

Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education

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This Article analyzes and draws lessons from the intersections of four complex institutions: the American law school, the American research university, the legal profession, and the major professional reforms of legal education—clinics, law school writing programs and ethics training. The thesis of this Article is that several institutional failures are limiting the beneficial effects of the professional reforms and, to help develop the promise and principles of these reforms, various writing exercises should be incorporated throughout the traditional law school curriculum. This Article also argues that these writing exercises could be implemented at minimal costs to law schools and to the professors who teach in the core curriculum.

I. INTRODUCTION

As the twentieth century ends American law schools and American universities are experiencing confusion. These institutions are successful in many ways, but at this fin-de-siecle there are centrifugal forces, including many conflicting forces, which appear to be pulling these institutions apart, shifting or diminishing their collective purposes and perhaps their effectiveness—especially in teaching undergraduates and law students.¹ In law schools, for instance, there is much uncertainty and conflict about what constitutes good teaching,² what constitutes good scholarship,³ and what the basic missions of law schools are or should be.⁴

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¹ See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 109–270 (1993) (discussing law schools); see generally BILL READINGS, *THE UNIVERSITY IN RUINS* (1996).

² See, e.g., KRONMAN, *supra* note 1, at 109–270; David P. Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479, 503–06 (1984); Richard S. Markovits, *The Professional Assessment of Legal Academics: On the Shift from Evaluator Judgment to Market Evaluations*, 48 J. LEGAL EDUC. 417, 418–23 (1998).

³ See, e.g., ARTHUR AUSTIN, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* 156–78 (1998); John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343, 356–75 (1989); Markovits, *supra* note 2, at 423–26.

⁴ Compare, e.g., SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, ABA, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM*, 1–215

Within this turmoil, the American Bar Association and particular constituencies and individuals within law schools continue to support three professional reforms to legal education: clinical education, training in legal ethics or legal professionalism, and legal writing courses.⁵ These reform movements themselves are in some turmoil and constitute significant centrifugal forces. In certain senses, these reforms are oppositional to traditions and principles of the case method/final examination law school, and the university law school has tended to oppose, limit, compromise, and assimilate the reforms. This opposition and assimilation have constrained the professional reforms, diverted them at times from their ideal principles, and limited significantly their beneficial effects. Yet the educational principles of these reforms offer a promising way to improve all legal education—if these principles could be perceived as a coherent program and then translated for effective use in core law school courses.

The purpose of this Article is to articulate how the principles of the professional reforms could be employed to shift mainstream law teaching towards more effective and more democratic forms of education. Such changes seem possible if three conditions can be satisfied. First, we must comprehend certain transformations of the American research university and the legal profession that are affecting contemporary legal education. This understanding is necessary to appreciate the full value of the concepts or principles of the professional reforms and the full depth of the resistance to these principles. Second, we must comprehend the subtle, substantial, and often tacit resistance to the reforms and their principles that is maintained by the traditions or structures of the case method/final examination law school. This resistance not only makes it difficult to advance reform ideas but has distorted, even corrupted, the practices and principles of the professional reforms. The ideal principles need to be extracted or rescued from the actual practices of the reforms. Third, we must figure out ways to translate the basic principles of the reforms so they can be employed effectively

(1992) [hereinafter MACCRATE REPORT] with John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 157–97 (1993).

⁵ The American Bar Association has promoted these reforms through periodic task force studies of legal education and by altering its accreditation standards for law schools. See, e.g., ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302(a)(ii) (1996) (“The law school shall offer . . . an educational program designed to provide its graduates with basic competence in legal analysis and reasoning, legal research, problem solving, and oral and written communication.”); MACCRATE REPORT, *supra* note 4, at 330–34 (recommending that law schools expand their training of prospective lawyers to promote the acquisition of a relatively broad range of “professional skills and values”). On the present nature and status of law school clinics, see generally *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508 (1992) [hereinafter *In-House Clinic Report*]; on ethics training, see, for example, Deborah Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 38–50 (1992); on legal writing courses, see generally J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994).

and economically within traditional law courses. Significant change will be possible only if the reform principles can be implemented by mainstream teachers at little or no cost to themselves or, better yet, with benefits to them as well as to students.

Part II of this Article describes recent transformations of the research university and legal profession that are affecting legal education. This analysis reveals the modern university to be a "university in ruins,"⁶ which subtly but paradoxically imposes adverse effects on law schools while creating conditions favorable for innovation. This analysis also reveals an ever more complex and diversified legal profession that is placing increasing but contradictory demands upon law schools. These transformations of the university and profession have established what might be called "productive dilemmas" for law schools—dilemmas which threaten negative effects but also offer considerable room and promise for establishing richer forms of legal education.

Part III of this Article explores the practices of the three professional reforms in order to discover possible ways out of the dilemmas. The point of this analysis is not to promote the reforms themselves, although this would not be a bad idea, but rather to recover the educational principles or purposes of the reforms from an obscurity created by the deep and often tacit assumptions of the case method/final examination law school. The basic principles of the reforms are those of acquiring tacit professional knowledge (that is, knowledge of things we know but cannot speak, like knowledge of how to hit good backhand shots) through much practice, individualized supervision, and feedback; contemplating ethical values in law and lawyering; making sound practical judgments; and learning by writing. If these principles can be related to each other effectively and translated into useful forms for economical use in mainstream courses, they could form the basis for a much richer and more effective legal education.

Part IV then presents a sketch of what legal education might look sketch depicts a "quasi-clinical curriculum" that would de-center the law school's reliance on the case method and on final examinations to teach doctrinal subjects. To implement the reform principles, various "writing-across-the-curriculum" practices would be inserted into doctrinal courses in ways that are economical to both law schools and law professors.⁷ These practices might take many forms

⁶ This idea is the title and thesis of Bill Readings. See generally READINGS, *supra* note 1.

⁷ A "writing-across-the-curriculum" movement developed in American universities during the past two decades, promoted mostly by English departments as a means of improving the abilities of contemporary college students to think, analyze, and write. Cf. Leigh Hunt Greenshaw, "To Say What the Law Is": *Learning the Practice of Legal Rhetoric*, 29 VAL. U. L. REV. 861, 882–95 (1995) (stating that writing practices in doctrinal courses can improve the teaching of legal rhetoric); Peter W. Gross, *On Law School Training in Analytic Skill*, 25 J. LEGAL EDUC. 261, 285–91 (1973) (stating that writing tasks should be given more emphasis in order to teach legal analysis effectively); see generally WRITING ACROSS THE CURRICULUM, CURRENT ISSUES IN HIGHER EDUCATION (Barbara Leigh Smith ed., No. 3 1983–1984); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to*

which could range, for example, from short writings or brief outlines that help students prepare for examinations;⁸ to short writings (written either in or outside class) that help students analyze, interpret, synthesize, or apply judicial opinions;⁹ to drafts of pleadings, contracts, or legislative documents that supplement case method studies;¹⁰ to writing on contested issues of legal ethics; to writing longer research papers, briefs, or memorandums that replace final examinations.¹¹ Not all these writings need be reviewed by professors and many could be reviewed by teaching assistants, other students, or the writers themselves working under a professor's general direction. These sorts of writings could improve the learning of law students across a rather wide range of subjects and skills by providing an active focused practice that emphasizes understanding and applying legal doctrine, making sound rhetorical and other practical judgments, contemplating the ethics of law, and—significantly—utilizing individualized supervision and feedback. This writing could also improve the general reading and writing habits of lawyers by encouraging more critical and more imaginative reading and writing of legal texts.¹² The proliferation of writing would also help make legal education more democratic—by providing more attention to individual students and by helping to accommodate the diverse learning styles, perspectives, backgrounds, and talents of contemporary law students.

