promise for legal work. See *id.*; Note, *Developments: Minority Attrition in Law School*, 37 J. LEGAL EDUC. 144 (1987).

212. See Bell, *supra* note 9, at 306-09 (suggesting that the cultural background of many minority students may disadvantage them in obtaining high Blue Book grades); Skillman, *supra* note 210, at 556 (suggesting that the focus of minority students on specific personal goals such as social justice may disadvantage them in a Blue Book process that requires an ability "to communicate to

Additional disadvantages of the Blue Book system depend on how extensively the dimensions of the law school experience carry into practice. These disadvantages include the paradigm of good paragraph thinking; the unreflective but prevalent law school philosophy that all law is fact and has nothing to do with values, uncertainty, interpretation, or controversy; the personal tendencies that may result from misinterpretations of the Blue Book experience; and the extreme deference to authority that is taught by our Blue Book system.²¹³ These disfunctions, because they are so deeply and subtly ingrained by Blue Book exams during the law school experience, may be more serious and less remediable in practice than the disadvantages of inadequate skills training and foregone opportunities. At the same time, these aspects of law school mentality may result primarily from the particular social structure of law schools and are perhaps corrected for the most part by the different social structures of practice. At present, we do not have adequate knowledge of the influence that law schools play on practice-based thinking and behavior, and our judgments about the extent and weight of these disfunctions will necessarily involve substantial uncertainty.²¹⁴ Nevertheless, such judgments must be made tentatively if we are to evaluate the modern Blue Book system in a comprehensive way.

The Blue Book system sends law graduates into the many worlds of legal practice with several specific if implicit messages that can distort their views of what constitutes good or high quality legal practice. These messages also clearly influence the views of law professors about what constitutes good teaching as well as good legal practice. These messages include a basic notion that "rules" rather than "practical

the reader that [the student] understands the values of the legal system"); cf. Romero, *supra* note 211, at 434-35 (claiming that law schools should establish special programs to minimize the attrition rate for minority students in order to retain students who will make competent lawyers); Note, *supra* note 211, at 144 (noting that "the rate of dismissal [from law schools] is substantially higher for minority students: 11 percent of minority students are dismissed as against 4 percent of nonminority students").

213. See discussion *supra* Part IV A.

214. Compare Lortie, *Laymen to Lawmen: Law School, Careers, and Professional Socialization*, 29 HARV. EDUC. REV. 352, 363-67 (1959) (noting that the radical separation of theoretical law school work from practical lawyer's work may limit the impact of law school on the socialization of lawyers) with G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 28 (1978). Bellow & Moulton state:

This does not mean, however, that because law schools (until quite recently) have offered very little practical training, all professional socialization occurs in the post-J.D. years. On the contrary, law school plays a critical role in shaping lawyers' understanding of and attitudes towards both law and the profession. Although there has been no further development of Lortie's hypothesis on the consequences of the radical separation of theory and practice in law training, our hunch is that this separation renders the would-be lawyer more vulnerable to the socializing forces of both law school and practice.

Id. (emphasis in original).

judgments" solve problems²¹⁵ and, more subtly, a notion that "legal analysis" requires strict adherence to a careful, precise, and comprehensive analysis of legal forms and objective authorities that avoids general, more abstract, more imaginative, and "nonlegal" considerations.²¹⁶

These messages also promote the idea that quickness, precision, and correctness are the proper ideals for all lawyerly pursuits; this idea diminishes other ideals such as reflection, deliberative action, imaginative analogy, general principles, and tentative or risk-taking behavior. Law students also learn from the Blue Book experience that professionalism entails an abject deference toward principles bearing the marks of professional authority; in other words, that quick, narrow, precise thinking which fits the context of a superior authority is the way to obtain access to personal opportunities and the applause of others.²¹⁷ Above all, each of these messages is consistent with, supportive of, and integrated by the paradigm of good paragraph thinking. Because this paradigm has earned new lawyers access to their profession, it seems likely that many lawyers may remain attached to this paradigm in order to earn subsequent professional rewards as well.²¹⁸

