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Thinking (By Writing) About Legal Writing

Philip C. Kissam

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ESSAY

Thinking (By Writing) About Legal Writing

*Philip C. Kissam**

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“If you can’t write history, you
don’t know history.”—Richard Marius†

I. INTRODUCTION

The practice of law requires a good amount of original writing, and it is a commonplace today that much of this writing is done rather poorly. Charles Fried, the United States Solicitor General, has implied that much legal writing, especially in appellate briefs, is “turgid and boring.”¹ John Nowak, a Professor of Law at the University of Illinois, has reiterated Fred Rodell’s classic complaint

* Professor of Law, University of Kansas. Laura Fine has provided excellent research assistance, and I am thankful to Martha Coffman-Gallagher, Rob Glicksman, Bob Jerry, Lisa Jerry, Rick Levy, Jerry Masinton, Sandy McKenzie, Neil Salkind, Sid Shapiro, and Peter Schanck for their many helpful comments on drafts of this paper. The University of Kansas General Research Fund and the Gensman Fund, University of Kansas School of Law, provided financial assistance for this project.

† Professor of History and Director of the Expository Writing Program, Harvard College. I quote from a talk on writing that Professor Marius presented at the University of Kansas, Lawrence, Kansas, on April 9, 1985.

1. *Of Power and the Law*, N.Y. Times, Dec. 28, 1985, at 9, col. 3, (late ed.) (quoting Charles J. Fried).

that the writing in law reviews lacks both style and substance.² More fundamentally, Steven Stark, in his *Harvard Law Review* comment, has argued that the style and substance of most legal writing are flawed by lawyers' ideological commitments to ritualized notions of authority and legal formalism.³ Robert Hyland, responding in the *Pennsylvania Law Review*, has argued that Stark's view is utopian; Hyland claims that the trouble with current legal writing lies instead with the failure of contemporary lawyers to engage in conceptual thinking.⁴

I want to approach legal writing from a different perspective. This perspective focuses on the writing process rather than its products, although what I shall say in this Essay is also relevant to substantive and stylistic concerns. I shall argue that there are two basic dimensions to the writing process: the "instrumental" and "critical" dimensions. Instrumental writing is designed to convey independently conceived ideas in a written form. Critical writing, by contrast, involves the writing process itself as an important source of substantive thought. These dimensions certainly overlap in most writing projects, but attention to the separate dimensions may yield some rich insights into the nature of legal writing.

Lawyers, law professors, and law students appear to have many difficulties in understanding and engaging in the critical dimension of legal writing. The reasons for these difficulties include our infrequent use of the critical dimension, the economics of law practice and legal education, the very nature of our professional expertise, the predominantly oral culture of our profession and schools, and often our failure even to perceive the critical dimension of legal writing. The task of critical writing, however, is important for lawyers, and especially for students, because the critical writing process can improve significantly the quality of legal analysis, legal interpretation, and legal thought in general. An understanding of the critical dimension in legal writing thus could

2. Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 317 (1985). See Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936); Rodell, *Goodbye to Law Reviews-Revisited*, 48 VA. L. REV. 279 (1962). But cf. *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984) (analyzing the new "critical legal studies" scholarship); Symposium, *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981) (analyzing new developments in contemporary legal scholarship).

3. Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984).

4. Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599 (1986). See also Re, *Legal Writing as Good Literature*, 59 ST. JOHN'S L. REV. 211, 218-19 (1985) (criticizing Stark's view that lawyers' bad writing serves their economic interests).

do much to improve the general quality of legal education and legal practice.⁵

The first part of this Essay analyzes the distinction between critical and instrumental writing and the implications of this distinction for legal education and legal work. The second part explains the difficulties that lawyers, law students, and law professors seem to have with the varied aspects of critical legal writing. The third part offers some recommendations about how lawyers, law professors, and students might work individually and collectively to improve their skills and practices in critical legal writing.

This Essay focuses on writing in law school rather than on legal writing in general. Writers of all sorts, however, should be interested in this discussion for two reasons. We begin to form our professional habits in law school, and some reflection upon these habits, including writing habits, should help to improve the quality of our work.⁶ In addition, many of the ideas in this Essay, with modification for a particular context, undoubtedly can be applied to other areas of legal practice and writing.⁷

5. At this point, I should recognize my substantial debt for many of the ideas in this Essay to the "writing across the curriculum" movement. This movement has arisen in American universities during the past decade in apparent response to the perceived inabilities of contemporary college students to think, to analyze, and to write. See Symposium, *Writing Across the Curriculum*, 1983-84 CURRENT ISSUES IN HIGHER EDUC., Issue #3. My thinking about and experiments in the classroom with ideas from this movement have been particularly influenced by several conversations with Haskell Springer, Professor of English, University of Kansas; by a talk on writing across the curriculum given by Professor Richard Marius of Harvard University, see *supra* note †; and by the ideas of Peter Elbow, Professor of English, State University of New York at Stony Brook, see P. ELBOW, *WRITING WITH POWER* (1981); Elbow, *Teaching Thinking by Teaching Writing*, CHANGE, Sept. 1983, at 37. Cf. Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875 (1985) (describing the development of a first-year course combining contracts, torts, and legal research and writing in which short writing exercises were used to enrich the study of substantive law); Gross, *On Law School Training in Analytic Skill*, 25 J. LEGAL EDUC. 261 (1973) (arguing that law schools should give writing tasks more emphasis in order to teach legal analysis).

6. See D. SCHON, *THE REFLECTIVE PRACTITIONER* (1983) (arguing that the best practitioners in various professions develop their skills through continual reflection about the uncertainties, complexity, and value conflicts that confront them in practice situations); Gross, *Intellect Beyond the Law: The Case of Legal Education*, 33 CLEV. ST. L. REV. 391, 422-34 (1984-85) (making a similar argument with regard to legal practice). The idea that professional knowledge is acquired in major part by reflection upon one's practices and experience is not a new one. See, e.g., C. DUFFY, *THE MILITARY LIFE OF FREDERICK THE GREAT* 300 (1986). In Frederick's view, the principles of warfare were to be acquired in part "from a continuous evaluation of one's own experiences, and the officer who failed to make this effort would end his days like the pack mule who followed Prince Eugene on his campaigns, and remained just as ignorant as when he set out." *Id.*

7. See *infra* text accompanying notes 99-108.

II. CRITICAL AND INSTRUMENTAL WRITING

In many circumstances, thought and communication can be viewed analytically as separate functions. Consider, for example, the negotiation and the writing of a simple contract or the research and the writing of a memorandum that describes how state securities laws are likely to be applied to a particular issue of new securities. Or consider the writing of the separate parts of more complex legal documents, such as merger agreements or appellate briefs. In these cases, we can imagine a thinking process that takes place prior to the communication of thoughts to others. This thinking need not occur in fact prior to the process of writing, but if the thinking could be performed at a prior time, then the subsequent or related writing may be thought of as "instrumental" in the sense that it is designed merely to convey our thoughts efficiently and effectively to others.

Instrumental writing is often a difficult task because it must convey thoughts, information, and analysis without the benefit of the valuable context that oral communication provides through the dialogue between speaker and listener. Moreover, instrumental writing is important to the law because many legal transactions should be stated as accurately and precisely as possible in some kind of relatively permanent form.⁸ Nonetheless, with instrumental writing we are concerned primarily with the finished product of the writing and not at all with how the writing process might affect favorably or help create the very substance of our written thought. In other words, with instrumental writing we are concerned with the process only to the extent that the conventions and rules of grammar and vocabulary are applied correctly to thoughts that could be communicated orally but for considerations of efficiency and effectiveness.

The concept of instrumental writing is pervasive in American legal education and, I suspect, in the writing practices of most American lawyers. Importantly, this concept supports a corollary principle that the teaching and learning of legal writing can and should be kept independent from other aspects of legal education. That is, while a basic legal vocabulary and legal thought can be taught orally by professors, the basic rules of grammar, vocabulary, and written construction should be taught independently by

8. For example, the parol evidence rule of contract law places a premium on drafting contracts that reflect the understandings of parties accurately and precisely.

experts in these fields—English teachers.⁹ Some attention in law schools might be paid to learning about and practicing with the different forms of legal writing, but this work can and should be done in a separate course that is taught primarily by upper-class students, law librarians, or other instructors who are recent graduates.¹⁰

The educational practices in American law schools reflect this premise that the acquisition of legal writing skills can be kept separate from other aspects of legal education. The basic learning in law schools is supposed to take place primarily on an oral basis. This learning occurs in large classes that consist of lectures and so-called Socratic dialogues between teachers and students.¹¹ This learning also occurs through the process of preparing for and writing time-limited “Blue Book” examinations, which function as a substitute for the oral examinations that were employed in medieval universities.¹² The contemporary law school typically offers a single required course in legal research and writing, a course that often emphasizes the acquisition of research techniques and the use of basic legal forms.¹³ Law schools today also offer a few seminars in which writing may be featured, certain clinics in which writing may be emphasized, and perhaps a single upper-class writing requirement as a nod towards the specialized teaching interests of individual faculty and a response to the currently perceived “crisis” in legal training.¹⁴ In general, however, writing is deem-

9. See, e.g., Prosser, *English As She Is Wrote*, 7 J. LEGAL EDUC. 155, 159-60 (1954); cf. Botein, *Rewriting First Year Legal Writing Programs*, 30 J. LEGAL EDUC. 184, 187-88 (1979) (arguing that one goal of law school writing programs should be to secure basic English composition skills, a task best accomplished by specialized writing teachers).

10. See generally Carrick & Dunn, *Legal Writing: An Evaluation of the Textbook Literature*, 30 N.Y.L. SCH. L. REV. 645, 645-60 (1985) (summarizing “legal writing in the law school curriculum”).

11. See R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 20-247 (1983) (describing the historical development of American law schools). Law professors, of course, have misappropriated the concept of a Socratic dialogue. See Dillon, *Paper Chase and the Socratic Method of Teaching Law*, 30 J. LEGAL EDUC. 529 (1980).

12. See generally Motley, *A Foolish Consistency: The Law School Exam*, 10 NOVA L.J. 723 (1986) (describing and evaluating law school examination practices); Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411 (1977) (same).

13. Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 550-52 (1973); see generally Boyer, *Legal Writing Programs Reviewed: Merits, Costs and Essentials*, 62 CHI.-KENT L. REV. 23 (1985) (describing and evaluating three basic models of teaching a first-year legal research and writing course: a faculty model, the associates-in-law model, and the teaching assistant model).