II. BASIC TRANSFORMATIONS

In the late nineteenth and early twentieth centuries the modern law school was constructed on the basis of two foundational institutions: the newly developed American research university and the then current practices for training lawyers. For example, the idea of employing full-time professors to become experts in “legal science” and the training of lawyers as scientists was drawn from the research university and amalgamated with professional practices for training apprentices such as the reading of cases and making arguments in “moots” or

Achieve It, 76 NEB. L. REV. 561 (1997).

⁸ See, e.g., Jay M. Feinman & Marc Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 J. LEGAL EDUC. 528, 542–43 (1985); Parker, *supra* note 7, at 568–79.

⁹ See, e.g., John M. Burman, *Out-of-Class Assignments as a Method of Teaching and Evaluating Law Students*, 42 J. LEGAL EDUC. 447, 456–57 (1992); Greenshaw, *supra* note 7, at 882–85.

¹⁰ See, e.g., Kathleen S. Bean, *Writing Assignments in Law School Classes*, 37 J. LEGAL EDUC. 276, 279–85 (1987); Parker, *supra* note 7, at 580–89.

¹¹ See generally, Philip C. Kissam, *Teaching Constitutional Law Differently*, 9 CONST. COMMENT 237 (1992).

¹² See Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 163–70 (1993); Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 140 (1987).

moot court.¹³ Although the ideas about legal science and legal scientists were quickly abandoned or modified, the distinctive "case method," which applies a kind of reasoning to judicial opinions, has ever since remained the dominant method of law teaching and the prevalent method of legal scholarship.¹⁴ The research university also provided the practice of written examinations, which law schools have adapted and modified into a distinctive system of comprehensive final examinations that are graded in ways that can easily generate discrete rankings of all law students.¹⁵

The historical relationships between law schools and these foundational institutions have produced deep, often tacit assumptions about the nature of appropriate education in the university law school. Generally speaking, university education has been assumed to be "theoretical" or "about reason," and professional legal training in the university has been assumed to be about acquiring "theoretical knowledge" about law, leaving only limited room at best for acquiring "practical knowledge."¹⁶ The case method that dominates law school texts, law teaching, and legal scholarship rests on these assumptions about theory and reason, and the use of the case method to generate and teach doctrinal knowledge and the skills of doctrinal analysis is rarely questioned. Moreover, when the case method is questioned, the usual response is that the method at most needs only to be supplemented by other practices.¹⁷ Law school examinations are similarly assumed to be appropriate, if not the best way to measure the competence of students, seemingly because these examinations implicate analytical skills and reasoning that are part of the case method's "theoretical knowledge" about law.¹⁸ The case method/final examination law school also rests upon the assumption that university graduates who enter law schools will have attitudes, experiences, and skills in reading, thinking, and writing that the case method/final examination system can shape or reform into the critical reading, thinking and writing skills of good lawyers.

But the foundational institutions upon which the modern law school was built

¹³ See WILLIAM LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 7-28, 92-99, 148-64 (1994); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, 35-199 (1983); ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967*, at 73 (1967).

¹⁴ See, e.g., Paul Brest, *Plus Ça Change*, 91 MICH. L. REV. 1945, 1945-46 (1993); see generally Edmund M. Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379 (1952) (describing the case method).

¹⁵ See Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 437-52 (1989).

¹⁶ See Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 578 (1987).

¹⁷ See, e.g., MACCRATE REPORT, *supra* note 4, at 330-34.

¹⁸ See Kissam, *supra* note 15, at 440-44.

have been subject to substantial transformations in recent decades. The American university no longer focuses as much upon theory or reason, especially in training undergraduates, and the legal profession is no longer as centered upon the use of appellate court opinions as it was in the late nineteenth century. If these foundational institutions have changed, the assumptions of the university law school may no longer be valid and should be put into question or rethought. We thus should examine the transformations of the research university and legal profession to assess how well the assumptions of the case method/final examination law school serve legal education.

A. *The Research University*

The American research university in which most law schools are located was established in the late nineteenth and early twentieth centuries as a site of "reason" and "culture." "Reason" was to be applied by different academic disciplines to contest tradition and advance knowledge in the enlightenment sense of Immanuel Kant, and "culture" was to be pursued in a dual sense prescribed by ideals of the nineteenth century German university: As the expansion and preservation of knowledge and as the cultivation of minds. The Kantian notion of reason meant that research and education should be oriented towards "theoretical" rather than "practical" knowledge, and such reason together with the dual sense of culture meant that university professors should engage in both research and scholarship (to expand culture) and teaching (to cultivate minds).¹⁹

The modern American law school was grounded in these ideas of reason and culture. In the late nineteenth century, the Dean of Harvard, Christopher Columbus Langdell, promoted casebooks and the case method of studying appellate court opinions as means of applying reason to legal materials. He advocated hiring full-time professors who did not have or need substantial practice experience but who would instead be capable of expanding legal knowledge and teaching students through skillful applications of the case method. He promoted final examinations to force students to take their university legal studies seriously.²⁰ Meanwhile, Oliver Wendell Holmes, Jr. argued that the law school's mission was to provide "moral education" to an "army of specialists" capable of employing technical legal concepts to restrain "democratic excesses."²¹

These basic ideas of reason and culture still reverberate throughout the legal academy. Law professors, like other university professors, are expected to devote substantial time to both research and teaching. The education of lawyers remains

¹⁹ See READINGS, *supra* note 1, at 54–88.

²⁰ See, e.g., LAPIANA, *supra* note 13, 7–28, 55–58; STEVENS, *supra* note 13, at 52–54; see generally Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

²¹ Oliver Wendell Holmes, Jr., *The Use of Law Schools*, in THE ESSENTIAL HOLMES 224–28 (Richard Posner ed. 1992).

essentially a function of the case method and final examinations, especially in the first two years of law school.²² The case method and its suasive, if open-ended, distinction between “law” and “politics” (or “rules” and “policies”) keep law students focused on technical concepts and relatively indifferent to questions of practice with real clients or questions of social justice.²³ Despite the many kinds of new scholarship, the vast bulk of writing by law professors and students remains committed to using the case method in order to analyze, organize, and criticize judicial doctrine.²⁴ More subtly, “reason” and “theory” continue to be privileged terms in law school discourse and politics,²⁵ a privileging that supports the resistance of law schools to treating the new professional reforms as anything more than mere supplements to the case method/final examination system.²⁶

Yet, at the end of the twentieth century, while reason and culture have not departed from the university, our contemporary universities have been transformed in ways that are subtly affecting law schools and are putting into question assumptions about how legal education should be conducted. Most obviously, during the past four decades American universities have expanded dramatically in number and size, more than tripling their total enrollment.²⁷ This expansion supported a concomitant expansion of law schools in the 1960s, 1970s, and 1980s,²⁸ and has produced contemporary law students who have more diverse educational backgrounds, talents, and quite probably more diverse interests than students who traditionally attended law schools. The marked entrance of women and members of racial minority groups into law schools during this period exemplifies, but does not exhaust, the very substantial demographic changes in law schools that have been wrought by the modern expansion of American universities.

Simultaneously the American research university has experienced a profound

²² See, e.g., Brest, *supra* note 14, at 1948. But cf. Jay Feinman, *The Future History of Legal Education*, 29 RUTGERS L.J. 475, 477–83 (1998) (predicting that the future historians of legal education will perceive the 1980s as a time when more diverse law schools emerged).

²³ See, e.g., ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 51–93 (1992); John Elson, *The Regulation of Legal Education; The Potential for Implementing the MacCrate Report's Recommendations for Curricular Reform*, 1 CLIN. L. REV. 363, 383–86 (1994); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 596–600 (1982).