The implicit messages of Blue Book exams may dissipate after law school as lawyers respond to the different social structures of work in the world of legal practice. Lawyers may respond to their new settings in different ways. The best lawyers will abandon or modify the implicit messages of Blue Books as they begin to deal with the complex requirements of practical judgment, interpretive methods, value conflicts, uncertainties, and the inherent controversies of legal practices.²¹⁹ Other, less fortunate practitioners may cope by adopting relatively rigid, work-oriented views that serve the practical requirements of their particular practice but limit their overall legal capabilities. For example, office

215. Cf. T. SHAFER & R. REDMOUNT, *supra* note 45, at 162-68 (describing rule-oriented lecturing in the modern law school classroom); Cramton, *supra* note 4, at 328 (stating that the law school curriculum "is too much of one piece in method, pace, and content: the dissection of appellate cases, two or three per hour, at that intermediate level of abstraction that focuses on rules and process"); Watson, *supra* note 92, at 107-08 (noting that the limited practice experience of law professors, which often has focused around a judicial clerkship, promotes a classroom focus on doctrinal abstractions). See generally Lehman, *supra* note 40 (analyzing the interrelated roles of rules and practical judgment in adjudication).

216. See discussion *supra* Part II.

217. See *supra* note 71 and accompanying text.

218. Cf. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (arguing that scientific paradigms are the major scientific achievements that research communities accept, often implicitly, as the basis for future scientific research; these paradigms, however, constrain the behavior of researchers and can generate substantial if irrational resistance to new ideas and achievements that fall outside the scope of the prevailing paradigm).

219. Cf. D. SCHON, *supra* note 87, at 14-18; Amsterdam, *supra* note 65, at 613-15; Pipkin, *supra* note 120, at 250-52 (noting that professional practice demands involvement with value conflicts, uncertainty, and controversy).

counselors may evolve into strict formalists who believe that the law consists only of certain rules, but recognize the complexity of fact situations and the need in some cases to make complex and controversial arguments.²²⁰ Many litigators, on the other hand, may become rather strict legal realists who do not believe in legal rules at all.²²¹ A third group of lawyers simply follow the messages of Blue Books in their practices, muscling ahead on the authority of professional expertise and benefiting from society's tendency to defer to this idea. These lawyers and their clients may be the most unfortunate victims of the Blue Book experience.

Each reader must draw her own conclusions about the overall values of our current Blue Book system. In my view, the alleged benefits are greatly overstated and, significantly, can be obtained by alternative techniques that allow for better educational practices. Thus, the disadvantages of Blue Book exams substantially outweigh their alleged benefits. Part VI suggests several modifications to the current Blue Book system.

VI. CHANGE

This Part describes a series of cumulative changes to our teaching and examination practices that could mitigate the adverse effects of the current Blue Book system. A few changes may require institutional decisions or commitments, and many clearly would benefit from institutional support. Most of these reforms, however, may be implemented by individual teachers. The changes prescribed are thus reforms of a relatively modest nature. From another perspective, each of these proposals calls for creating preclinical or quasi-clinical teaching methods that may be used in the relatively large classes of American law schools. Even in these classes, we can and should be teaching and examining for professional attributes and skills instead of teaching merely to measure our students' relative examination productivity and self-learning capacities.

These changes could promote a healthy measure of intellectual pluralism in legal education, and more specifically they would help to implement four improvements in legal education. First, conventional legal analysis, or the Blue Book skills, could be taught more effectively through a combination of writing exercises, practice by students, and supervised feedback to students on their performance of these skills. Second, providing increased opportunities for students to engage in

220. Cf. Lehman, *The Influence of the Universities on Judicial Decision*, 10 CORNELL L.Q. 1, 2 (1924) (stating that "[t]he lawyer in this practice deals with concrete cases . . . [h]e seeks primarily certainty in law, so he can advise his client what his legal rights and obligations are").

221. See Kissam, *supra* note 3, at 265.

writing would develop their abilities to present a coherent discourse, in contrast to the Case Analysis/Blue Book paradigm of good paragraph thinking. Third, we should increase our attention to context and theoretical matters that lie behind or beyond doctrine—go “beyond cases”—in both the classroom and in student writings and examinations.²²² Fourth, we should engage in preclinical and quasi-clinical teaching to help prepare our students to work with the clinical skills of fact investigations, interviewing, counseling and negotiation, interpretation, client planning, and advocacy.²²³