14. See, e.g., R. STEVENS, *supra* note 11, at 166 n.24 (describing “seminars” in modern American law schools); Barnhizer, *The Clinical Method of Legal Instruction: Its Theory*

phasized in law schools because it is considered a skill that should be acquired prior to law school and one that can be polished only when a writer is working daily with the forms of some legal specialty in practice.

This focus on instrumental writing misses the fundamental point that the writing process itself can serve as an independent source, or critical standard, that alters and enriches the nature of legal thought. Consider, for example, the need to interpret or synthesize some related judicial opinions in order to establish one or more standards that will function to organize, explain, and justify these decisions. Or consider the need to establish an estate plan for a client who has a relatively complex set of assets and business interests and who desires to support (or not to support) various relatives. In such cases, the actual writing of the analysis, be it an appellate brief, law review article, memorandum, or estate plan, will allow *the writer as thinker* to develop new connections or new ideas about what the law is and how it should be applied in particular situations.

The critical writing process appears to work in the following manner. A continuous and reciprocal feedback can occur between a writer's partially completed text or texts and her thoughts, memories, and instincts about a chosen subject. This feedback can enrich the writer's vision and stimulate her perception of connections between different elements in a complex picture, especially as she reviews partially stated written elements within the context of her overall knowledge and experience. In Richard Marius' arresting phrase, the critical writing process allows a writer's mind to function like a "radar scope that plays continually over one's own text" in ways that can force the writer to confront and control hard issues more directly and more creatively than is possible with non-written thought.¹⁵ This special perspective thus can enhance the creation of new thoughts, the articulation of complex thoughts, and the recognition of the subtleties, nuances, and qualifications that are so important to the art of lawyering. In sum, the critical dimension of the writing process encourages a writer, by herself and possibly with the assistance of others, to enter into a sustained

and Implementation, 30 J. LEGAL EDUC. 67 (1979) (describing the clinical method in American legal education); Bridge, *Legal Writing After the First Year of Law School*, 5 OHIO N. U. L. REV. 411, 423-24 (1978) (summarizing upper-class writing requirements at a representative sample of American law schools); Stark, *supra* note 3, at 1389 (describing Harvard's offer of new writing courses in its current attempt to improve legal training).

15. See *supra* note †.

and serious dialogue about the subject under consideration. This dialogue can generate a much fuller and richer consideration of contradictory evidence, counterarguments, and the complex elements of a subject than is ever possible in oral communications alone or in a strictly instrumental process of legal writing.¹⁶

The critical writing dimension (and thinking about writing as critical writing) is thus an integral aspect of effective legal analysis. The critical dimension is essential to many types of legal practice, and it should be essential to most areas of legal education. If beginners do not develop an instinctive habit of learning, developing, and applying the law through a critical writing process, they are less likely to be interested in or capable of engaging in the continual task of learning, creating, and applying the law by writing when they enter practice. Unfortunately, the structure of American law schools, which emphasizes oral learning and deemphasizes written learning, suggests that law schools are doing a relatively poor job of preparing lawyers to engage in effective legal practice.¹⁷

III. WHY LAW SCHOOLS HAVE FAILED

Law professors and law school administrators traditionally have given two reasons for the lack of writing opportunities in law school. One is that the proper experts for teaching writing to lawyers are English teachers, who are expected to perform this function in the schools and colleges that students attend prior to law school and—perhaps—in remedial writing classes in law school.¹⁸ The other reason is that the limited funding of law schools, which has produced relatively high student/faculty ratios by comparison to other university graduate departments, makes it impractical for overburdened law professors (or anybody else for that matter) to provide much writing experience for their students.¹⁹ These reasons, however, are either misleading or wrong. Better and deeper

16. See P. ELBOW, *supra* note 5, at 47-175 (describing several techniques of "creative" and "critical" writing in which a writer's frequent reviews of her partial texts and the review of these texts by others play a crucial role in the development of good writing).

17. For some evidence of the contemporary concerns about the quality of lawyer training, see 1979 A.B.A. SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, *Lawyer Competency: The Role of the Law Schools*; Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695.

18. See, e.g., Carrick & Dunn, *supra* note 10, at 653-54; Prosser, *supra* note 9, at 159-60.

19. See, e.g., Brand, *Legal Writing, Reasoning & Research: An Introduction*, 44 ALB. L. REV. 292, 294 (1980); Moreland, *Legal Writing and Research in the Smaller Law Schools*, 7 J. LEGAL EDUC. 49, 51-52 (1954).

explanations exist for the failure of law schools to employ the writing process as an effective learning device. If we can begin to understand these factors, perhaps we can begin to construct effective reforms of an undesirable situation.

The first conventional reason—that English teachers should teach writing and law professors should teach law—is wrong because it ignores the fundamental contribution to learning that can result from a commitment to critical legal writing. Nevertheless, it is instructive to ask why law professors have ignored or simply missed seeing this aspect of writing as thinking. The second conventional reason—that resources are limited—is perhaps more to the point, but it too deserves further inquiry. Why have law professors and their administrators been willing to accept or tolerate relatively high student/faculty ratios in law schools since the end of the nineteenth century? Inquiry into these conventional reasons for limiting law school writing reveals an interesting, if complex, set of social and ideological factors at work in the legal academy. On the one hand, these factors are certainly sources of resistance to any change in law school ways. On the other hand, perhaps these factors can be restructured to support desirable changes in our educational practices.

Historically, the emphasis upon oral rather than written communications in American law schools does not seem to depend fundamentally upon either the English teacher or the limited resources rationale. These rationales always have been available, of course, but a better explanation can be obtained by considering the particular kinds of acts that lawyers and law professors traditionally have regarded as *heroic acts*, acts deserving of widespread acclaim. Professional behavior that earns recognition and status for both the performer and her profession often can be a persuasive explanation of an attachment to misleading or wrong ideas.²⁰

The heroic acts of lawyers certainly include participating in oral argument before the United States Supreme Court and, to a lesser extent, arguing before any appellate court. These acts also include negotiating a successful oral agreement for a complex merger acquisition, settling a difficult divorce suit, or reaching an agreement in principle on some international treaty or tax reform act. Of course, these kinds of oral work often are based on research

20. Cf. Kissam, *Government Policy Toward Medical Accreditation and Certification: The Antitrust Laws and Other Procompetitive Strategies*, 1983 Wis. L. Rev. 1, 20-26 (describing the economic, ideological, and technological conflicts of interest between private and public values that can occur in physician self-regulation).

into complex legal issues and generally are supported by much prior and subsequent legal writings. But it is the oral communications between lawyers (or between lawyers, judges, and others) that lie at the heart of these heroic acts, and it is these communications that are celebrated widely in the profession and by the community at large.

Similarly, the high points or heroic acts within the law school community are also based on oral communications or their equivalent. Consider the oral exchanges between teachers and students in the classroom, especially in the first year as teachers try to socialize their students into "thinking like a lawyer." Consider also the premiums that are placed on the oral aspects of Moot Court arguments, both in terms of teaching emphasis and public celebration of the final oral rounds. Consider too—perhaps most significantly—the widespread acclaim that is awarded to successful performance on Blue Book examinations, examinations that are not much of a writing experience at all, but rather a teacher's *simulated oral examination* of the student.²¹

Of course, written work occasionally is celebrated in the profession and legal academy, as, for example, when lawyers or law professors speak in praise of or participate in Supreme Court opinions, good student law review writing, or legal scholarship. These events, however, seem to be a matter of superior interest—by comparison to the events of oral communication—only to those lawyers, professors, and law students who might be characterized as academic or theoretical types.²² Furthermore, even great legal literature too often is reduced to the "rules" and "holdings" that can be extracted from this writing and employed practically, for example, in Blue Book examinations, contracts, or opinion letters.²³

21. Blue Book examinations, of course, have some characteristics of written work, but they lack its most vital aspect: the writer's opportunity to reflect upon her initial or tentative writings and reconstruct a more powerful subsequent draft. *See supra* text accompanying notes 15-16. As writing, then, Blue Book examinations are a very limited and very special form of instrumental writing.

22. *Cf.* Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968) (arguing that individual law professors are divided, perhaps schizophrenically, between their classroom role as "Hessian trainers" and their research role as "academics"); Kronman, *Foreward: Legal Scholarship and Moral Education*, 90 YALE L.J. 955 (1981) (describing the responsibility of law professors to bring their academic research findings at times into the classroom for the purposes of enriching the professional training of students in advocacy).

23. *Cf.* Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251, 262-93 (1986) (describing changes in the social structure of the modern law school that encourage or emphasize the acquisition of black letter rules as opposed to the acquisition of

Thus, oral communications or their equivalent appear to lie at the heart of the heroic acts that are celebrated by both the legal profession and the law school community.

This emphasis on oral communication is likely to leave many lawyers and law professors and most law students with the understandable notion that good writing is merely a substitute instrument for conveying or supporting legal thoughts that are most important and most exciting when delivered orally. In this view, writing about legal subjects while in law school (and law professors' reading of student writing) is most likely to be treated as a rather boring and relatively unimportant task that should be avoided whenever possible. Moreover, because law school writing is viewed as instrumental writing, both the writers and their readers (law professors and the readers of law reviews) will be concerned primarily or exclusively with writing as a finished product. Their concern will be whether the writing has an appropriate form and contains "the right answers" or other useful information that can be apprehended and communicated to others as easily orally as in writing. There will be minimal attempts at, interest in, or encouragement of writing that involves the writer and her readers in a process by which writer and readers become engaged jointly in discovering and creating new ideas, for themselves if not for others. In this view, student writers in law school understandably can be expected to want to know "what the teacher wants" (*i.e.*, "the right answers") before they actually write, just as they want to know "the right answers" to Blue Book examinations. Their readers in turn will expect a finished product that appropriately can be graded in terms of right answers, much as Blue Books are graded, whenever they receive a written document from students. This denial of the independent value of the writing process, with its attendant feedback loops in which readers can participate jointly with writers to facilitate discovery and learning,²⁴ may result in

skills in analysis, synthesis, advocacy, and interpretation).

24. On the nature and significance of revising with feedback obtained from readers of incomplete drafts, see P. ELBOW, *supra* note 5, at 139-45. Cf. Maimon, *Cinderella to Hercules: Demythologizing Writing Across the Curriculum*, 2 J. BASIC WRITING 3, 9 (Spring-Summer 1980)

Martyrs and magistrates can profit greatly from faculty workshops, especially those that encourage participants to share their own writing in draft stages. From this process, every prospective teacher of writing is reminded of the solid benefits received from a preliminary response to his writing, a response that addresses concepts, meaning, and intent in the formative stages, well before the piece is ready for meticulous editing and final assessment.

large part from the predominantly oral culture of our law schools and legal profession.