²⁴ See Michael J. Saks et al., *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK L. REV. 353, 370–71 (1996).

²⁵ See Spiegel, *supra* note 16, at 580–95.

²⁶ See *infra* Part III.

²⁷ See, e.g., Alan Ryan, *Invasion of the Mind Snatchers*, NY REV. BOOKS, Feb. 11, 1993, at 13, 13.

²⁸ See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 40 (1972); SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 67 (1994).

structural transformation in which increasing attention and resources have been devoted by the university to faculty research, scholarship, and training of graduate students, while undergraduate education has been left to survive as something of a poor cousin.²⁹ This transformation appears to be changing the nature of undergraduate education, producing larger classes, more lectures, more courses featuring critical reading and writing taught by graduate students, more impersonality, more competition, and more indifference among students to the substance of their studies if not their grades.³⁰ These changes suggest that many law students may begin their legal education with rather limited motivations, aptitudes, or experiences in several intellectual activities that are preconditions for successful learning in the case method/final examination system. These activities include: the careful, critical, imaginative reading of complicated texts, the contemplation of ethical questions—as presented by literature, philosophy, or the social sciences—and the writing coherent texts on complex subjects in ways that depend on a process of rereading both the text one is writing and one's subject texts; obtaining feedback from these rereadings; and relentlessly rethinking, revising, and rewriting texts.³¹ Might not the increased competition for grades

²⁹ On the structural transformation of American research universities since the 1950s, see generally HUGH DAVIS GRAHAM & NANCY DIAMOND, *THE RISE OF AMERICAN RESEARCH UNIVERSITIES: ELITES AND CHALLENGERS IN THE POSTWAR ERA* (1997); *THE RESEARCH UNIVERSITY IN A TIME OF DISCONTENT* (Jonathan R. Cole et al. eds., 1994). On the declining status and imbalance of undergraduate education vis-à-vis research and graduate education within the contemporary research university, see Jonathan R. Cole, *Balancing Acts: Dilemmas of Choice Facing Research Universities*, in *THE RESEARCH UNIVERSITY IN A TIME OF DISCONTENT*, *supra*, at 4, 23–28; see generally ERNEST L. BOYER, *COLLEGE: THE UNDERGRADUATE EXPERIENCE IN AMERICA* (1987); ERNEST L. BOYER, *SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORiate* (1990); BOYER COMM'N ON EDUCATING UNDERGRADUATES IN THE RESEARCH UNIV., *REINVENTING UNDERGRADUATE EDUCATION: A BLUEPRINT FOR AMERICA'S RESEARCH UNIVERSITIES* (1998).

³⁰ See generally GEORGE H. DOUGLAS, *EDUCATION WITHOUT IMPACT: HOW OUR UNIVERSITIES FAIL THE YOUNG* (1992); CHRISTOPHER J. LUCAS, *CRISIS IN THE ACADEMY: RETHINKING HIGHER EDUCATION IN AMERICA* (1996). These changes in undergraduate education are not likely to be the same at all institutions, of course, because elite research universities and elite liberal arts colleges have the resources to provide continuing attention to undergraduates. Yet there are complaints today about the limited teaching efforts of research-oriented professors and the increasing competitiveness of students about grades. See Julie Flaherty, *On Campus*, NY TIMES, Mar. 17, 1999, at B9 (discussing competitiveness at Harvard, an elite research university); William H. Honan, *Small Liberal Arts Colleges Facing Questions on Focus*, NY TIMES, Mar. 10, 1999, at B8 (describing competitiveness at elite liberal arts colleges noting that “[t]he claim [that faculty members at small colleges devote themselves to being teachers and mentors] is only partly valid, since small-college professors, like those at universities, are well aware that throughout academe, professional advancement is largely based on research and publishing and therefore are ignored at one's peril”).

³¹ Cf. Fajans & Falk, *supra* note 12, at 163–70 (describing the limited critical reading abilities observed among upper class students in an advanced legal research and writing course); Parker, *supra* note 7, at 565–66 (describing how the writing process generates

among undergraduates who attend law schools also influence their law school behavior, causing them to seek competition rather than understanding in law school classrooms,³² to focus on examination-related material and ignore matters not covered on final examinations,³³ or to simply forego class attendance altogether in order to prepare for their examinations?³⁴ Might not the changes in undergraduate education also portend a limited intellectual interest or curiosity among at least a significant portion of law students that could reduce their engagement with a range of difficult but important subjects such as legal ethics, legal theory, and the open-ended, rather frustrating process of constructing legal arguments in hard cases?³⁵

The case method/final examination system assumes that university-trained undergraduates will have sufficient aptitude and skills to engage successfully, with little instruction, in reading and interpreting complex appellate court opinions, in understanding complicated discussions of these opinions, and in writing clearly, coherently, and even imaginatively about difficult problems.³⁶ But if these assumptions do not hold, the case method/final examination law school may be producing a more limited and far different set of skills from those skills that expert case method professors intend to teach. Reading cases and understanding the case method may be reduced by many students to a search for

knowledge or meaning through rereadings, feedback, revisions, and self-editing).

³² See, e.g., Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1332–45 (1988) (describing a competitive “non-conversational” form of speech in classrooms at Yale Law School).

³³ See, e.g., Markovits, *supra* note 2, at 427 (suggesting that today’s law students prefer the teaching of “legal conclusions” rather than “legal arguments”).

³⁴ See generally Roy E. Rickson, *Faculty Control and the Structure of Student Competition: An Analysis of the Law Student Role*, 25 J. LEGAL EDUC. 47 (1973) (suggesting that competitiveness among law students limits their learning by inhibiting information exchange).

³⁵ Cf. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR PROF’L COMM., ABA, TEACHING AND LEARNING PROFESSIONALISM 13–25 (1996); SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR PROF’L COMM., ABA, TEACHING AND LEARNING PROFESSIONALISM: SYMPOSIUM PROCEEDINGS 25–63 (1997) (expressing concerns about the lack of law school interest in issues of legal professionalism); Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMPLE L. REV. 393, 405–11 (1997) (describing the apparent disappearance or decline of law school interest in teaching methods of appellate argument).

³⁶ Sophisticated versions of the case method require much intellectual dexterity as well as considerable imagination if students are to comprehend, reconstruct, and apply usefully the multiple dimensions of complex judicial opinions. See, e.g., KRONMAN, *supra* note 1, at 109–62; Morgan, *supra* note 14, at 384–87. Similarly, if new lawyers are to have or develop sophisticated writing habits despite their substantial experience in law schools with the rather mechanical writing that is demanded by law school examinations, they must have acquired a basis for such writing from their undergraduate education. On the nature of “the paradigm of good paragraph thinking/writing” that is encouraged by law school examinations and its deficiencies elsewhere, see Kissam, *supra* note 15, at 443–44, 474–79.

doctrinal rules that can be used to answer final examination problems but not many other basic legal issues.³⁷ Legal thought and writing may be reduced to the mechanics of the "paradigm of good paragraph thinking/writing," an instrumentalist paradigm which suffices for writing successful examination answers but in other contexts can often produce excessive complexity, mechanical fragmented thought, and even incoherence.³⁸ The idea of making sound judgments about rhetoric or solving problems may be reduced to making the quick, impulsive, rule-oriented judgments that suffice for making productive responses in case method classes or on examinations but lack the awareness of context, the balancing of competing values, and the application of common sense that infuse sound practical judgments.³⁹ Law students who are inexperienced at contemplating ethical questions are also left free by the case method/final examination system to assume simply that good lawyering separates ethics from technique and consists only of an amoral, technically proficient advocacy.⁴⁰ These effects may all be important consequences that result from the combination of a predominantly case method/final examination pedagogy with the modern transformations of the American university.