A. Practice and Feedback

If the Blue Book skills of issue identification, specification of rules, and the application of rules to complex facts are valuable legal skills, the teachers of doctrinal courses should be providing more instruction, more practice, and individualized feedback on student writing that employs these skills in different doctrinal areas.²²⁴ Many writing exercises are possible, but one direct method is simply to ask students several times a semester to write short ungraded essays (or outlines of essays) based on old examination problems that cover the same issues the students will face on the final exam.²²⁵ Individualized feedback can be provided by a combination of methods that need not unduly tax law school or professorial resources. These methods might include class discussions of the problems; written self-critiques by students after class discussion; peer review of students' work; a review of student essays, outlines, and self-critiques by teaching assistants (if money is available to hire assistants); and cursory reviews of some of the written work by faculty members to ensure that their students and teaching assistants are working generally in the right direction.²²⁶

Law professors traditionally object to offering these sorts of writing exercises because of the large classes at American law schools and the

222. See generally Lindgren, *Beyond Cases: Reconsidering Judicial Review*, 1983 WIS. L. REV. 583; Luban, *supra* note 184; Macaulay, *supra* note 17, at 534-42; Michelman, *The Parts and the Whole: Non-Euclidean Curricular Geometry*, 32 J. LEGAL EDUC. 352 (1982).

223. See generally Amsterdam, *supra* note 65. I owe this point to Marina Angel of Temple Law School.

224. See Feinman & Feldman, *supra* note 4; Motley, *supra* note 4, at 747-60.

225. I have employed this technique in teaching Constitutional Law to upper-class students and Criminal Procedure to first-year students with apparent success. See Bean, *supra* note 131; Kahn, *supra* note 131; Kissam, *supra* note 8, at 164-68 (describing and recommending the use of short, ungraded writing exercises to help teach doctrinal courses).

226. On the educational values of employing law student teaching assistants in legal education, see Trakman, *Law Student Teachers: An Untapped Resource*, 30 J. LEGAL EDUC. 331 (1979). On the need to employ teaching assistants to institutionalize educational reforms in law schools, see Feinman, *Change in Law Schools*, 16 N.M.L. REV. 505, 506-07 (1986); Kissam, *supra* note 8, at 165.

consequent cost of faculty time that would be devoted to writing supervision. As outlined, however, this proposal does not require a significant commitment of faculty time, and any resistance to this kind of teaching in law schools can only be justified on other grounds. I can think of four sources of resistance. First, many faculty may be unwilling to delegate their teaching function to teaching assistants or to students themselves, even though much student learning occurs in any event without faculty supervision.²²⁷ Second, many faculty may sense, at least implicitly, that extended practice and feedback on Blue Book skills will reveal the basic source of their expertise for what it really is: a process that is not terribly complicated or intellectually sophisticated, even if its effective performance requires experience, practice, and repetition along with common sense, practical judgment, and a talent for nuance.²²⁸ Third, many faculty may sense correctly that much practice for and feedback to students on these basic skills will make it more difficult to impose the school's mandatory grading curve on final exam papers.²²⁹ Finally, law faculty may sense, again correctly, that providing midterm criticism of the students' individual written work may have adverse effects on the students' subsequent formal evaluations of the professor's teaching, an evaluation that typically occurs right before law students write and are graded on their Blue Book exams.²³⁰

The first two factors are matters of false professional pride and should not be allowed to obstruct reasonable educational reforms.²³¹ Faculty concern about their execution of mandatory grading curves is a more substantial problem for the implementation of exam practice and feedback. This concern could be alleviated, however, by a law school's decision to modify the harsher aspects of its grading curve for classes in which writing exercises are employed.²³² Perhaps the mandatory curve could be modified substantially for all upper-class courses, for by this time class ranks have been established and grades are no longer as im-

227. See Kissam, *supra* note 8, at 165-66.

228. See D. KENNEDY, *supra* note 103, at 26-28.

229. See Feinman & Feldman, *supra* note 51, at 924-30; Kissam, *supra* note 8, at 162-63; Roberts, *supra* note 85, at 224.

230. See Kissam, *supra* note 8, at 148-49. On the nature and use of student evaluations in law schools, see Roth, *Student Evaluation of Law Teaching*, 17 AKRON L. REV. 609 (1984). On the importance of these evaluations to the work and careers of at least some law professors, see Kissam, *supra* note 3, at 272-75, and *Harvard Professor Protests Colleagues' Tenure Denials*, N.Y. Times, June 9, 1987, at A-14, col. 2 (quoting Robert Clark of Harvard Law School on the denial of tenure to two critical legal studies professors: "Neither of those people were very good teachers . . . [b]oth were among the bottom ten percent in student ratings").