The ideal of legal expertise, as perceived and acted on by law teachers and their students, is a second factor that diminishes our appreciation of critical legal writing.²⁵ Certainly, lawyers, law teachers, and even law students can become experts by acquiring special knowledge and special skills through their experience in particular roles. The ideal of legal expertise, however, refers to a broader concept that is loosely based on this root notion of expertise. This legal ideal is the general belief, which seems to be shared by many lawyers, most law professors, and an increasing number of students as they progress through law school, that any lawyer (or any incipient lawyer) *who is any good* will be able to provide right answers to legal problems with relative quickness, with great precision, and (most importantly) without making mistakes. Witness, for example, the rewards that both the profession and law schools pay to students who earn the highest marks on time-limited examinations, which demand that right answers of some kind be developed with quickness, precision, and relative comprehensiveness without testing much for the depth or creativity of a writer's ability to think through difficult legal issues.²⁶ Witness also the expectations of most students and many practitioners that law professors will be able to "give them the cases" or "the answers" that quickly will resolve almost any problem they are struggling with in their studies or practice. Witness too the typical embarrassment that we law professors experience (or evidence) when a student in class discovers a right answer that wasn't also our answer or stumps us momentarily with a question or hypothetical. In sum, this ideal of legal expertise appears to be widely held and acted upon by many lawyers, law professors, and students.

The ideal of legal expertise, on balance, may be a good thing because it helps lawyers attend to some notion of doing the best possible job for their clients. This ideal, however, also supports and is supported by the oral culture of the legal profession and American law schools, and it thus helps incline law teachers and their students—if not practitioners—towards an emphasis upon instrumental rather than critical writing. This ideal, in other words, has some problematic side effects that can be overcome only if we can

Id.

25. See Kissam, *supra* note 23, at 258-59 (describing the ideal of the law professor as expert lawyer).

26. See Nickles, *supra* note 12, at 432-39, 451-53.

move towards a richer, more complex notion of legal expertise.

The relationships between the ideal of legal expertise and writing practices in the law school are indeed complex. In general, the ideal of legal expertise is served better by oral communications between teachers and students than by their joint work on written communications. Given limits on time and effort, oral communications between a teacher and her students are more likely than written work to allow each to impress the other with her own expertise. For one thing, speech can reach more listeners in an economical manner. For another thing, speech can touch more easily upon the multiple bits of expert knowledge that a speaker possesses than can a single, more focused piece of writing. Yet another factor that favors speech if demonstration of expertise is the point, is that the conventions of speech (for example: keeping things simple, repeating or restating frequently, and not interrupting the speaker), the context of listeners with the possibility of qualifying dialogue, and the evanescent quality of speech all allow a speaker, whether professor or student, to appear as an unchallengeable expert who is capable of dispensing right answers.²⁷ In contrast, the conventions of writing (for example: organizing principles for an entire work, its sections, and paragraphs and sustaining focus on one subject and one main theme), the context of a reader rather than listeners, and the more permanent quality of the written word constrain and make more difficult the demonstration of expertise by both a writer and her readers. The relative focus of written work tends to limit the pieces of legal knowledge that a person (writer or reader) can demonstrate quickly to others. This focus also increases the risks of significant error because the writer (and reader) often will be dealing with a more complex, unique, and difficult legal issue. This is not to say that expertise cannot be demonstrated by writing and thoughtful reading (the whole point of this Essay contradicts that notion), but rather to claim that an ill-defined concept of legal expertise may constitute an important explanation of law schools' failure to employ writing as an effective and useful learning device.

The ideal of legal expertise is also served by large law school classes, which in turn appear to preempt the possibility of extensive writing by law students. Communications between a teacher

27. In his lecture at the University of Kansas, *see supra* note †, Richard Marius made the point that "speech conventions can be used to talk around the issue." The argument in the text follows from this observation.

and students in the large class must be a very directed form of communication—at least today when law teachers are often concerned about obtaining favorable student evaluations of their teaching efforts for the purposes of promotion, tenure, salary increases, or purely personal satisfaction.²⁸ This requirement of directed communication encourages the law teacher to demonstrate her expertise by providing many right answers to legal issues in order to bring frequent resolution to any classroom uncertainty.²⁹ To be sure, this assertion contradicts the traditional idea of an open ended, intellectually challenging Socratic dialogue between a law teacher and her students, a dialogue that is purported to work in large classes as well as, if not better than, in small classes.³⁰ This traditional idea, however, may never have been implemented as widely in American law schools as we have thought.³¹ More importantly, mounting evidence today indicates that the communication in large law school classes consists mostly of teachers talking to students, whether by lecture, by the teacher's "Socratic monologue," or by the use of precisely pinpointed teacher questions.³² The large class, then, provides the perfect atmosphere for the law professor to demonstrate fidelity to the ideal of legal expertise.

In addition, the ideal of legal expertise can influence adversely the nature of teacher-student exchanges about student writing. If both teacher and student want to appear as experts before each other, their expectations in producing, reading, and commenting on students' written work will be governed by the idea that every written product should be a finished product in terms of form, style, and substantive answers. When these (often unarticulated) expectations are present, the writer of a law school paper, memorandum, or brief is less likely to be creative or to experiment in

28. See Kissam, *supra* note 23, at 262-80 (describing structural changes in the American law school that encourage professors to provide many right answers in classroom settings). On the apparent increase in law professor lecturing, either directly or in disguise as a Socratic monologue, see T. SHAFFER & R. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE* 162-67 (1977) (noting that at three Indiana law schools, legal education is returning to the textbook and lecture); Cramton, *The Current State of the Law School Curriculum*, 32 *J. LEGAL EDUC.* 321, 328 (1982) (describing an "avuncular Socratic method" that often becomes a thinly disguised lecture in law school classrooms).

29. See Kissam, *supra* note 23, at 263-66, 276-80; see also Rutter, *Designing and Teaching the First-Degree Law Curriculum*, 37 *U. CIN. L. REV.* 7, 26-36 (1968) (describing the traditional classroom dialogue in large law school classes).

30. See generally Morgan, *The Case Method*, 4 *J. LEGAL EDUC.* 379 (1952).

31. See R. STEVENS, *supra* note 11, at 157; Morgan, *supra* note 30.

32. See *supra* note 28 and accompanying text.

trying to integrate the relevant legal authorities and relevant facts of some difficult issue. The student probably will not attempt to say something (or anything) not found in an authoritative text.³³ In this situation, law school writers are likely to be more conservative and timid in their choice of topics on which to write and in their approach to legal analysis and writing. Similarly, the professor-reader is less likely to be conscious of the important facilitating role that readers can play by enriching (and thereby demonstrating) the creative feedback process of critical writing, a feedback process that admittedly works in idiosyncratic, ad hoc, and artistic ways.³⁴ Instead, the emphasis will be on evaluating or grading the product as if it were a Blue Book exam and on explaining one's grade or comment to the writer with maximum "objectivity."³⁵ In this process, influenced by the expertise ideal, all incentives point towards writing in a careful instrumental fashion, in order to avoid risking error, and towards reading the writing as instrumental writing, in order to insure a demonstration of the reader's own professional expertise. The possibilities of the critical dimension in writing will be missed, downplayed, or even punished.

A third factor that diminishes our appreciation for the critical writing process is the bureaucratization of the American university.³⁶ This process has created new demands for "objective" evidence of law faculty quality and productivity.³⁷ Law school administrations satisfy these demands by reviewing formal student evaluations of a teacher's performance³⁸ and by focusing on how many articles law faculty publish and the number, length, and prestige of a professor's publications rather than their inherent quality.³⁹ Unfortunately, a law professor's need to obtain favorable

33. Consider, for example, the penchant of law students to quote extensively from authoritative texts in their writing and their corresponding unwillingness to do the hard work for readers of understanding, interpreting, and summarizing these texts. *Cf.* Stark, *supra* note 3, at 1389 (using legal jargon helps to convince the public of lawyers' occupational importance).

34. See P. ELBOW, *supra* note 5, at 139-45 (regarding the important and quite varied roles that readers can play in helping to improve and revise drafts of papers).

35. *Cf.* Kissam, *supra* note 23, at 277-78 (describing a defensiveness and excess search for "objectivity" among contemporary law faculty in setting and explaining their Blue Book examinations).

36. See, e.g., Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383, 393-94, 406-10 (1982).

37. See Kissam, *supra* note 23, at 271-76.

38. See *id.* at 272. See generally Roth, *Student Evaluations of Law Teaching*, 17 AKRON L. REV. 609 (1984) (summarizing the current widespread use of formal student evaluations of law teaching in American law schools).

39. See Kissam, *supra* note 23, at 275-76. The quantitative demands for scholarship

student evaluations may discourage her commitment to the process of engaging students in critical writing exercises. Consider, for example, a law professor who attempts to provide critical comments on the substance of short writing exercises required of students throughout a basic course in, say, constitutional law. Criticism often hurts, and required writing exercises in a basic doctrinal course are likely to violate the general norms and expectations of the law school community. Under these conditions, the student ratings of the professor's work quite possibly could decline.⁴⁰

Similarly, a law professor's need to publish relatively frequently in prestigious journals may discourage her commitment to the process of critical writing by students. The process of teaching by writing often is viewed as more time consuming than traditional case coverage in large classes, and this process certainly will be more time consuming if it simply is added to the classroom coverage of cases. Moreover, student writing—especially in basic courses—is unlikely to support the general research interests of the faculty member. Thus, the imposition of bureaucratic norms in contemporary law schools again reinforces our oral culture and our ideal of legal expertise in ways that help to defeat the opportunities for critical writing by beginning lawyers.

Economics, or the dilemma of limited resources, is another factor that appears to play a significant role in the failure of law schools to promote the critical writing process. I have described the incentives of faculty members to avoid student writing in order

by law faculty can appear in a variety of forms, which include implicit or explicit norms about the quantities of publications that are appropriate or required for purposes of tenure, promotion, and annual salary decisions; a university requirement that all faculty be evaluated annually by their deans or department chairmen; and periodic competitions for research funds that require evidence of past productivity. *Id.* at 275 n.66; see also J. CENTRA, DETERMINING FACULTY EFFECTIVENESS 11-16, 119-24 (1979) (describing the evaluation of research and scholarship in American universities). For an express endorsement of a quantitative norm of scholarship by an experienced law professor, see R. LEFLAR, ONE LIFE IN THE LAW 250 (1985) (arguing that professors have an obligation to write at least one law review article every year).