Ironically, the structural transformation of research universities helps entrench the case method/final examination system at the same time that it places demands upon law schools for a richer, more extensive education. Although most law schools have not been directly affected by the vast expansion of funding for university research, contemporary law professors have become both participants in and subjects to the modern research orientation of the American university. Publication standards for tenure, salary increases, and chaired positions have emerged and been progressively heightened over the past few decades not only in research universities but in their law schools.⁴¹ More generally, the research-oriented atmosphere and tacit cultural norms of the research university clearly have affected many law professors and law school deans, as evidenced by the proliferation of publications by law professors in recent years⁴² and the urgency with which many schools today promote the reputation of their faculties by disseminating glossy brochures and alumni publications that trumpet the recent publications of home faculty. One consequence of these new commitments to research, of course, is the diminished time, if not also the diminished interest, that

³⁷ See, e.g., Bryden, *supra* note 2, at 503-04; Fajans & Falk, *supra* note 12, at 164; Markovits, *supra* note 2, at 427.

³⁸ See Kissam, *supra* note 15, at 443-44, 474-79.

³⁹ On the nature of sound practical judgments we would like lawyers to exercise, see KRONMAN, *supra* note 1, at 11-162.

⁴⁰ See, e.g., Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 247-52 (1978).

⁴¹ See, e.g., Philip C. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251, 271-76 (1986).

⁴² See Saks et al., *supra* note 24, at 364.

law faculty have to commit to their teaching.⁴³ In this environment, the simple replication of case method teaching and traditional examinations, with perhaps even less attention to feedback to students, seems inevitable.

More subtly, American research universities also appear to be changing their purposes or ideology from "reason" and "culture" to what Bill Readings has labeled "excellence,"⁴⁴ and this ideological change has implications for legal education too. According to Readings, the ideology of excellence is fundamentally nonreferential: That is, in contemporary universities one may be excellent in many things or anything, and reason or culture may have little to do with excellence. One may be academically excellent in using reason or in cultivating minds, but one may also be academically excellent in obtaining good grades or publishing in prestigious journals without reference to the reason or culture of the work. For example, one may be an "excellent student" by getting top scores on aptitude tests and the best grades in courses, no matter what subjects are studied or what learning process has been pursued, and this excellence may have little to do with one's reading and writing abilities or one's intellectual curiosity and experience. Similarly, one can be an "excellent teacher" by earning top scores in student evaluations without reference to any other criteria of good teaching such as the development of reasoning skills or the cultivation of good writing habits.⁴⁵ Or one can be an "excellent scholar" by producing large quantities of publications or prestigious publications no matter what the subject or quality of the scholarship.⁴⁶ The ideology of excellence is not merely reductive, however, as these examples suggest, for the governing idea of excellence allows the university (or "multiversity" as Clark Kerr renamed it) to take on as legitimate many tasks so long as they are perceived as striving for some kind of excellence.⁴⁷ Thus, the university of excellence also embraces many innovative, nontraditional ideas about teaching or scholarship, as long as they can be perceived as academically excellent in some way, and indeed the new

⁴³ See, e.g., Elson, *supra* note 3, at 343; Terrence Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 165-66 (1984).

⁴⁴ READINGS, *supra* note 1, at 21-43.

⁴⁵ See JOHN A. CENTRA, DETERMINING FACULTY EFFECTIVENESS: ASSESSING TEACHING, RESEARCH, AND SERVICE FOR PERSONNEL DECISIONS AND IMPROVEMENT 1-46 (1979) (describing a marked increase in the use of student evaluations of teaching by American universities in the 1970s and attributing this to the need of university administrators to make more discriminating choices about tenure, salary increases, and other employment matters); Markovits, *supra* note 2, at 420-23 (describing the impact of student evaluations on law teaching).

⁴⁶ See, e.g., GRAHAM & DIAMOND, *supra* note 29, at 235-48 (relying heavily upon "publication counts" as a means of ranking American research universities); Markovits, *supra* note 2, at 423 (describing an increased attention of law professors to the prestige of law reviews in which they and their colleagues publish).

⁴⁷ See CLARK KERR, THE USES OF THE UNIVERSITY 18-20 (3d ed. 1982); READINGS, *supra* note 1, at 28-43.

professional reforms of legal education may qualify more easily for full acceptance by the university of excellence than they did before in the older university of reason and theory.

The university of excellence has replaced the older university of reason and culture for a complex set of reasons. The expansion of universities, especially public universities, and the vast increase in funding for university research in basic sciences, medical sciences, and defense-related research since World War II are certainly major causes. The increased openness of research universities to the financial, political, and ideological influence of business corporations is certainly another.⁴⁸ The modern bureaucratization of research universities to deal with external influences and to apply "rigorous" measures of accountability to faculty performances also has supported the displacement of reason and culture by the ideology or purpose of excellence. But whatever its nature and causes, the university of excellence clearly has shifted power and influence from faculty members, who specialized in reason and culture, to administrators and external policymakers, who specialize among other things in establishing "objective criteria" of "excellence" for teaching, research and scholarship, and other relevant aspects of education's work.⁴⁹

The ideology of excellence may contribute to diminished interests in reading, writing, and intellectual exploration among those students who learn to pursue excellence rather than reason or culture. The university of excellence also may contribute, as a matter of ideology or bureaucratic accountability, to the marked penchant among many law professors to commit their efforts to scholarship, consultations, and their specialized subdisciplines while leaving aside questions about what should be done to provide good training for new lawyers who will begin their practices in the diverse sectors of the American legal profession.⁵⁰ Moreover, these two tendencies combine in something of a pincers movement to restrict the qualities of legal education. Law students trained in the university of excellence may be less capable or less interested in learning from the traditional case method or in writing competently about complex matters without extensive instruction or practice.⁵¹ Meanwhile, law professors are committed by the

⁴⁸ See GRAHAM & DIAMOND, *supra* note 29, at 26–50; READINGS, *supra* note 1, at 21–43.

⁴⁹ See generally READINGS, *supra* note 1; Kissam, *supra* note 41, at 271–76.

⁵⁰ See, e.g., Elson, *supra* note 3, at 350–51; Sandalow, *supra* note 43, at 165–66 ("Faculty members concerned primarily with their scholarly specialties are likely to direct their courses toward enhancing student understanding of those specialties rather than concerning themselves with the broader aspects of legal education . . ."); Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 747–56 (1998).

⁵¹ Cf. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 474, 478 (1993) (reporting a survey of lawyers in Chicago and Missouri who believe that "oral communication" and "written communication" are the most important legal skills and that law schools are deficient in producing students with these skills).

university of excellence to achieving excellence in scholarship (or consulting or teaching special subjects) and will want to rely on the case method, which includes much lecturing or "Socratic monologues" about cases, and traditional examinations in order to preserve their time and energy to pursue this excellence.⁵² Thus more extensive instruction of law students seems needed in today's university of excellence, but basic values of this university point law faculty and administrators in a different direction.