231. See Kissam, *supra* note 8, at 165-66.

232. Cf. *id.* at 162-63 (recommending that mandatory grading curves be modified to accommodate general use of take-home examinations as a means of promoting better education).

portant for their material consequences.²³³ In any event, a mandatory curve can be imposed on almost any kind of written performance, especially time-limited Blue Book exams, even if the quality of student performance is improved overall by practice and feedback. While it does seem unfair to give the same low grades for better performances, law students will be better off with increased learning from practice and feedback. Finally, faculty concerns about adverse effects on student evaluations of their teaching is understandable. These concerns could be alleviated by an institutional decision to individualize the student evaluations of teachers, which would avoid imposing bad teaching practices on students because of bureaucratic accountability.²³⁴ In any event, individual teachers, especially if tenured and experienced, should be able to get around this obstacle at little permanent cost.

B. *Different Grading Practices*

Three changes to grading practices could help alleviate the bad effects of our current Blue Book system. First, law schools should revise their grading scales to reduce the number of required distinctions in the grades of individual courses, or they at least should modify these scales for courses in which writing exercises are employed in addition to or instead of Blue Books. This change would encourage the use of writing exercises, either as practice for Blue Book exams or as alternative graded work, because faculty members no longer would be required to impose so many different grade distinctions upon the evaluated work of their students.²³⁵

Second, law schools should revise their mandatory grading curves, either for all classes or for those in which significant writing exercises are used, in order to allow higher grades and more flexible grading patterns. This modification would also encourage the use of writing exercises because faculty members no longer would be required to impose as many low grades on the individual written work of students, which is generally more coherent than Blue Book essays written by the same students.²³⁶ In addition, more flexible and more humane grading curves could help faculty members to correct the common misinterpretation by students that law school grades are an authoritative measure of their professional promise and personal worth.²³⁷ This proposal does not re-

233. See Cramton, *supra* note 4, at 328-29 (noting that first-year grades control the distribution of law school "goodies").

234. See Kissam, *supra* note 3, at 310.

235. See *supra* text accompanying note 229.

236. See Kissam, *supra* note 8, at 163.

237. See *supra* Part IV A (describing student misinterpretation of grades as indicators of professional quality).

quire that every student receive an A or that class ranks be abolished. It only suggests that law schools examine the reasons for their current grading curves, which often limit the "good" grades to less than half of all grades. Law schools may wish to consider whether something like the Harvard model of twenty percent As, sixty percent Bs, and twenty percent Cs²³⁸ or the more flexible grading patterns at other national schools²³⁹ would not make sense as a more adequate mechanism of self-regulation that allows for more writing by students and more diverse teaching practices.

Third, individual faculty members should consider switching from objective grading methods to an Aristotelian style of reading and evaluating student written work. This change could promote better student writing and more learning-by-writing; it also would make reading traditional Blue Book essays a more enjoyable and informative process for faculty. The Aristotelian style of reading and evaluating student written work already is employed in law school clinics.²⁴⁰ This style is appropriate for reading and evaluating seminar papers because the Aristotelian approach, especially when used with ungraded first drafts, is more likely to elicit creative work by students and helpful, creative commentary from faculty.²⁴¹ Might not many of these same benefits, though in different forms, accrue from applying the Aristotelian method to Blue Book exams as well?

Thus, the Aristotelian approach should be extended to reading final examinations in doctrinal courses, whether these are Blue Book essays, take-home examinations of extended duration, or other kinds of student writing. If students know that their work will be evaluated by the same standards that are applied in clinics, seminars, and legal practice, they are more likely to think and write in an organized, imaginative, and critical way. Furthermore, the Aristotelian approach to grading exams is likely to be more enjoyable for the faculty member, more informative about the potential qualities of our students, and more generative of feedback to students about how they might improve

238. See *supra* note 105 and accompanying text.

239. For example, Boalt Hall, Buffalo, and Yale law schools have developed grading systems that have reduced the number of grading categories. See 81 BOALT HALL, ANNOUNCEMENT FOR ENTERING STUDENTS, at 9 (Sept. 1988) (High Honors, Honors, Pass and Fail grades); STATE UNIVERSITY OF NEW YORK AT BUFFALO, FACULTY OF LAW AND JURISPRUDENCE 1986-88 BULLETIN, at 8 (1988) (Honors, Qualified, Marginal, and Fail grades); YALE LAW SCHOOL, INFORMATION AND APPLICATION FORMS FOR CLASS ENTERING SEPTEMBER 1988, at 2 (1988) (Credit/Fail grading first semester; Honors, High Pass, Pass, and Fail grades thereafter).