40. In the spring of 1985, under the influence of a writing across the curriculum program at the University of Kansas, I asked my students in constitutional law to complete four short, ungraded writing exercises during the semester in addition to writing a Blue Book examination or take-home examination for their grades. I returned each of these exercises with brief written comments. In that semester my aggregate student evaluation ratings declined substantially from what they had been in the previous semester. Subsequently, I have taught constitutional law twice without requiring these exercises, and my aggregate ratings by students returned to their previous level. At least one faculty member elsewhere at the University of Kansas reported a similar experience from using ungraded writing exercises to help teach a basic survey course in the spring of 1985.

to comply with the new bureaucratic rules or norms that demand objective evidence of law faculty quality and productivity. In addition, the increasing specialization of modern law firms has created new consulting opportunities for specialist members of law faculties.⁴¹ This incentive to engage in practice-oriented research and writing also may discourage law faculty commitment to a substantial amount of critical writing by students—especially in basic courses.

The economic incentives of individual students also appear to diminish enthusiasm for open-ended, time-consuming writing projects. In this era of an apparent lawyer surplus and particularly strenuous competition for high grades, it is rational (at least in the short term) for students to devote their best study time to mastering the many right answers that will be expected of them in Blue Book examinations, rather than to struggle with more complex problems through the mechanism of time-consuming writing projects. At the same time, the rising salaries for associates in law firms have expanded the opportunities for law students to engage in part-time legal work.⁴² These opportunities certainly provide welcome income, a chance for permanent employment, and perhaps relief from the monotony of large classes during the upper-class years in law school. But this part-time work also reduces the possibility that law students will choose to engage in extended writing projects that involve the process of critical thinking and writing. Furthermore, any substitute writing experience that students may obtain in the course of their part-time legal employment is likely to be of a routine, instrumental nature.⁴³

Limited law school resources also discourage critical writing opportunities, although here the play of economic forces is perhaps more subtle than is apparent on first impression. On the one hand, relatively high student/faculty ratios and large classes typically are cited as reasons why more writing opportunities are not provided, and it cannot be denied that a lower student/faculty ratio could enhance the opportunities for writing in legal education. On the other hand, many law professors clearly enjoy teaching large clas-

41. See Ackerman, *The Marketplace of Ideas*, 90 YALE L.J. 1311, 1132-35, 1144-47 (1981).

42. See Cramton, *Change and Continuity in Legal Education*, 79 MICH. L. REV. 460, 464-66 (1981).

43. See Kissam, *supra* note 23, at 279 (claiming that part-time work opportunities for law students, if they are constructed rationally from the profit-making perspective of a private law firm, are likely to involve much routine and repetitive work).

ses, and they certainly appreciate their relatively high university salaries and their ability to insist on the "very best" credentials for new faculty members.⁴⁴ These factors suggest that law faculty, at least implicitly, may be more willing to tolerate high student/faculty ratios than the public expressions of their reform-minded leaders and deans might indicate. Lower student/faculty ratios in law schools would threaten the prestige, if not also the salaries, that law faculty earn by keeping their numbers at a low level relative to the numbers of students they teach.⁴⁵ In any event, we may conclude that, in whatever form it takes, economics is—like our oral culture, the ideal of legal expertise, and bureaucracy—a stubborn factor that impedes the opportunity for sweeping reforms that would change law school writing.

IV. WHAT CAN BE DONE?

The social and ideological factors that I have described suggest that proposals for significant institutional reforms in law school writing may not be practical.⁴⁶ Nevertheless, individual professors have substantial discretion to design their courses in ways that offer experience in critical writing, and upper-class students have considerable discretion to choose law courses that offer innovative writing opportunities. Furthermore, law school faculties collectively might be persuaded to undertake some changes at the margin in order to improve the quality of the educational process—particularly at this time of declining law school enrollments. Aiming at these areas of individual and collective discretion, I offer

44. For evidence of the emphasis that law school appointment committees place on the credentials of a candidate's law school, law firm, law school grades, law review experience, and judicial clerkship, see Fossum, *Law Professors: A Profile of the Teaching Branch of the Profession*, 1980 AM. B. FOUND. RES. J. 501, 507, 527-28; Zenoff & Barron, *So You Want to Hire a Law Professor?*, 33 J. LEGAL EDUC. 492, 495, 504 (1983).

45. Cf. First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311 (1978) (describing the cartel-like behavior of law schools and law professors in developing accreditation standards for law schools that have had the effect, if not the purpose, of limiting the number and size of law schools). I have emphasized the nonmonetary rewards that law faculty earn from high student/faculty ratios because the relatively high salaries of law professors may be attributable primarily to the general market wages of lawyers, at least to the extent that law professors must be "purchased" by universities from a general market of lawyers. On the other hand, in the imperfect market for academics, law professors may enhance their salaries in annual negotiations with university administrations by pointing to the relatively high student/faculty ratios in law schools as a justification for relatively high salaries.

46. Cf. R. STEVENS, *supra* note 11, at 264-70 (describing how significant reform proposals in American legal education have failed because they ignored the basic social structure of American law schools).

a series of suggestions or recommendations that would improve our practices and skills in critical legal writing.

These suggestions are derived from the work of educators who have become deeply concerned about the analytical and writing abilities of American college students and who believe that the appropriate response should be a widespread commitment of university resources to the use of writing exercises throughout college and professional school curricula.⁴⁷ These educators, employing such slogans as "critical reading,"⁴⁸ "writing with power,"⁴⁹ and "writing across the curriculum,"⁵⁰ are engaged in attempts to improve our techniques as students and teachers of the writing process, and I encourage law faculty and administrators to join this program. This approach would focus on the basic point that critical writing needs to be extended substantially into all parts of the law school curriculum. It is a mistake for legal educators and law students to continue to place responsibility for the development of general analytical abilities and writing skills on the colleges or on reform projects in colleges that somehow might teach law students and lawyers to think and write effectively. If writing can improve thought, law students and lawyers need to engage continually in the critical writing process in order to develop more fully the quality of their legal thought.

Among educators who think about the writing process, it is an axiom that good writing is based on good reading, if for no other reason than that careful reading of good literature will generate models, habits, and ideas that the reader can employ in her writing.⁵¹ I want to push this notion further and suggest that good writing by law students can be based only on good *critical reading* by these students. "Critical reading" may be distinguished from "instrumental reading." Much of our reading in everyday life, including the everyday life of the law, is instrumental in the sense

47. See, e.g., P. ELBOW, *supra* note 5; THE WEB OF MEANING: ESSAYS ON WRITING, TEACHING, LEARNING AND THINKING (D. Goswami & M. Butler eds. 1983); Symposium, *Writing Across the Curriculum*, *supra* note 5.

48. See Grinols, *Critical Reading and Learning in College*, in CRITICAL THINKING: READING ACROSS THE CURRICULUM 21-31 (A.B. Grinols ed. 1984).

49. See P. ELBOW, *supra* note 5.

50. See, e.g., Symposium, *Writing Across the Curriculum*, *supra* note 5; see also WRITING AND READING DIFFERENTLY (G. Atkins & M. Johnson eds. 1985) (essays on the interrelatedness of writing and reading from a deconstructive point of view).

51. See, e.g., T. WHEELER, THE GREAT AMERICAN WRITING BLOCK: CAUSES AND CURES OF THE NEW ILLITERACY 3-8 (1980); *Tips: How to Write Better*, NEWSWEEK ON CAMPUS, April 1986, at 46.

that we read to obtain directly useful or transferable knowledge: knowledge that we can put to certain uses without reflecting extensively upon what we have read, without needing to interpret this knowledge, or without needing to evaluate or criticize what we have read. This type of reading has many specific values, and it even will help us to become better instrumental writers as we begin, somewhat intuitively, to model our own writing on the styles and substance of what we read. But instrumental reading does not prepare us for critical writing, which involves developing our own connections and ideas, because instrumental reading does not require the reader to search for original ideas in and about the material she is reading. To engage in critical writing about the law, we need first to become critical readers of the law in the sense of being able to draw inferences, to interpret, and to evaluate what we read.⁵²

It is a fundamental belief of legal educators that we teach law students to “think like a lawyer.” Traditionally, this notion has included a substantial emphasis on teaching students to analyze and synthesize judicial opinions. These skills can generate a limited but powerful sort of critical reading and thinking that is based on the student’s ability to read judicial opinions from some external, or independent, perspective.⁵³ Unfortunately, the day-to-day practices in many contemporary law schools fail to afford adequate practice in the skills of analysis and synthesis because of a complex set of economic, social, and ideological factors.⁵⁴ Consider, for example, that the leading cases that most professors ask their students to read and analyze already have been analyzed and synthesized with other decisions in easily accessible case outlines and student hornbooks. Why then should students today try to think critically about cases? Because their teachers tell them that this would be a good thing to do? This sermon is unlikely to have much effect unless the professor can demonstrate to her students that a day-to-day critical reading of cases will be necessary either to obtain a successful grade or to avoid painful classroom embarrassment. But the professor may be unable to demonstrate either of these things. Both she and her students may realize that the course grade will be based on a Blue Book examination that asks mostly for right answers and depends very little on independent analysis

52. See Grinols, *supra* note 48, at 21-31.

53. See Kissam, *supra* note 23, at 256-58, 260-61.

54. See *id.* at 262-300.

of the leading cases. Both she and her students also may know that the class is too large, and the norms of contemporary classroom behavior too civilized or too laissez faire, to provide much embarrassment for the lack of daily preparation.

A significant decline in critical reading by law students also is indicated and encouraged by the formalism of many contemporary casebooks. These books provide relatively brief excerpts of cases, one case per issue, and extensive supplemental notes that organize, analyze, and synthesize the cases in a treatise-like fashion.⁵⁵ Indeed, some modern casebooks resemble treatises much more than they resemble the raw data or primary sources of unedited cases that Dean Langdell used in his casebooks to introduce the case method to Harvard in the 1870s.⁵⁶ Furthermore, the ideal of legal expertise encourages the contemporary professor to do most of the talking in class and thus to perform the case analysis and synthesis for her students.⁵⁷ In most classes, then, law students may have very little incentive to engage in any sort of critical reading.