Another transformative force in the modern research university must be considered. While undergraduate education today remains largely a matter of reading books, attending lectures, participating in class discussions, performing laboratory work, and writing papers and examinations, the new computer technology and information highway are surely bringing changes to this process. Moreover, if recent experience is a guide, these changes are likely to be a bewildering mixture of liberating and constraining or disciplining practices. For example, the Internet provides low cost, rapid access to much greater amounts of relevant information, but will discovering and reading this information on small screens change the way one processes or understands the information? Will this kind of reading make us more critical readers or less critical readers? Similarly, the Internet classroom, with its elaborate electronic communications among faculty and students, promises more individualized student-faculty contacts, which surely can enhance learning, but might not these changes on balance tend to discipline students into undertaking more exhaustive (or exhausting) reading assignments as they pursue the many leads of hypertext lessons?⁵³ Laptop computers allow students to take verbatim notes more easily, but might not this note-taking merely feed the law student's penchant for the many bits of positive information that can be used on final examinations, and thereby diminish the student's reflections about and synthesis of legal information that are such vital parts of good professional learning and practice? Word processors surely can facilitate writing, revising, and rewriting complicated texts, but might not this writing and editing on balance tend to produce more frequent, more complex, and longer texts that fail to improve writing quality?⁵⁴ In any event, we can be

⁵² See KRONMAN, *supra* note 1, at 264-70; Sandalow, *supra* note 43, at 165-66, 169-72.

⁵³ See generally THE WEST NETWORK: BRIDGING THE MILE WITH TWEN, DESKTOP COLLEAGUE, March, 1998, at 1, 1, 3 (describing Professor Philip Bouchard's Internet classroom at the Western New England College School of Law); William R. Slomanson, *Electronic Lawyering and the Academy*, 48 J. LEGAL EDUC. 216 (1998) (discussing web-based classes).

⁵⁴ Cf. Jeff Madrick, *Computers: Waiting for the Revolution*, NY REV. BOOKS, Mar. 26, 1998, at 29, 31, stating:

Why haven't computers dramatically augmented productivity? Some analysts believe that the enormous power of computers is often superfluous. For example, law briefs are now much thicker and more detailed than they once were, thanks to word processing and the greater ease in obtaining supporting documents. But this does not mean that law is being practiced any more efficiently; perhaps just the opposite is true.

relatively sure that law students trained on word processors and the Internet will be different from students trained exclusively on books, lectures, and class discussions. And these new model students, like students in the university of excellence, may be more interested in securing the rules or bits of positive law they need to compete for grades than they are in attending to the complex practices of critical reading, critical writing, practical judgment, and ethical contemplation that are still needed by effective legal practitioners. Law schools ought to be concerned about this possibility.

The university of excellence may seem superficial by comparison to traditional university ideals, but this ideology also has its positive features. It expands the possibilities for programmatic and individual innovations in universities as long as one can establish a claim for excellence under some kind of educational or academic criterion. Struggles may ensue over the proper standards of excellence to apply to innovations,⁵⁵ but the ideology of excellence has shifted the playing field and opened up new spaces at the margins at least for experimenting and challenging the traditional conventions of a university education. Indeed, the expanding presence in most law schools of the professional reforms of legal education may be viewed as an instance of such innovations being embraced by the university of excellence, as its criteria of excellence have expanded from reason, theory, and expansion of culture to also include excellence in practice-oriented education.

B. *The Legal Profession*

Like universities, the American legal profession has been transformed in the postwar era. These changes are demanding that law schools do more, not less, to train competent lawyers, but these changes are also limiting the capacities of law schools to provide more extensive education. In effect, contradictory external forces are entrenching the case method/final examination law school while simultaneously challenging its deep assumptions.

In the nineteenth century the American legal profession was diversifying, but it fairly may be said that the profession then was centered around litigation and appellate law.⁵⁶ Langdell's installation of casebooks, the case method, and final examinations as the virtually exclusive method of the modern law school was thus understandable, if not also commendable, in that this regimen focused law school inhabitants upon appellate law. But the work in today's highly specialized

Id.

⁵⁵ See, e.g., AUSTIN, *supra* note 3, at 196 (describing current disputes within law schools over the appropriate standards for evaluating new kinds of scholarship); Markovits, *supra* note 2, at 418-27 (describing changes in standards for evaluating teaching and scholarship and attributing these changes in part to new uncertainties about law teaching and legal scholarship).

⁵⁶ See, e.g., LAWRENCE FRIEDMAN, *THE HISTORY OF AMERICAN LAW* 525-66 (1973); JONATHAN LURIE, *LAW AND THE NATION, 1865-1912*, at 43-54 (1983).

and diverse profession is less concerned with litigation and appellate law, and the nature of effective legal education for beginners may be quite different. To be sure, lawyers of all kinds rely to an extent upon appellate law. Further, most law students presumably desire a generalist training that can help qualify them for the most desirable kinds of legal work, including complex doctrinal work in corporate law firms, especially since most students begin law school with relatively few ideas about the kinds of legal work they ultimately will want or seek. What is in question, then, is not specialist versus generalist training, but the kind of generalist training that would be most appropriate for entrants into the diversified legal profession of the twenty-first century.

The contemporary transformations of the legal profession include a vast increase in the number of American lawyers, the increasing division of the profession into highly specialized and essentially unrelated sectors, the expansion and specialization of large corporate law firms, and the new "open competitiveness" or "commercialization" of law practices. Also, law graduates today often do not practice law but work in law-related businesses such as banking or insurance law or directly in business management or public administration.⁵⁷ These changes help entrench the doctrinal specialization, case method and final examination/grading/ class ranking system of law schools. At the same time, these changes are demanding or inviting law schools to diversify and enrich the kinds of training they provide to prospective lawyers in ways that diverge from the case method and traditional final examinations. The most concrete evidence of these demands, of course, consist of the legal profession's apparent interest in promoting law school training in the "skills and values" that are associated with legal research and writing programs, law school clinics, and law school courses in legal ethics.

The transformations of the profession support the case method/final examination system in several ways. Students and faculty alike realize that law school grades and class ranks today are more important than ever to students who wish to compete for employment with high paying corporate law firms or to compete for employment of any kind in the stagnant market for lawyers that developed in the mid-1990s. Law firms also may be paying more attention to the grades and class ranks of prospective employees to help maintain their reputations in the increasingly competitive markets for legal services. Thus, within law schools, law professors will surely understand at least tacitly that they must administer "fair" and "objective" procedures to distribute the many different grades that are necessary to comply with mandatory grading curves, which are intended to establish fair or legitimate class ranking systems.⁵⁸ An efficient way

⁵⁷ See RICHARD ABEL, *AMERICAN LAWYERS* 166–72, 177 (1989); MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: TRANSFORMATION OF THE BIG LAW FIRM* 121 (1991); ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 57 (1988); MACCRATE REPORT, *supra* note 4, at 29–102.

⁵⁸ See generally Robert C. Downs & Nancy Levit, *If It Can't Be Lake Woebegone . . . A*

to implement this grading is to offer case method classes, which concentrate on the "analysis" of "leading cases," and then require students at the end of each course to quickly "identify issues," recall "the rules," and "apply" the rules to novel fact situations on time-limited comprehensive examinations for which no supervised practice or mid-term examinations have been provided. The basic disjunction between case method analysis in the classroom and the rule-oriented process of identifying and quickly resolving novel, surprising situations on time-limited final examinations makes it relatively easy to draw the many fine distinctions between student examination performances that are required by mandatory grading curves.⁵⁹ In contrast, providing students with supervised practice and individualized feedback in solving examination problems is likely to make it more difficult to draw discrete grading distinctions because supervised practice on a basic set of issues and skills tends to narrow or mitigate performance differences.⁶⁰ The case method thus serves the examination/grading/class ranking system of law schools quietly and efficiently, in a way that other kinds of law teaching, for example, clinics and paper-writing courses, cannot.

The diversification, specialization, and competitiveness among modern law firms also create incentives for law schools to provide many specialized doctrinal courses. Law firms often look to hire doctrinal specialists on law faculties as consultants, and law schools compete with each other to offer specialized courses to students who think they will need these courses for employment or who otherwise desire them. These impulses for doctrinal specialization, of course, feed the tendencies of law professors to concentrate their scholarship in specialized fields and to rely on the case method and final examinations as their basic teaching method. This traditional form of teaching is often related to their scholarship, and in any event it will save them time and energy for scholarship or consulting.