240. See, e.g., Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 132-34 (1979); Carr, *Grading Clinic Students*, 26 J. LEGAL EDUC. 223, 225-27 (1974); Klineberg & Barnes, *supra* note 101, at 27-29, 40-42.

241. See Kissam, *supra* note 8, at 168-70.

their future performance of the examination functions.²⁴² Of course, a switch to an Aristotelian grading style would be enhanced considerably if the proposed changes to grading scales and mandatory curves are implemented because these changes would alleviate the professor's need to impose many grade distinctions, which invite the use of objective grading methods. This reform, however, is quite possibly within the reach of many faculty members who could change their grading styles without any institutional support or endorsement.

Critics will raise the objection, of course, that Aristotelian grading is less consistent in application and thus unfair to individual students. Critics also will complain that grades under this method are more difficult to explain. Aristotelian grading might take additional time to explain,²⁴³ but law professors in general do not seem to have much trouble justifying their grades on seminar papers or clinical work, so why should we avoid this grading process elsewhere? This analysis does suggest that Aristotelian methods might be employed more easily in upper-class courses, at least initially, especially if faculty members grade in this fashion without explicit institutional endorsement. Still, if the Aristotelian method of grading is accompanied by changes in the teaching focus, examination questions, and types of examinations in upper-class courses, even this limited change could do much to improve the nature of legal education.

C. *Different Kinds of Questions*

With these proposed reforms in place, especially those of practice, feedback, and Aristotelian grading, law professors would be in a better position to experiment and diversify with different kinds of examination questions. While some diversification already is taking place,²⁴⁴ the proposed reforms would help law professors understand the purposes and values of different examination questions. The proposed reforms also would help professors explain the purposes and values of different examination questions to their students.

First, law professors probably should be using more rather than fewer short-answer questions on traditional Blue Book exams. In the 1920s Professor Benjamin Wood demonstrated at Columbia Law School how the examination purposes of the Columbia law faculty could be

242. See *supra* text accompanying notes 41-42.

243. The best way to explain grades under the Aristotelian method might be to send short letters to each student outlining the examiner's application of the standards of professional performance to the examination. Cf. Kissam, *supra* note 8, at 169 n.96 (recommending Elaine Maimon's idea of using letters or some other written critique to explain grades on final versions of student papers after a student and professor have collaborated on initial stages of the work).

244. See Macdonald, *supra* note 15, at 569-70.

achieved more effectively and students graded more consistently by the use of well-designed short-answer questions in place of the traditional Blue Book essay.²⁴⁵ The modern Blue Book exam's focus on testing for just three functions—issue spotting, rule specification, and rule application—seems ideally suited for short-answer questions because this focus apparently is narrower than the examination purposes of the Columbia law faculty in the 1920s.²⁴⁶ Furthermore, short-answer Blue Book exams are better suited for comprehensive testing of the many doctrinal rules that modern professors encourage their students to learn.

Of course, a traditional objection to short-answer questions is that law faculty do not have the expertise to construct well-designed questions that can test for complex issue spotting and analysis.²⁴⁷ This same lack of expertise, however, may apply to designing essay questions as well.²⁴⁸ Moreover, if short-answer questions to test for a comprehensive knowledge of doctrine were accompanied by the use of non-Blue Book writing exercises to test students on complex analysis,²⁴⁹ professors would not have to worry as much about the consequences of inept short-answer questionmaking.