The attempt to teach law by means of a critical writing process should be accompanied by some renewed effort to engage students in the critical reading of legal materials. In large classes this may present a real dilemma because the availability of student guides, the formalism of many casebooks, and the possible influence of objective examinations⁵⁸ suggest that the traditional case

55. See R. STEVENS, *supra* note 11, at 270 n.48; Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL EDUC. 1, 3-4 (1964). John Henry Schlegel has suggested to me that casebook formalism was first recognizable in casebooks of the 1930s, or perhaps the late 1930s. Letter dated July 27, 1986.

56. Compare E. BARRETT & W. COHEN, *CONSTITUTIONAL LAW: CASES AND MATERIALS* (7th ed. 1985) and W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* (7th ed. 1982) (treatise-like casebooks) with Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1, 11-20 (1980) (describing Langdell's use of case materials at Harvard in the 1870s, where Langdell and his students slowly probed for an understanding of the principles embedded in a line of unedited cases).

57. See Kissam, *supra* note 23, at 263-66, 276-80; see also *supra* note 28 and accompanying text.

58. On the use of objective examinations in American law schools, compare Nickles, *supra* note 12, at 433-34 (describing a typical law school examination as consisting of "three essay questions and thirty-six objective (*i.e.*, short-answer) questions") with Kissam, *supra* note 23, at 277-78 (defining objective examinations to include not only short-answer questions, but also essay questions that are graded with model answers or check-lists of answers, and speculating that objective examinations may be increasing in American law schools as the result of new student pressures on law faculty to explain Blue Book grades to the contemporary generation of law students). The use of objective examinations, by comparison to open-ended essay questions, encourages law students to memorize right answers rather than

method, in which students are asked to analyze cases, will not generate much critical reading or thinking by students. Moreover, this conclusion will be true no matter how nasty the professor might be in style or grading practices. Such nastiness, at best, is likely to produce only more diligent student work in an instrumental mode with case outlines and other formalistic devices.

Two other methods of encouraging critical reading may work somewhat better, but each of these methods may have significant costs for individual teachers. One method would be to prepare one's own unique set of cases to teach a subject, but this preparation obviously would be demanding in terms of time and intellectual effort. In addition, if students pass their class notes to the next year's class, one might have to prepare a new set of cases each time the course was offered. Moreover, the preparation of unique materials could be complicated if there is a need to rely substantially upon the leading cases or canonical texts of the subject. These cases develop their elevated status, after all, because they are recognized as major sources of principles and legal arguments in opinions, briefs, and legal scholarship.⁵⁹ This phenomenon of canonical texts explains why so many cases appear in all casebooks in a particular field and suggests that it may not be possible in many subjects to produce a rich or coherent set of unique texts that allows one to teach from a perspective that encourages critical reading.

The other alternative may not be much more attractive. With a casebook (or local materials) that provides full opinions, including concurring and dissenting opinions, one can employ Karl Llewellyn's technique of teaching cases "as problems to be solved." This approach systematically asks students to develop the best possible legal arguments for the parties in appellate cases.⁶⁰ This case method limits the possibility that students will rely on the analysis of others, unless they economically can obtain access to

to analyze individual cases.

59. Cf. F. KERMODE, *FORMS OF ATTENTION* (1985) (describing the gradual process of artistic and literary criticism by which works of art are added to, maintained within, and deleted from the canonical works of art and literature).

60. See Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 213 (1948); Morgan, *supra* note 30, at 384-87; see also Gerwin & Shupack, *Karl Llewellyn's Legal Method Course: Elements of Law and Its Teaching Materials*, 33 J. LEGAL EDUC. 64, 64-67 (1983) (describing Professor Llewellyn's use of cases in the classroom as "problems to be solved"); cf. Kissam, *supra* note 23, at 319-20 (advocating use of Professor Llewellyn's method in order to move law school analysis beyond formalism towards a more contextual and critical inquiry into legal and social materials).

the briefs in the assigned cases or to prior class notes of especially brilliant students. In my experience, however, students often become frustrated with, and seemingly bitter about, the use of this technique, especially in large classes. The result can be unfavorable student evaluations and, even worse, a sullen or dull classroom atmosphere and feelings of considerable bitterness on both sides.⁶¹ This result, I believe, stems primarily from the pervasive formalism in contemporary legal education that I already have described.

The prospects for encouraging critical reading by law students are enhanced in smaller classes, especially in elective seminars in which the optimal enrollment is ten to fifteen students. In small classes that are devoted to covering legal doctrine, I have experienced some degree of success in treating cases "as problems to be solved."⁶² This relative success may result at least in part from the more relaxed environment of the smaller audience that faces both the professor and students. If this audience is perceived as a "safe audience" that allows one to risk asking difficult questions and risk experimenting with complex and controversial answers, then the oral exchanges between teacher and students are likely to be more creative and more critical than instrumental.⁶³ In turn, the students are likely to be more critical in their reading of the relevant materials. Of course, one drawback to Llewellyn's method, in small or large classes, is that the discussion consumes a good amount of time and fewer cases can be covered extensively by class discussion. This drawback will be of concern to some, although I believe that the values of practice in critical reading and critical discussion generally will outweigh the losses in coverage of legal rules. Furthermore, law students on their own should be able to apply their

61. My claims in the text are based on my experience since 1981 in teaching courses with Professor Llewellyn's method in administrative law (one small class and one medium-size class), antitrust law (two small classes and one medium-size class), constitutional law (one medium-size and four large classes), and criminal procedure (one large class). In the three small classes (14 to 17 students), this technique appeared to work rather well and seemed acceptable to most students. In the three medium-size classes (24 to 27 students), the technique seemed to work, but it also proved distasteful to a significant minority of students, as recorded or reflected in their overall evaluations of the course and instructor. In the five large classes, my claims in the text approximately describe student reactions to the method. Another factor that may explain these different reactions, of course, is that the small and medium-size classes were, with one exception, elective courses and the five large classes were required courses.

62. See *supra* note 61 and accompanying text.

63. On the distinction between safe and dangerous audiences and various ways in which our perceptions of these audiences can focus our thinking and communication, for better or worse, see P. ELBOW, *supra* note 5, at 183-90.

acquired skills in critical reading to additional cases.

In small classes or seminars that do not involve a steady diet of cases, I have been able to encourage a significant amount of critical reading by employing what I call the Salkind method of seminar instruction. In a course taught jointly with Neil Salkind, of Kansas University's Department of Educational Psychology, I learned to lead seminar discussions in the following manner. For each class, two or three students are asked to prepare written questions for class discussion of the assigned readings. At the beginning of each session, the instructor collects these questions and in turn distributes to all students a one or two page typed statement of comments and questions that pertain to the day's readings. The first minutes of the class hour are devoted to reading the statement and questions, and the instructor then organizes the discussion around the themes indicated by the students' questions and the instructor's statement. In my experience, this method generally has produced a richer and more critical discussion of the main themes in the day's readings. Admittedly, these discussions tend to be more open ended than those that law professors generally lead, and the resulting sense of uncertainty (or even loss of control) for the professor can be initially unsettling. These discussions also tend to require several classes and repeat performances by students assigned to ask questions before the method begins to work with maximum effectiveness. I am convinced, however, that the Salkind method, at least in small classes, promotes a considerable degree of critical reading by all students.⁶⁴

The Salkind method works for two basic reasons. The students learn to ask critical questions about the reading material, even on days when they are not assigned the task of providing written questions. Many students also may be placed at ease by their preliminary access to a faculty member's initial thoughts, questions, and even confusions about the subject under consideration, all of which can be presented more effectively in writing than by oral communication. In any event, a habit of critical reading by law students is essential to the critical writing experience, and law professors who engage in the writing movement must attempt to insure or restore some measure of critical reading of legal materials.

64. I have employed the Salkind method in the following seminars at the University of Kansas School of Law: a law and social science research workshop (with Salkind); two constitutional law seminars; an arms control workshop; and a jurisprudence research workshop.

I turn now to a consideration of how critical writing exercises could be placed throughout the law school curriculum in an incremental but significant fashion. The opportunities to put these exercises in place are limited only by our imaginations, a restraining sense of professionalism, and, to some extent, available resources, although this last factor typically is overstated. I shall describe three possible approaches: the increased use of take-home examinations, especially those with a duration of at least forty-eight to seventy-two hours; the increased use of short writing exercises, which may be ungraded and student supervised, in basic doctrinal courses; and, at least in smaller classes, an increased emphasis on writing ungraded first drafts, with teachers assuming the role of *coach* rather than *umpire* in reading and commenting on these drafts to help writers improve their thinking and writing about complex matters. Each of these approaches deserves some explanation and justification, as well as the recognition of certain corollary problems and objections.

Take-home examinations allow students to construct some extended arguments on difficult legal issues. The questions used in take-home examinations can be quite similar to those used in Blue Book exams; yet with take-home exams the student has more time to think through the problem, organize her answers, and obtain invaluable feedback from writing and reading the tentative, partial, and first drafts of her answers.⁶⁵ In general, however, take-home exam questions probably tend to emphasize the development of arguments on complex, unsettled questions of law and to deemphasize issue spotting and rule application by comparison to time-limited Blue Book examinations.⁶⁶ Furthermore, take-home examinations that have a duration of at least forty-eight to seventy-two hours are probably more valuable exercises in critical writing than five-hour, eight-hour, or twenty-four-hour examinations. While these shorter examinations have certain value, they do not allow as easily for a requirement that the examinations be typed, and, more importantly, they severely limit the opportunities for reflecting on

65. For a perceptive student's description of two eight-hour take-home examinations during his first year at Harvard Law School, see S. TUROW, ONE L 194-95, 290 (1977). In my third year at Yale Law School, I wrote a 48-hour take-home examination in local government law and a 72-hour take-home exam in jurisprudence, and on both papers I benefited immensely (in terms of learning rather than grades) from the opportunity to write first drafts and then to write or rewrite subsequent drafts.