But the transformations of the legal profession are demanding more of law schools than an objective class ranking system and the expanded coverage of legal doctrine. Most poignantly, as law firms and lawyers become busier, more competitive and more specialized, and as lawyer employees become more expensive, legal employers rationally are looking to transfer training costs elsewhere—to law schools.⁶¹ Law firms and other employers also want their new lawyers to be better critical readers, better researchers, better writers, better

Nationwide Survey of Law School Grading and Grade Normalization Practices, 65 U. MO. KAN.-CITY L. REV. 819 (1997) (describing the increased use of mandatory grading curves in contemporary law schools).

⁵⁹ See Kissam, *supra* note 15, at 437–52.

⁶⁰ See Feinman & Feldman, *supra* note 8, at 545–51; Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L. J. 875, 918–25 (1985); Owen J. Roberts, *Methods for Review and Quiz in "Case System" Law Schools*, 1 AM. L. SCH. REV. 222, 223–24 (1904).

⁶¹ See Roger Cramton, *Change and Continuity in Legal Education*, 79 MICH. L. REV. 460, 466 (1981).

oralists, more practical, common sense thinkers, and more imaginative thinkers than they have been historically.⁶² The specific nature of the new knowledge and skills that are desired varies considerably across the profession; judges may desire better trial advocates, corporate firms better researchers, and so on. In general, however, the new demands on legal education are demands that law school graduates should have both experience and facility with the rhetorical skills of communicating complicated ideas to many different audiences in a persuasive manner⁶³ and the “common sense” skills of making practical and ethical judgments to help solve legal problems.⁶⁴

Law professors generally have maintained that the case method, at least in the hands of master teachers, promotes critical reading, legal analysis necessary for effective research and writing, imaginative thought, and sound judgment.⁶⁵ This view, however, is based upon deep assumptions about the reception of the case method among students and ignores the fact that most law teachers are not master teachers—much as we might like to think. It ignores the available, if limited evidence, which suggests that law students tend to ignore learning in case method classrooms to prepare efficiently for their examinations.⁶⁶ It also ignores the possibility that a steady diet of case method classes and issue-spotting examinations does not instruct most students effectively in such basic “case method skills” as distinguishing case holdings from dicta, interpreting legal rules by reference to their purposes, or reading statutory provisions carefully, skeptically and with attention to possible ambiguities.⁶⁷ To be sure, case method classes suffice to get most students through examinations, through bar examinations, and into employment. But the effectiveness of this method for other purposes has always been in doubt,⁶⁸ and the contemporary transformations of the research university and legal profession should only increase our doubts.

Thus the bind for law schools. On the one hand, both the university of excellence and external constituencies are demanding more of traditional law school methods. In other words, they are demanding case method teaching and an examination/grading/class ranking system that generates many distinct grades and class ranks while leaving law professors free to produce large quantities of scholarship that are believed to enhance the reputation of their law schools,

⁶² See, e.g., Garth & Martin, *supra* note 51, at 472–77.

⁶³ See *id.* (reporting that lawyers in both Chicago and Missouri give very high priorities to training law students in general oral and written communication); see generally Greenshaw, *supra* note 7 (describing actual and possible training in legal rhetoric).

⁶⁴ See, e.g., MACCRATE REPORT, *supra* note 4, at 141–57; see also KRONMAN, *supra* note 1, at 11–162 (describing the nature of sound practical judgments by lawyers and some possibilities of achieving training in this through the use of the case method).

⁶⁵ See, e.g., KRONMAN, *supra* note 1, at 109–62; Morgan, *supra* note 14, at 381–82.

⁶⁶ See Rickson, *supra* note 34, at 54.

⁶⁷ See Bryden, *supra* note 2, at 480–81.

⁶⁸ See STEVENS, *supra* note 13, at 39–40, 57–59, 117–23 (describing early doubts).

universities, and alumni. On the other hand, various constituencies in the legal profession are demanding more effective forms of education that point beyond the case method and final examinations—towards an education that generates better readers and writers and more imaginative, practical, and ethical problem-solvers.

The response of modern law schools to these dilemmas has been to supplement the case method/final examination system by adding limited versions of the three professional or practice-oriented reforms to legal education. These reforms have been perceived as mere supplements to case method training in legal doctrine and analytical skills and accordingly, have been given only a limited scope.⁶⁹ But these reforms contain educational principles that, if taken seriously, would substantially challenge our beliefs in the efficacy of the case method/final examination law school. Part III of this Article explores the history of these reforms, paying special attention to the ways in which the reforms in principle challenge the case method/final examination system and to the ways in which assumptions about the research university and university law school have limited these reforms, caused disintegrations within them, and obscured their fundamental principles.

III. THE PROFESSIONAL REFORMS

American law schools operated throughout the first half of the twentieth century with a relatively simple program based on Dean Langdell's innovations at Harvard. Courses on legal doctrine were taught by the case method with a final examination at the end of each course. Law students were required to take a legal bibliography course, which prepared them to do research in practice. Moot courts were available on an optional or required basis, and at elite law schools a student-edited, student-managed law review provided opportunities for sustained research and expository writing to those few students who obtained top grades on their first year examinations and were admitted to law review. Apart from these minimal supplements, legal education was devoted to case method courses and final examinations that engaged students in applying appellate law to novel fact situations. Scholarship was performed mostly by professors at elite schools, and this was case method scholarship about legal doctrine until Legal Realism introduced social contexts and interdisciplinary studies into the margins of scholarship in the 1930s.⁷⁰

There were, to be sure, stirrings of change in law teaching before World War II. In the 1920s, Columbia Law School experimented with new kinds of reading materials and new courses in order to develop a "functional" rather than

⁶⁹ See, e.g., Rhode, *supra* note 5, at 33–42; Spiegel, *supra* note 16, at 577.

⁷⁰ See STEVENS, *supra* note 13, at 35–199; Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 540–41 (1973); see generally John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985);

“doctrinal” curriculum.⁷¹ In the 1930s, John Bradway and Jerome Frank argued for learning law by representing clients,⁷² and the University of Chicago Law School started its research and writing program for first year students in 1938.⁷³ But case method classes and final examinations remained the basic program at most law schools (at least for students not on law review) throughout the first half of the twentieth century and into its second half as well.

After World War II, the expansion of American universities and law schools and the influx of veterans to law schools generated new resources and new democratic motivations to make changes to the basic program.⁷⁴ The one professional reform implemented at this time was the first year course in “legal writing,” which subsequently was combined with legal bibliography to constitute a single legal research and writing course.⁷⁵ Initially, the new writing programs were designed to expose law students to thought and writing not included within case method courses and provide opportunities for extensive research and legal analysis comparable to the experience of law review students.⁷⁶ But the first year writing course has been in a state of constant flux at most law schools ever since, as law schools have experimented with a great variety of structures in order to achieve better results from limited resources.⁷⁷ More recently, many schools have added an “upper class research and writing requirement,” which typically is satisfied by the completion of a seminar paper or work on law review.⁷⁸ The proliferation of seminars and multiple law reviews at many schools may also be

⁷¹ See, e.g., Brainerd Currie, *The Materials of Law Study* (pts. 1 & 3), 3 J. LEGAL EDUC. 331, 332–34 (1951), 8 J. LEGAL EDUC. 1, 1–78 (1955).

⁷² See generally John Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469 (1933); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

⁷³ See Harry Kalven, Jr., *Law School Training in Research and Exposition: The University of Chicago Program*, 1 J. LEGAL EDUC. 107, 108 (1948).