Second, if Blue Book essays are employed, the Aristotelian grading style would allow the professor to contemplate many different kinds of questions for exams in doctrinal courses. For example, given flexibility in evaluating Blue Books, law faculty members should be willing to create a broader range of questions concerning the exposition and interpretation of complex authority, the construction of complex legal arguments, counseling and planning issues, ethical issues, and legal theory.²⁵⁰ To be sure, the time constraints of Blue Book exams will limit the quality of student responses to these questions, but the students will have learned more about these broader issues from their review process (and perhaps from their writing Blue Book exams) than they currently do under a system that is so heavily oriented towards Blue Book objectivism.²⁵¹

245. Wood (pts. 1-3), *supra* note 4.

246. Compare *id.* (pt. 1), at 226-34 (describing the examination purposes at Columbia in the 1920s) with discussion *supra* Part II (describing contemporary examination purposes in law schools).

247. See *supra* text accompanying note 54.

248. See Nickles, *supra* note 4, at 443-51.

249. See discussion *infra* Part VI D.

250. See Macdonald, *supra* note 15, at 570.

251. Cf. Berthoff, *I.A. Richards*, in *TRADITIONS OF INQUIRY* 50, 52 (J. Brereton ed. 1985) (suggesting that "[i]ndeed, the old formula—students can only write as well as they can read—may be reversed as teachers come to understand what it means to say that writing is a mode of learning: *students can read only as well as they can write*" (emphasis in original)); Kissam, *supra* note 8, at 140-41 (describing the learning process that can occur in the course of serious writing). In other words, if we change what students must write on Blue Books, we may be able to change the ways

Third, law school professors should consider giving their students choices of questions on which to write. This reform has two advantages. The professional promise of students could be assessed on the basis of their relative strengths and interests in a particular subject. Perhaps more significantly, the faculty member's interest in reading and evaluating student answers might be maintained by reading essays on the different subjects that her students choose to address. If tedium and boredom are relieved, professors might become more insightful and helpful examination readers, as well as more enthusiastic teachers and persons.²⁵²

D. Different Sorts of Examinations

The most important changes to educational practices would be achieved by diversifying the kinds of student writing that we evaluate in basic doctrinal courses. Blue Books at best constitute a very limited form of instrumental writing.²⁵³ The severe time constraints require one to transfer immediate thoughts directly to printed or written form, with little or no opportunity for the writer to reflect on and obtain creative feedback from partial writings as in a more complete and serious writing process. Further, as a consequence of this instrumental quality, Blue Books encourage the paradigm of good paragraph thinking as the only way to think about the law, the legal process, and legal analysis. These limitations of Blue Book exams could be mitigated by requiring alternative kinds of student writing in basic courses.

Take-home examinations of extended duration, ideally of two or three days (in some cases perhaps longer), would provide a better educational experience for learning analytical skills and at least some kinds of legal doctrine.²⁵⁴ This kind of writing also should provide readers with essays that are much better organized than Blue Book essays, and thus the reader is more likely to develop a favorable assessment of the students' general potential as practicing lawyers. Of course, the evaluation of take-home questions that approximate Blue Book questions is more difficult to fit into a grading curve with many gradations, and some institutional reform of a school's grading scale and grading curve may be necessary or helpful.

In addition, law professors should consider evaluating students in basic doctrinal courses by combining traditional Blue Book evaluation with clinic or seminar evaluation. In other words, professors might com-

in which they read and learn in their daily study and reviews, if not in the exam writing itself.

252. See discussion *supra* Part IV B.

253. See Kissam, *supra* note 8, at 138-39, 143.

254. *Id.* at 158-63.

bine relatively short (one- or two-hour) short-answer final exams with requirements that students also write short papers, short research memorandums, or short take-home essays on assigned questions. This combination of evaluative methods would provide the traditional Blue Book value of covering doctrine while offering many of the educational advantages of take-home examinations. Of course, this change, like my proposal for take-home exams, could be accomplished more easily if the proposed reforms to grading practices were already in place.