66. This claim is based on my own experience as a student, see *supra* note 65, and as a teacher in setting and reading take-home examinations in antitrust law, constitutional law, and property law.

first drafts.⁶⁷ In addition, the limitation of take-home examinations to two or three days may have certain advantages. These advantages include the regulatory effect of insuring relatively equal time distributions between a student's several exams and the limitation that this time constraint places on students' ability to search for and rely too heavily on secondary sources in developing their answers.⁶⁸

In sum, take-home examinations are an economical means of encouraging, even requiring, law students to engage in a form of critical writing that helps to develop, as well as to demonstrate, their abilities to think about complex and uncertain legal problems. In these examinations students have the opportunity to write, to review, and then to revise or rewrite their own initial and partially developed ideas about legal materials in ways that the Blue Book experience does not provide. In other words, take-home examinations of extended duration can provide, in a manner that Blue Book exams or shorter take-home exams can never approach, both systematic feedback between prior and present thoughts and the time to reflect upon possible connections.⁶⁹ I recommend that individual professors think seriously of increasing their use of take-home examinations and, furthermore, that law faculties consider

67. See S. TUROW, *supra* note 65, at 194-95, 290 (describing the intense pressure of eight-hour take-home examinations at Harvard). The distinction between 24-hour examinations and longer take-home examinations with regard to opportunities for student contemplation, revisions, and rewriting was suggested to me by Gordon Sneider, based on his experience with 24-hour take-home examinations at the University of Chicago. This distinction is supported also by my experience as a student and teacher with both kinds of take-home examinations, although I have given only one 24-hour take-home examination and have taken no examination shorter than 48 hours. See *supra* notes 65-66.

68. In his talk to the University of Kansas faculty, see *supra* note †, Richard Marius illustrated the importance of getting students to think and write about primary sources on their own, without the assistance or crutch of secondary sources, by telling a charming story about a first-year Harvard College writing assignment. Students were asked to write a paper about the "architect's meaning" of the exterior structure and sculpture of Memorial Hall, a building on the Harvard campus that was constructed shortly after the Civil War. Many students immediately rushed to Widener Library and thereafter reported to their instructors (as the instructors knew) that Widener contained absolutely no writings on the meaning of Memorial Hall. When these students then asked their instructors what they should do, the instructors repeated the assignment: write a paper about the architect's meaning of the exterior structure and sculpture of Memorial Hall.

69. Cf. Dickerson, *Teaching Legal Writing in Law Schools (with a Special Nod to Legal Drafting)*, 16 IDAHO L. REV. 85, 85-86 (1979) (claiming that one teaching legal writing in law schools needs to recognize the role that writing can play in the improvement of substantive ideas); Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 312 (1980) (arguing that writing can help law students learn the difference between settled and unsettled issues and work effectively with facts).

developing systems of take-home examinations to insure that students regularly engage in this critical writing process during their first two years in law school. An officially sanctioned system of take-home examinations would help to overcome possible student resistance to courses with take-home examinations, at least at schools where writing has not been emphasized previously, and it would help to insure that the benefits of the critical writing experience are disseminated widely throughout the student body.⁷⁰

The law school community may raise several objections to take-home examinations. I believe that persuasive answers can be given to each objection, but this view will not be shared by everyone, especially those who see great value in the exclusive use of Blue Book exams. The appropriate response to these objectors is simply that take-home examinations may be viewed as a complement to, rather than a threatening substitute for, Blue Book examinations. To be sure, take-home examinations place less of a premium on quickness and issue spotting than Blue Book exams, but take-home exam papers serve other important values that should justify their regular use in conjunction with the Blue Book process.

One objection to take-home examinations is that they provide increased opportunities for cheating, either in the form of students talking with each other about possible answers or in the form of substitute writers. One answer to the first form of cheating is to allow and even encourage such behavior, as long as students ultimately write their own papers.⁷¹ Students talk with each other and influence each other's answers prior to writing their Blue Book examinations, and lawyers in practice frequently engage in collaborative work in which one writer takes the credit and blame for the quality of the final written work. Why not allow take-home examinations to simulate law practice? Another answer, of course, is to prohibit such talking and rely upon the school's honor code to enforce this prohibition.

The problem of substitute writers cannot be handled as casually, but at least two good ways to limit this kind of cheating exist. First, if students have performed short writing exercises during class periods, the professor can save some of these to check in instances in which she suspects that substitutes have written the

70. An ideal system might be a plan to insure that each student takes one or two take-home examinations in each semester of the first two years of law school.

71. This answer to the cheating objection was suggested to me by Haskell Springer, Professor of English at the University of Kansas.

take-home examination.⁷² Second, if the exam is constructed to invite the use of analytical techniques that have been employed throughout the course, it would seem that few outsiders could be effective substitute writers, and any student's attempt to rely on insiders (students in this or previous classes) would increase radically the possibility of detection. One might also observe that law school honor codes should count for something and, furthermore, that the problem of substitute writers exists with regard to any writing in law school that is performed outside the classroom.

A second objection to take-home examinations is that they will reduce or eliminate the incentive for students to engage in a comprehensive review of the subject. It thus can be argued that students will "learn less" than they would in a course with a Blue Book examination. In my view, it is difficult (and probably senseless) to construct take-home examinations that try to cover all the issues in a course, and I agree that reviewing can be an important part of learning. Two counterobservations, however, diminish the weight of this objection—particularly when take-home exams are proposed as a complement to, rather than substitute for, Blue Book examinations. First, the review process in any law school course is undoubtedly more valuable for the learning of a basic analytical framework in a doctrinal area than it is for the short-term memorization of specific issues and rules. After all, the analytical framework stays with us after the examination is over and is most helpful in dealing with future problems in practice. Moreover, take-home examinations probably can be designed, more effectively than can Blue Book exams, to force students to review and develop the basic analytical framework in most law school courses.⁷³ If there are courses in which the analytical framework is nothing but a collection of specific issues and rules, then take-home examinations can and should be avoided in those courses. Second, whatever losses may accrue from a lack of comprehensive review in one or two subjects a semester, these losses clearly would be outweighed by the substantial training in analytical thinking and critical writing that the increased use of take-home examina-

72. I owe this answer also to Haskell Springer.

73. For example, in an antitrust law course, a take-home examination can force its writers to deal in some depth with one or two situations involving application of the rule of reason analysis, which pervades most antitrust issues. Similarly, in a constitutional law course, a take-home examination can force writers to argue for different standards of judicial review and to apply these standards to complex situations more extensively than is possible or likely during the writing of time-limited Blue Book examinations.

tions would afford.

A third objection to take-home examinations might be that this form of exam, by comparison to Blue Book exams, is somehow unfair to the teachers of other courses or to particular students.⁷⁴ One argument is that a take-home examination of extended duration will disrupt students' ability to prepare adequately for their other exams. If the take-home is limited to forty-eight or seventy-two hours, and students are allowed to take the exam during a time of their choice within the final examination period, it is difficult to see how the take-home will be more time demanding than any Blue Book examination. If difficulties in administration foreclose this possibility, and the examination is handed out for a longer period, the student's choice to spend relatively more or less time writing the take-home would seem to be no different from a student's choice to spend more or less time preparing for particular Blue Book examinations.

A second unfairness argument might be that take-home examinations disadvantage students who commute, work part time, or work at managing families. The argument is that these students can budget their time to allow semester-long preparations for Blue Book examinations, but that they perhaps could not as easily commit extended periods of time to writing take-home examinations during a final exam period. Certainly these students must manage their lives more precisely than others. I am not convinced, however, that they could not also manage one or two take-home examinations each semester. These students also might find the structured review process for a take-home examination more attractive than the comprehensive preparation that an issue-spotting Blue Book exam requires. Without any empirical evidence on this point, the most sensible response to this objection would be to offer an increased number of take-home examinations and see if complaints arise or if these students in fact choose to avoid courses that have take-home examinations or do more poorly in such courses.

The fundamental (though perhaps unstated) objection to take-home examinations will be that these papers cannot be graded as easily, if at all, on the grading scales that law schools traditionally have employed to generate the fine distinctions believed necessary

74. My understanding of these unfairness objections to take-home examinations comes from the comments of two colleagues on a proposal of mine that would have required students at our school to take at least one take-home examination in each of their first four semesters at law school.

to induce effort and produce a class ranking system.⁷⁵ My own experience, and the fact that law school seminar papers and other non-Blue Book courses typically are graded on a simpler and higher scale than Blue Book exams, suggest that take-home examination papers cannot be divided reasonably into as many categories or given such low aggregate grades as are Blue Book examinations. Is this a good reason to avoid a valuable teaching method?⁷⁶ To be sure, most law schools probably need to generate a reasonably detailed and precise class ranking of their students in order to screen them for prospective employers and thus to benefit the placement prospects for all students.⁷⁷ Yet requiring one or two take-home examinations each semester would not defeat the construction of finely tuned class ranking systems. Perhaps what is really at stake, then, is not the grading objection per se, but rather the attachment of most law professors to the paradigm of the Blue Book examination, whatever the consequences. These exams have worked quite well for law professors, first in their role as students and then as teachers. Why should anyone want to deviate from this successful model?⁷⁸

75. On law school grading practices in general, see Nickles, *supra* note 12, at 325-32. On the objections of the faculty at one law school to significant deviations from customary grading practices, see Feinman & Feldman, *supra* note 5, at 925-30.

76. Cf. Cahn, *Some Reflections on the Aims of Legal Education*, 11 J. LEGAL EDUC. 1, 1-2 (1958) (concluding that examinations, grades, the search for objectivity, and the demand for precision in American law schools all represent "academic distortions" of the search for truth); Feinman & Feldman, *supra* note 5, at 881-82 (describing the dismal perspective on many students' potential abilities to practice law that is generated by the professorial reading of Blue Book examination papers).

77. See Kissam, *supra* note 23, at 260-61; see also Feinman & Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 J. LEGAL EDUC. 528, 547 (1985).

The final component of grading is ranking, the ordering of students along a scale. Criticism serves an educational function. Evaluation serves primarily a certification function and secondarily an educational one. Ranking serves no educational function at all. Ranking has only two purposes in legal education: to legitimate the educational, professional, and social hierarchies in which we all are enmeshed and to assign students their places in those hierarchies, especially as to employment opportunities. The ranking system permits employers to choose among students, to make fine distinctions even though the distinctions may be meaningless. It also leads students to believe that the existence of hierarchies is appropriate as an expression of differences among them and that their place in these hierarchies is fair as an expression of their particular merit in comparison to others.

Id.