⁷⁴ See generally AALS Committee on Curriculum, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945) (having been chaired by Karl Llewellyn).

⁷⁵ See Rombauer, *supra* note 70, at 539–42.

⁷⁶ See Kalven, *supra* note 73, at 110 n.6; Howard C. Westwood, *The Law Review Should Become the Law School*, 31 VA. L. REV. 913, 913–14 (1945).

⁷⁷ See generally Allen Boyer, *Legal Writing Programs Reviewed: Merits, Flaws, Costs and Essentials*, 62 CHI.-KENT L. REV. 23 (1985) (describing three basic models for the first year writing course); Helene S. Shapo, *The Frontiers of Legal Writing: Challenges for Teaching Research*, 78 L. LIBR. J. 719, 721–24 (1986) (describing eight models of instruction for legal writing courses).

⁷⁸ See William J. Bridge, *Legal Writing After the First Year of Law School*, 5 OHIO N.U. L. REV. 411, 423–24, 426–28 (1978); George D. Gopen, *The State of Legal Writing: Res Ipsa Loquiter*, 86 MICH. L. REV. 333, 355–56 (1987); see generally S. Blair Kauffman, *Advanced Legal Research Courses: A New Trend in American Legal Education*, 6 LEGAL REF. SERVS. Q., Fall/Winter 1986, at 123–39.

viewed as part of the modern expansion of writing opportunities.⁷⁹

Starting in the 1960s, clinical education became another significant presence as law schools opened legal clinics to make legal education "more relevant" and to help the legal profession meet its new constitutional and ethical duties to provide legal services to the poor.⁸⁰ Subsequently, simulated clinical courses, especially in trial advocacy, were developed in response to allegations by judges and professional organizations that new lawyers were deficient in trial skills.⁸¹ The development of clinical programs has largely continued in the 1980s and 1990s, limited by available resources but stimulated by new ABA accreditation standards and several task force studies, most recently the MacCrate Report.⁸²

In the 1970s, the Watergate affair aroused public and professional concerns about the ethical behavior of lawyers, and the profession responded by establishing a professional ethics part to state bar examinations and by requiring law schools to teach "legal ethics."⁸³ Law schools traditionally had adopted a minimalist approach to teaching legal or professional ethics, and, responding to the ABA requirement, they simply added a required course.⁸⁴ But the ABA's interest in promoting training in legal ethics and legal professionalism has continued and, if anything, has increased as evidenced by the many concerns about "professionalism" expressed in recent task force and committee reports.⁸⁵

These professional reforms were started for a complex set of political and educational reasons, and they have been subjected to numerous constraints, including strategies or traditions of the university law school that would limit the reforms and assimilate them into the case method/final examination system. Thus, each reform has been developed as a specialized compartment within the already highly compartmentalized structure of the law school curriculum. The

⁷⁹ On the proliferation of law school clinics, see, for example, Eleanor M. Fox, *The Good Law School, The Good Curriculum, and the Mind and the Heart*, 39 J. LEGAL EDUC. 473, 476-81 (1989). On the proliferation of multiple law reviews at individual law schools, see Saks et al., *supra* note 24, at 363, 373.

⁸⁰ See, e.g., AALS & ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION, CLINICAL LEGAL EDUCATION 7-8 (1980) [hereinafter CLINICAL LEGAL EDUCATION]; William Pincus, *Clinical Legal Education in the United States, 1968-1975*, 49 AUSTRALIAN L.J. 420, 420-22 (1975).

⁸¹ See CLINICAL LEGAL EDUCATION, *supra* note 80, at 7-8; see generally Roger C. Cramton & Erik M. Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies*, 30 J. LEGAL EDUC. 253 (1979).

⁸² See *supra* note 4.

⁸³ See MICHAEL J. KELLY, LEGAL ETHICS AND LEGAL EDUCATION 2 (1980).

⁸⁴ See *id.* at 5-21.

⁸⁵ See generally ABA, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986); ABA, TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE (1996); ABA, TEACHING AND LEARNING PROFESSIONALISM: SYMPOSIUM PROCEEDINGS (1997); MACCRATE REPORT, *supra* note 4.

administrative and political structures of these programs have been splintered, especially by the employment of part-time teachers, contract teachers, faculty with "special" tenure status, and student teaching assistants in lieu of full-time tenure-track professors. This insures that the specialists in these fields are without political power or incentives to do much more than establish their own niches within law schools. The concurrent development of the reforms since the 1970s has also meant that these programs compete with each other for new resources, insuring that their proponents tend to be competitors rather than allies in reforming the curriculum.⁸⁶ Basic ideas of the case method/final examination law school have also infiltrated the professional reforms in ways that limit their reformist qualities and ensure their loyalty to the university law school.

In light of their complex origins and constraints, detailed examination of the histories and practices of the reforms is necessary to recover their basic educational principles. These principles, as will be discovered, have considerable promise for redirecting law schools towards more effective and more democratic education. In particular, both legal writing and clinical education emphasize the importance of acquiring different kinds of tacit professional knowledge that are best obtained by active practice with supervision and sympathetic feedback from more experienced practitioners, and all three reforms point towards experience and skills in making practical or rhetorical judgments. The reforms, especially ethics training at its best, can also promote reflection about ethical issues that are integral to many aspects of legal work. Further, legal writing courses rest on the most powerful principle of learning by writing, a principle that could enhance all legal education including, especially, education in tacit professional knowledge, education in making practical or rhetorical judgments, and education in ethical reflection. Moreover, these principles, in particular those of supervision and feedback on writing projects, can help provide more attention, perhaps equal attention, to each individual student, thus democratizing legal education in a way that was promised but never fully realized by the original legal writing programs.

Of course, once the basic principles of the professional reforms have been recovered, they will need to be translated into workable methods that can be implemented in mainstream doctrinal courses. Likely objections to this implementation must also be answered. But translation and justification are the tasks of Part IV. This Part focuses on extracting the basic principles from reform practices.

⁸⁶ See Beverly Balos, *Conferring on the MacCrate Report: A Clinical Gaze*, 1 CLINICAL L. REV. 349, 353-54 (1994).

A. Legal Writing Programs

It is curious that law schools only recently have paid curricular attention to education in writing for lawyers. This is a particular anomaly in the legal profession, in which communication is essential and words are "the skin of a living thought."

—Helene S. Shapo⁸⁷

Perhaps ideally, all faculty members would devote the major portion of their time to teaching writing, research, and analytical skills to each student individually. Needless to say, this would be a more time-consuming program than most faculties would tolerate.

—Stewart Macaulay & Henry G. Manne⁸⁸

Law schools began to introduce writing programs into the curriculum under two different influences. One was the Legal Realist critique of legal education, which called for "some realism" about professional training and the provision for more comprehensive education in the activities of practicing lawyers.⁸⁹ The second consisted of the egalitarian or democratic values of the New Deal and World War II, which suggested that more attention and resources be paid to the majority of law students who do not obtain the educational benefits of a law review experience.⁹⁰ The writing programs instituted after World War II were thus designed to provide writing opportunities that would be different from the writing of examinations, would involve much individualized feedback from more experienced writers and would entail much rewriting, especially of memorandums that attempt to resolve client problems.⁹¹ As writing programs have developed and expanded, however, they have become subject to a host of competing purposes and competing conceptions about writing or how to implement writing, to say nothing of limited resources and the unwillingness of most full-time faculty to supervise student writing. While new resources have

⁸⁷ Shapo, *supra* note 77, at 719 (footnotes omitted).