E. A Note on Teaching Styles and Materials

The use of exams to help teach and examine discourse writing, legal theory, and clinical skills should be accompanied by changes in classroom teaching styles and philosophies. As professors experiment with new approaches to teaching the mainstream subjects of American law, we will need to rethink the regulatory style of our so-called Socratic dialogues,²⁵⁵ our extensive "Socratic monologues" or disguised case lectures,²⁵⁶ and our pure text-bound lecturing on the many complex aspects of contemporary doctrine.²⁵⁷ Instead, different kinds of lectures, different sorts of conversations,²⁵⁸ and, importantly, different types of reading materials²⁵⁹ will become appropriate and necessary to

255. On the regulatory style of our classroom dialogues, see T. SHAFFER & R. REDMOUNT, *supra* note 45, at 162-68; Dillon, *Paper Chase and the Socratic Method of Teaching Law*, 30 J. LEGAL EDUC. 529 (1980); Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970); Savoy, *Toward A New Politics of Legal Education*, 79 YALE L.J. 444, 457-60 (1970); Watson, *supra* note 92, at 119-32.

256. See Cramton, *supra* note 4, at 328 (describing the "Socratic monologue" or "avuncular Socratic method").

257. See T. SHAFFER & R. REDMOUNT, *supra* note 45, at 162-68.

258. See Calleros, *Variations on the Problem Method in First-Year and Upper-Division Classes*, 20 U.S.F. L. REV. 455 (1986) (suggesting assignment and discussion of periodic review problems); Cole, *The Socratic Method in Legal Education: Moral Discourse and Accommodation*, 35 MERCER L. REV. 867 (1984) (advancing a conception of the Socratic method as a "moral education"); Kahn, *supra* note 131 (suggesting research writing problems and small group discussions to teach doctrine in large classes); Feinman & Feldman, *supra* note 4, at 537-44 (suggesting a mix of lectures, small group sessions, practice problems, and mastery learning examination techniques to help teach contracts and tort law); Menkel-Meadow, *Women as Law Teachers: Toward the "Feminization" of Legal Education*, in ESSAYS ON THE APPLICATION OF A HUMANISTIC PERSPECTIVE TO LAW TEACHING 16, 22 (1981) (characterizing her classroom style as the production of a "tossed salad" of ideas from different persons in the classroom); Stone, *supra* note 71, at 406-18 (describing educational problems with the rigorous or regulatory use of the Socratic method, which is destructive and not constructive of moral values; noting potential dangers in a mere "permissive" use of the Socratic method; and suggesting that faculty members bring some of their "firm ideological positions" from scholarship into the classroom and that they organize "student projects which promote cooperation, which allow self-selection, which test value orientations, [and] which permit students to make use of relevant expertise they already possess").

259. See Kissam, *supra* note 3, at 303-07; Laycock, *Reflections on Two Themes: Teaching Religious Liberty and Evolutionary Changes in Casebooks* (Book Review), 101 HARV. L. REV. 1642, 1652-55 (1988).

legal education. In other words, if we want law students to engage substantially in a process of coherent and contextual thinking and writing, then both our reading materials and classroom efforts must become more coherent and contextual in order to support our general purposes.

This is not the place to speculate about these experiments, but at a minimum professors will need to develop and employ coherent texts. We also will need to develop a new ethic under which law students will be responsible for learning themselves by reading these texts. We must prepare students to be examined on this learning even if the material has not been covered in a law school classroom.²⁶⁰ In other words, we must move away from the discipline of many classroom hours and the ideal that all learning must be centered around what the professor says.

VII. CONCLUSION

The Blue Book world depicted in these pages should be changed, yet it will be difficult to make effective changes primarily because of the vested interests, false consciousness, and easy rationalizations that also have been described. How, then, might one persuade others to engage in effective changes?

Professor Richard Rorty has argued recently that much philosophical enterprise consists of attempts to persuade others to change their ways of thinking and acting by inventing new metaphors, new languages, and new perspectives about old subjects, even though these new ideas and concepts must inevitably be built upon and constrained by the older languages, perspectives, and interests.²⁶¹ Perhaps one could do this with Blue Book exams by suggesting new metaphors to describe our current predicament.

In one view, the contemporary Blue Book system may be seen as a manifestation of the increasing commercialization of the legal profession. The dramatic expansion of corporate law firms in the past two decades, which seems to result from economic needs to serve complex clients and provide specialized legal services,²⁶² has imposed new pressures on law school examination and grading practices. First, the needs of large firms for young associates who are capable of performing complex but routine cognitive work with limited supervision from more ex-

260. See *supra* note 142; see also Laycock, *supra* note 259, at 1655; cf. Berthoff, *supra* note 251, at 52 (suggesting that if students are required to write they may begin to read in a critical fashion).