78. On the resistance to new ideas in scientific research that can be caused by paradigms, see T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). Kuhn argues that normal scientific research is conducted within the major constraints of "scientific paradigms," which are major scientific achievements that are accepted, often implicitly, by specific research communities as constituting the basis for future research work. These para-

A second approach to expanding the critical writing process in law schools would be to use relatively frequent but short writing exercises to help teach basic doctrinal courses. These exercises could assume various forms relevant to the subject under study.⁷⁹ The exercises could be reviewed and commented on in a variety of ways: by some combination of faculty, part-time instructors, upper-class students who previously have taken the course, other students in the class, and even the writers themselves.⁸⁰ These exercises need not be graded, although some sanction—perhaps a requirement that certain exercises must be redone until they are in satisfactory form—may be necessary in order to insure that students take the projects seriously. Of course, these exercises cannot be used to teach the same kinds of complex analysis as longer writ-

digms, while efficient from a personal point of view, can obscure or create much irrational resistance to new ideas among scientific researchers. *See id.* at 5-7, 59-65, 77-82. Similarly, the success of law professors in first taking and then grading Blue Book examinations could be viewed as a legal paradigm or major legal achievement that blinds law professors to other ways of doing things. *Cf.* Feinman & Feldman, *supra* note 77, at 547 (asserting that law school class ranking systems "legitimate the educational, professional, and social hierarchies in which we all are enmeshed"); Riesman, *Law and Sociology: Recruitment, Training and Collegueship*, 9 *STAN. L. REV.* 643, 648-49 (1957) (noting the presence of circular reasoning and self-confirming prophecy in the belief of law professors that good grades necessarily measure legal quality because large firms hire only persons with the highest law school grades).

79. For example, one might ask students to draft pleadings, the outlines or fragments of research memorandums, appellate briefs or judicial opinions, or the critical parts of legislative documents such as contracts, trust agreements, and statutes, depending upon the subject under study. More importantly, less formal kinds of writing could be required simply in order to get students to think more clearly about their assigned readings. *See supra* text accompanying notes 60-64 (describing a classroom method of systematically asking students to develop the appellate arguments of the parties to assigned cases); *infra* note 80 and accompanying text (suggesting various types of short informal writing assignments).

80. In May 1984 at a University of Chicago conference on the relationships between intellectual development, critical thinking, and effective writing, Elaine Maimon, then a Professor of English at Bentley College, offered the following list of informal, ungraded writing assignments to facilitate learning:

- a. take ten minutes at the end of a lecture to have students write a summary of the lecture and read a few aloud;
- b. take five minutes during a discussion to have students think in writing—then use this writing to continue the discussion;
- c. ask for summaries of assigned reading to begin class;
- d. have students write an informal letter about their intellectual growth, problems, thoughts about the course, *etc.*

"Fifteen Ideas from Elaine Maimon" 1-2 (workshop outline). *See* R.L. LARSON, *WRITING IN THE ACADEMIC AND PROFESSIONAL DISCIPLINES: A MANUAL FOR FACULTY* 3-9 (1983); *cf.* Maimon, *Cinderella to Hercules: Demythologizing Writing Across the Curriculum*, 2 *J. BASIC WRITING* 3, 8-11 (Spring-Summer 1980) (suggesting that local faculty workshops between English teachers and other teachers in the university would be a good way to develop ideas for short, informal writing assignments that could be used in other disciplines).

ing pronte intellectual development, critical thinking, and effective writing, Elaine Maimon, then a Professor of English at Bentley Col a stimulus to critical reading and the interpretation of legal materials by students on a day-to-day basis.⁸¹

The basic objections to this approach are likely to be its costs, in terms of time required of faculty and paid assistants, and the "pedagogical danger" of letting less expert persons become responsible for teaching a faculty member's subject.⁸² The first objection can be met or mitigated substantially in several ways. First, one simply might experiment with faculty time. It may not take that much time to provide trenchant substantive comments to students on their short, ungraded writing exercises, particularly as the instructor gains experience with this process and learns to limit comments to the singularly important and often recurring problems. Second, one could compensate for the commitment of extra time by setting a shorter final examination, by cancelling class on days that writing assignments are due, or by devoting class time to a discussion of the assigned problems after the students have completed their writing. Third, the costs of this proposal also might be reduced or eliminated by relying upon paid assistants, by using other class members as peer reviewers, or by letting students review their own work—all under guidelines provided by the faculty member and with the professor occasionally sampling the student writing. If the writing exercises are ungraded (except to the extent that they must be satisfactory), I see no reason why these solutions would not be feasible.⁸³

The objection of pedagogical danger from the use of teaching assistants, other students, or the writers themselves to review a student's written work in a doctrinal course is not persuasive. This objection results from an inflated or distorted notion, which often

81. I employed brief writing exercises once in my constitutional law class, when, by a quirk of scheduling, I was blessed with an enrollment of 27 students. These exercises simply required each student, four times during the semester, to respond in writing to certain questions that I asked in advance about the day's reading assignment. I would comment occasionally on some of these writings in the classroom, and I returned all written exercises with brief substantive comments written on the papers. I believe that these exercises helped me to provide the best course that I have ever offered in basic constitutional law, although the student evaluations of my efforts certainly failed to reflect this belief. *See supra* note 40 and accompanying text.

82. Two colleagues of mine raised this "pedagogical danger" objection independently in commenting on a proposal of mine that would have established short writing exercises for all students in at least one doctrinal class during each of their first four semesters at law school.

83. *See supra* notes 79-81 and accompanying text.

is shared by teachers and students alike, about the role of a teacher in helping students, especially adult students, to acquire skills and information. Like many others, I prefer to think of the study of law as a matter of *learning*, with emphasis on a student's active work in acquiring skills and knowledge, rather than as a matter of *teaching*, with emphasis on the teacher's active role in dispensing goods to passive students.⁸⁴ From this perspective, a law student necessarily learns from many sources, which may include faculty members, reading materials, study guides of varying quality, and, inevitably, other students.

Given the *mélange* of alternate sources from which a student constructs her own understanding of any legal subject, what substantial objection can there be to using paid assistants or other class members to comment, under faculty guidelines, on the substance of a student's short, ungraded writing exercises? Certainly mistakes will be made in this process, but are these mistakes likely to be any different in kind from the mistakes that students make on their own? Furthermore, would the harm from the mistakes of student peer reviewers outweigh the benefits that students could obtain from writing for a critical reader and from reading critically the writings of other students? In sum, the answer to the objection of pedagogical danger is that we, as law professors, sometimes need to recognize certain limits to the imperial sweep of our ideal that law professors must be among the very best *legal experts*.⁸⁵ Others, less well trained than we, can provide important help to the learning process of beginners. Other sources, whether study guides or fellow students, will provide some kind of help in any case, and law faculty should try to work, at least in small ways, to improve the learning our students obtain from these collateral sources.

Some practical problems may arise in implementing short writing exercises in basic doctrinal courses. Students may resist

84. See, e.g., R. LEFLAR, *supra* note 39, at 245 ("What a person makes out for himself stays with him better than what a teacher tells him."); Elkins, *The Paradox of a Life in Law*, 40 U. PITT. L. REV. 129, 151-52 (1979) ("The truly good teacher is a paradox in that his skill lies in doing less rather than more."); Reich, *Toward the Humanistic Study of Law*, 74 YALE L.J. 1402, 1403 (1965) ("Law schools do little to encourage students to use initiative in educating themselves."); 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 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.").

85. On the nature and possible sources of this ideal, see Kissam, *supra* note 23, at 258-59. See also Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985).

these projects because of their novelty, difficulty, or apparent extra work and may express this displeasure by avoiding classes in which writing exercises are required, by writing unfavorable evaluations of these courses, or by passively limiting their efforts to the barely acceptable minimum.⁸⁶ Perhaps these problems can be overcome simply by the factors of time, collective experience, and the sustained efforts of individual faculty members. The problem of student resistance, however, could be eased considerably by the adoption of a few collective remedies by any law faculty interested in expanding its critical writing program. For example, a faculty could agree to insure, roughly speaking, that each student is faced with one or two take-home examinations in each semester of the first two years of law school; similarly, a faculty could agree that each student will face in each of these semesters at least one major doctrinal course that requires periodic short writing exercises. Once such a system were in place, it probably would be rather easy for individual faculty members to offer additional writing exercises. Moreover, the administration of such a regulatory system, once in place, probably would function more smoothly than doubting law school deans and faculty members might anticipate.⁸⁷

Students also may resist or be skeptical about the supervision of their writing by other students, and this sort of supervision could be rather frequent in many writing across the curriculum programs in law schools. In their drive to become professionalized,⁸⁸ law students often appear unwilling to take advice about the law from anyone but a certified lawyer or law professor.⁸⁹ Although this attitude seems quite irrational, particularly in view of students' frequent use of informal study groups, this sort of resistance clearly deserves attention. I can think of two mitigating solutions. Most importantly, individual faculty members who work with student teaching assistants must be conscious of supporting and

86. See, e.g., *supra* note 40 and accompanying text.

87. At the University of Kansas School of Law, during my tenure, we have moved to a small section program for fall semester first-year students, with some faculty-supervised writing, and subsequently integrated this program, which involves teaching a first-year substantive subject, with our legal research and writing course, thereby increasing the amount of faculty-supervised writing. In each case, the expressed fears about administrative difficulties in finding professors to teach the small sections have not (yet) materialized.

88. On the professionalization of law students, see Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 132-33 (1968). Cf. Schlegel, *supra* note 85 (on the professionalization of law professors).

89. I owe this observation to Lisa Jerry, a nonlawyer, who has taught writing courses to both college undergraduates and law students.

praising the quality of their supervisory work in ways that are visible to the affected students.⁹⁰ In addition, a law faculty's official sanction of a full-scale writing across the curriculum program could do much to promote student acceptance of broader kinds of writing supervision. Part of professionalization, after all, involves the acceptance of authority, and the official sanction of writing programs by a law faculty presumably would encourage most, if not all, students to take critical writing seriously.

A third approach to expanding the critical writing process in law schools involves rethinking the role of faculty members in commenting on first drafts of student papers, briefs, and other writings. Peter Elbow, a Professor of English at the University of New York at Stony Brook, has written persuasively about the importance of creative, experimental first draft writing to good thought and good writing. First draft writing that risks error helps both the writer and readers of these drafts to make new connections that will improve their thinking and writing about complex, difficult subjects.⁹¹ Elbow argues that good writing typically involves two rather different kinds of thinking: an intuitive, creative process and a critical, revising process. Elbow holds that good writing can be enhanced by writing techniques that emphasize one or the other type of thinking at different, alternating stages of the writing process.⁹² In this view, when two drafts of a paper are written for readers, the first draft should emphasize the "creative process." The second draft should focus upon the "critical process," in which the ideas established through the writing and reading of the first draft and by the subsequent exchange of views between writer and readers can be put into a revised (*i.e.*, reseen) and more precise or more persuasive version.⁹³

This two-stage writing process will be enhanced, I believe, if law faculty will encourage their students to write first drafts that the faculty member will read in the role of a "coach" rather than "evaluator."⁹⁴ The coaching role in reading first drafts should

90. I owe this observation to my colleague Bob Jerry. Cf. Cohen, *Ensuring an Effective Instructor-Taught Writing and Advocacy Program: How to Teach the Teachers*, 29 J. LEGAL EDUC. 593 (1978) (describing the selection and training of teaching assistants for law school writing programs); Feinman & Feldman, *supra* note 77, at 540-41 n.30 (describing their support of student teaching assistants employed in an innovative law school course).

91. See P. ELBOW, *supra* note 5, at 6-175; Elbow, *supra* note 5.

92. Elbow, *supra* note 5, at 37.

93. *Id.* at 39. See *supra* notes 16 and 24 and accompanying text.

94. This important distinction was suggested by Elaine Maimon at a writing across the curriculum workshop in the spring of 1984. "Fifteen Ideas from Elaine Maimon" 1 (work-

include a faculty member's willingness to contribute as many ideas as she can to the subsequent writing of the second or final draft, her willingness even to construct a new outline of a paper that merely is suggested by a student's first draft, and, more generally, her willingness to tolerate the "creative mess" that freely written first drafts can so often involve.⁹⁵ Only after completing this coaching process without the threat of grading should the faculty member assume the evaluator's role and dispense a grade on the second or later draft, a grade that ideally should be accompanied by some kind of written critique.⁹⁶

In my experience, law professors tend to approach the reading of multiple drafts by students in ways that are diametrically opposed to the approach I have outlined. We tend to recognize the reading of first drafts as an especially painful process for several reasons, and we tend to avoid this process whenever we can. Of course, limited time is one of these reasons, but there are countervailing reasons that faculty members should rethink and put this process to advantage in our roles as teachers. First, we tend to treat all evidence of disorganization in first drafts with equal criticism and disdain, at times to the extent of imposing significant grades on first drafts in order to insure effort, organization, and precision. Moreover, we tend to search for and comment on all imperfections, technical and otherwise, that we can find in first drafts, thereby consuming substantial amounts of time and sometimes missing the central point of the exercise. This approach constitutes a failure on our parts to invite creativity in student writers and, more particularly, a failure to distinguish between what is a creative mess and what is merely incoherence that stems from inadequate thought and effort. Of course, some students may misinterpret or take advantage of invitations to write a first draft for a coach rather than an evaluator, to write with emphasis upon creativity and making new connections, and to write on an ungraded

shop outline). I have employed this distinction, with increasing rigor, in four seminars that I have taught at the University of Kansas School of Law in 1985 and 1986. With a few exceptions, this approach has helped to generate excellent research efforts and final written work from students with all kinds of previous grade point averages, ranging from two editors in chief of the *Kansas Law Review* to several students with "C" or "C+" grade averages. *But cf. infra* note 97 and accompanying text (describing some of the unanticipated pains of reading ungraded first drafts that are written for a "coach").

95. See P. ELBOW, *supra* note 5, at 13-19, 47-120.

96. See "Fifteen Ideas from Elaine Maimon" 1 (workshop outline, 1984). In my experience, using a written critique of the final draft not only provides useful feedback to students, but also helps the faculty member move from the role of coach to that of evaluator.

basis, and a faculty member can be left with the quite difficult task of distinguishing between and restructuring both creative messes and incoherent messes.⁹⁷ But who promised us that teaching is or should be easy?

Second, many faculty members reading first drafts are overly concerned with what might be called the concept of independent responsibility, or, in other words, the concept that students should earn grades only on the basis of individual work that is uncontaminated by the ideas or help of their teachers. These faculty members worry excessively, in my view, about making it "too easy" for students to earn high grades by "giving away too much" in terms of substantive and structural comments on first drafts and thereby writing the paper for the student or outlining what needs to be done to earn a high grade. The unfortunate consequences of this concept include faculty members avoiding first drafts or treating them as if they were finished products—that is, as instances of instrumental writing that deserve faculty comments only on the formal and substantive correctness of the writing. Moreover, this reliance on the concept of individual responsibility is misplaced. When we read Blue Book examinations for grades, we really are looking at, if not looking for, a joint product of our ideas and the student's ideas. We also do not read first drafts of student writing for law reviews with the limited purposes of grading them or commenting on their form—instead, we tend to read these drafts with the purpose of improving their substance. Our other students deserve equal treatment in learning by writing. I conclude, therefore, that if by fully sharing our ideas, we can help a student learn and express that learning about some complex problem, and the final product represents high quality work, then we should award a high grade.⁹⁸

97. My failure to distinguish between creative messes and incoherent messes in ungraded first drafts caused me considerable anguish in the spring of 1986 when I was reading first drafts written for seminars in arms control and jurisprudence. (Some of my colleagues can attest to this in terms of my very loud and frequent groans and shouts at the time.) Yet, in virtually all cases, the student's finished product was an excellent or very good paper and a pleasure to read. In retrospect, it was the creative messes that evolved into excellent papers and the incoherent messes that, with some considerable help, became the merely good or very good papers in their final form.

98. Cf. Feinman & Feldman, *supra* note 77 (describing their employment of "Mastery Learning" techniques in a first-year law school class and the resulting need to employ a higher grading scale as a necessary, though controversial, component of their teaching methodology).

V. CONCLUDING THOUGHTS: OTHER LEGAL WRITING

I have concentrated in this Essay on the basic aspects of law school writing. It is in law school that we begin to form our professional habits, and it is particularly important to promote the critical writing process throughout this institution. I suspect, however, that one fruitfully could promote this process in other legal institutions as well. In conclusion, I shall comment briefly on three other kinds of legal writing with which I have had some experience.

Law firms today are experiencing both bureaucratization and increasing economic pressures from a more competitive environment produced by the recent increase in lawyers and the relaxation of anticompetitive professional rules.⁹⁹ This environment suggests that many legal practices may have little room for a full appreciation of the critical writing process. It is admittedly a costly practice in terms of time and dollars, as well as in terms of risk to one's own sense of expertise. Yet some firms, particularly larger ones, have a social structure that probably can or does promote critical writing experiences. For one thing, a collective responsibility for the quality of a firm's work may encourage a helpful and even sympathetic reading of first drafts by other lawyers in the firm. For another, some of the larger firms still operate without specific cost constraints imposed by clients or competition, and these firms are better able to support the critical writing process in an appropriate style.¹⁰⁰ There remain, of course, the problems for writing that our oral culture creates: our strong sense of professional expertise and the weak introduction to critical legal writing that most law schools provide. The opportunities for adequate employment of the critical writing process in law firms are probably very mixed opportunities.

The most important reform movement in contemporary American legal education is surely the legal clinic, although this movement has remained (or been contained) too much at the margins of legal education.¹⁰¹ Clinical education affords many opportunities

99. See generally Nelson, *The Changing Structure of Opportunity: Recruitment and Careers in Large Law Firms*, 1983 AM. B. FOUND. RESEARCH J. 109 (claiming that associates entering large law firms today face an increasingly bureaucratic law firm structure); Symposium, *The Law Firm as a Social Institution*, 37 STAN. L. REV. 271 (1985) (providing various perspectives on the internal and external structures of the modern corporate law firm).

100. See Galanter, *Mega-Law and Mega-Lawyerling in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 152 (R. Dingwall & P. Lewis eds. 1983) (describing incentives in mega-firms to engage in unlimited research and writing of legal documents).

101. See Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J.

for supervised student writing. The varied purposes of clinics, their frequent underfunding, the press of client service, and our professional ideals all may limit the opportunities for effective critical writing in clinics, but the analysis in this Essay may be especially relevant to this part of legal education. This analysis also provides an important justification, though not the only one, for expanding the clinical movement and clinical methods throughout the law school curriculum.¹⁰² Indeed, a writing across the curriculum program in law schools could be viewed as representing just such an expansion of clinical methods.

Finally, legal scholars traditionally have written their articles and treatises on legal doctrine with little or no attempt to obtain from their peers creative or critical feedback on drafts of their writings.¹⁰³ The apparent explanations for this lack of scholarly exchange on works in progress include the professional temperament of many law professors,¹⁰⁴ the compartmentalization of modern law faculties into specialized fields,¹⁰⁵ and perhaps the lack of much need for exchange in performing the doctrinal analysis of statutes and cases.¹⁰⁶ This situation now appears to be changing under the force of two separate developments. The writers of the new nondoctrinal scholarship, such as economic analysis of law and critical legal studies, which invites interdisciplinary response, clearly are exchanging their drafts and presenting their papers at faculty workshops with some frequency.¹⁰⁷ In addition, the bureau-

LEGAL EDUC. 612 (1984); Feldman, *On the Margins of Legal Education*, 13 N.Y.U. REV. L. & SOC. CHANGE 607 (1984-85); Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1949); Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

102. On the basic justifications for expanding the clinical movement, see generally Amsterdam, *supra* note 101. See also Kissam, *supra* note 23, at 286-88 (asserting that the clinical movement, by reason of its influence throughout the law school, ultimately could bring about not only the better practical training of lawyers, but also an impetus towards more contextual legal inquiry and the development of socially responsive law).

103. See Kitch, *The Intellectual Foundations of "Law and Economics,"* 33 J. LEGAL EDUC. 184, 194 (1983) (asserting that legal scholars traditionally have worked "alone and in isolation, except for recurrent and elaborate discussions of the sporting scene"); cf. Riesman, *supra* note 78, at 647, 652 (noting that law professors are "intelligent," but rarely "intellectual," and that their comradely arrogance creates an atmosphere that discourages genuine intellectual exchange).

104. See Kissam, *supra* note 23, at 266-67, 311.

105. See Kitch, *supra* note 103, at 194.

106. See *id.*; Schlegel, *Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology*, 34 J. LEGAL EDUC. 103, 103-09 (1984) (describing contemporary "doctrinal policy analysis" by American law professors as having reached a state of "boring sameness").

107. See, e.g., Kitch, *supra* note 103, at 194.

cratic pressures on faculty to publish frequently and in prestigious journals, especially before tenure, may be encouraging faculty members to obtain more substantial help from their colleagues on all kinds of legal scholarship.¹⁰⁸ These changes would seem to be a very good thing—even with respect to doctrinal scholarship—because they cannot help but promote the critical writing process in law schools and thus help us to become better thinkers, better writers, better teachers, and better lawyers.

108. This has been our experience at the University of Kansas School of Law during the past five or six years.