261. Rorty, *The Contingency of Community*, LONDON REV. BOOKS, July 24, 1986, at 10-14; Rorty, *The Contingency of Selfhood*, LONDON REV. BOOKS, May 8, 1986, at 11-16; Rorty, *The Contingency of Language*, LONDON REV. BOOKS, April 17, 1986, at 3-6.

262. See Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 VAND. L. REV. 683, 684-88 (1988).

perienced lawyers presumably has increased geometrically. This need, of course, has increased the demand by these firms for associates who have demonstrated a capacity and talent for productivity and self-learning, which Blue Books measure best. Second, the creation of the megafirm also has caused many firms to expand their interviewing to regional and local law schools that previously had sent only a few students to large corporate firms. Although these schools still may send only a fraction of their students into the corporate world, unlike national law schools,²⁶³ these schools must now generate disaggregated class ranks that measure productivity and self-learning in order to serve the basic interests of the large firms and students who are interested in working for these firms. But commercialization of many law firms need not and should not produce a parallel commercialization of legal education. To let this happen would be to let our public interests be harnessed by the private interests of the few: the large corporate firm and those who work in this environment.²⁶⁴

In another view, one of longer duration, our contemporary Blue Book system may be seen as the ultimate development of a classical law school discipline. From the perspective of Michel Foucault, the Blue Book system works with an admirable or terrible rationality to supervise the minute details of law student lives in order to transform our students into productive and subjected bodies—in other words, a “useful force.”²⁶⁵ Like the eighteenth-century inventions of military barracks, factory workplaces, and the modern school, the classical discipline of law schools results from an attempt to supervise almost everything about our students’ lives and thoughts through long reading assignments; many carefully timed class hours per week; the amphitheater classroom; our close and skeptical questioning; and a competitive examination system with its puzzling and fragmentary contexts of casebooks, treatises, and many-layered discussions. We probably cannot avoid discipline in the modern university, and any discipline will have its dark sides.²⁶⁶ But the classical discipline manifest in our Blue Book system does seem unnecessarily harsh and inhumane, and we should strive instead to develop pluralistic disciplines within university law schools.

263. See *Bok Assails Gaps in Pay in Vital Jobs*, N.Y. Times, June 10, 1988, at A16, col. 3 (reporting Derek Bok’s 1988 commencement address in which he stated that 96% of Harvard law graduates enter private law firms).

264. Cf. R. LUSTIG, *CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY 1890-1920*, at 7-12 (1982) (claiming that the modern corporate organization harnesses public interests for the private interests of the few).

265. See M. FOUCAULT, *DISCIPLINE*, *supra* note 2, at 26, 135-228.

266. See generally M. FOUCAULT, *Two Lectures*, *supra* note 2.

Finally, let us consider the metaphor of community and the ethics of our responsibilities to different communities.²⁶⁷ The law professor, intentionally or not, assumes responsibilities to one or more of several personal and professional communities. These communities include our students; sectors of the legal profession such as corporate firms, small general practices, or the criminal defense bar; the law school or university; and broader social groups as well. This analysis of Blue Book exams suggests that there is a serious and inappropriate imbalance in professorial service to these various communities, and that this imbalance has been constructed by our unthinking adherence to a conservative examination system. The present Blue Book system serves mainly corporate law firms and their clients, and it may serve these interests in less than optimal fashion. Perhaps we can change this system if we try to think more as teachers rather than scholars and attend to our proximate community—the community of all students, their interests, and the varied social groups to which our students and our profession can and must relate.²⁶⁸

267. See Shaffer, *supra* note 184 (contrasting Aristotelian, Kantian, and Buberian approaches to ethics and recommending that an ethics of relationships with others and with communities, which may be derived from the work of Martin Buber and H. Richard Niebuhr, should be applied to questions of law school ethics); cf. C. GILLIGAN, *supra* note 76; Menkel-Meadow, *supra* note 210, at 44-49 (suggesting that women in general may approach the resolution of ethical and legal issues in a more contextual and more interdependent fashion than men).

268. See Savoy, *supra* note 255, at 447-48. He states:

For myself, the only way to grow is to take risks and experiment. . . .

If any real learning is to go on in our schools (and I take it that is what we are all concerned about), then our first responsibility must be to the human beings who live in our academic house, not to the Bar, or the profession, or the alumni.

Id.