⁸⁸ Stewart Macaulay & Henry G. Manne, *A Low-Cost Legal Writing Program—The Wisconsin Experience*, 11 J. LEGAL EDUC. 387, 388 (1959).

⁸⁹ See, e.g., KARL LLEWELLYN, *THE BRAMBLE BUSH* 19 (1930) (noting the limited professional value of case method training); Karl Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 674–76 (1935) (recommending clinical training for law students); see generally Frank, *supra* note 72 (recommending that law students be provided broader training in reading and writing law).

⁹⁰ See Kalven, *supra* note 73, at 107–08, 108 n.1, 110 n.6, 112; Roy Moreland, *Legal Writing and Research in the Smaller Schools*, 7 J. LEGAL EDUC. 49, 52–55 (1954); Westwood, *supra* note 76, at 916–17.

⁹¹ See Burton Kanter, *Effective Legal Writing—Some Thoughts and Reflections on Learning and Teaching*, 42 CHI. B. REC. 113, 113–18; see also Kalven, *supra* note 73, at 110–13; Moreland, *supra* note 90, at 54, 56–57.

been provided and particular improvements have surely occurred, experienced observers today tend to agree that law school writing programs in general do not come very close to their goal of providing substantial, meaningful, student-centered learning experiences that are based on the writing process.⁹²

The modern university law school thus incorporates both an "ideal conception" of writing and a "fragmented reality" of writing programs that does not approach this ideal and often points in other directions. This ideal, this reality, and the yawning gap between them serve the case method/final examination law school quite nicely. The ideal helps legitimate case method teaching by signaling to the profession, law students, and prospective students in a general way that law graduates will be effective writers. Meanwhile, the fragmented reality of actual programs reduces the implicit threat that writing poses to the values of teaching by the traditional case method/final examination system.

The ideal conception of law school writing may be summarized by a series of principles that articulate ways to use writing as an experience-based learning process to acquire legal knowledge and a variety of skills. The most fundamental principle states that legal research, legal thought, and legal writing should be integrated exercises in order that students will experience and understand the vital, often tacit interconnections between effective research, the analysis of problems that often shifts as research and writing progresses, and the rethinking and rewriting of documents that so often informs effective research and analysis.⁹³ Moreover, these integrated exercises should be continued and intensified throughout the three year curriculum in order to take advantage of the increasing knowledge and confidence of students in applying legal techniques.⁹⁴ This practice should provide many opportunities for revising legal texts on the basis of feedback from more experienced writers or, more simply, from rereading one's own text,⁹⁵ in order to help students acquire a capacity to reflect and to evaluate their problem solving work and to make adjustments to their work—a

⁹² See, e.g., Gopen, *supra* note 78, at 355–62; Rideout & Ramsfield, *supra* note 5, at 36–37; Shapo, *supra* note 77, at 725. A short list of exceptional law school writing programs would probably include the programs at Brooklyn, Chicago-Kent, Montana, NYU, and the University of Chicago. See Bari R. Burke, *Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context*, 52 MONT. L. REV. 373, 396–98 (1991); Fajans & Falk, *supra* note 12, at 173–74; Gopen, *supra* note 78, at 356–62; Kalven, *supra* note 73, at 107–08; Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOLEDO L. REV. 1, 19–27 (1992); see generally SECTION ON LEGAL EDUC. & ADMISSION TO THE BAR, ABA, SOURCEBOOK ON LEGAL WRITING PROGRAMS (1997).

⁹³ See Rombauer, *supra* note 70, at 540–41; Shapo, *supra* note 77, at 726–28.

⁹⁴ See Robert C. Berring & Kathleen Vanden Heuvel, *Legal Research: Should Students Learn It or Wing It?*, 81 L. LIBR. J. 431, 441 (1989) (arguing that genuine instruction in legal research can only be accomplished in the second and third years of law school).

⁹⁵ See Kalven, *supra* note 73, at 114–16; Moreland, *supra* note 90, at 56; Harry Pratter & Burton W. Kanter, *Expanding the Tutorial Program: A Bloodless Revolution*, 7 J. LEGAL EDUC. 395, 407 (1955); Rideout & Ramsfield, *supra* note 5, at 61–93.

capacity which is essential for many kinds of high quality professional work.⁹⁶ Law school writing should also involve many different kinds of documents (for example, opinion letters, contracts, wills, pleadings, and legislation) to introduce students to the varied contexts and audiences for whom lawyers must write.⁹⁷ Substantial feedback followed by rewriting also implies a need for certain “collaborative” or “joint” work between students and supervisors as a good, perhaps essential, means by which experienced supervisors can convey their understandings of tacit professional knowledge to students.⁹⁸

More generally, law school writing should be governed by two principles drawn from contemporary composition theory. One is that good substantive writing should be learned and taught as a process in which the writer generates substantive and stylistic knowledge by the act of writing itself and thus benefits from much rereading, feedback, revisions and rewriting. The second is that good writing should be learned and taught as a social act in which the writer enters into a complex discourse between her own ideas and texts, the texts of others, the readers of her texts, and the imagined ideal audience for each kind of writing.⁹⁹ This conception of writing as a process and social act holds that it is a mistake to think of writing as merely a product by which one instrumentally conveys independently conceived thought in a clear and neutral manner.¹⁰⁰

This ideal conception of the writing process serves the university law school by enhancing claims about the effectiveness of law school training. Were this ideal widely implemented, however, it would seriously challenge the case method/final examination system. If legal writing “is basically 85 percent analysis and 15 percent composition,”¹⁰¹ students and faculty who begin to use an extensive writing process to learn law would soon discover that writing together with feedback of various kinds is a far better means of learning most of the basic skills of legal analysis, synthesis, and rhetoric than mere oral exchanges in case

⁹⁶ See generally DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983) [hereinafter SCHÖN, *THE REFLECTIVE PRACTITIONER*]; DONALD A. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS* (1987) [hereinafter SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER*].

⁹⁷ See, e.g., Greenshaw, *supra* note 7, at 873–82 (emphasizing writing for varied contexts and audiences as critical aspects of acquiring skills in legal rhetoric).

⁹⁸ See Rideout & Ramsfield, *supra* note 5, at 61–93; cf. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER*, *supra* note 96, at 41–172 (describing the collaborative transmission of tacit professional knowledge in studio classes of architecture schools).

⁹⁹ See Parker, *supra* note 7, at 565–67; Rideout & Ramsfield, *supra* note 5, at 51–61; cf. Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to “Think Like Lawyers”*: *Integrating Socratic Method with the Writing Process*, 64 *TEMP. L. REV.* 885, 885–908 (1991) (elaborating methods for a “writing process perspective” in law school writing).

¹⁰⁰ See Parker, *supra* note 7, at 565–67; Rideout & Ramsfield, *supra* note 5, at 51–61.

¹⁰¹ Gross, *supra* note 7, at 266 (quoting W.C. Warren, *The Teaching of Legal Writing and Legal Research—A Panel*, 52 *L. LIBR. J.* 350, 352 (1959)).

method classrooms and the instrumentalist writing that is demanded by final examinations.¹⁰²

The university law school has deployed several devices to devalue or subjugate writing knowledge and the writing process, thus helping preserve an emphasis on the case method and final examinations. First, attention to writing has been limited primarily to a single required course in the first year that is taught separately from doctrinal subjects.¹⁰³ This separation signals that legal writing is a "skill" separate and independent from legal analysis, and the first year course engages students in writing law at the moment when they are least capable of perceiving the possibilities of using writing to acquire and generate substantive and procedural legal knowledge. To be sure, the proliferation of elective seminars, upper class writing requirements, and new law reviews has increased opportunities for student writing in upper class years. But the lack of formal institutional attention and approbation continues to signal that writing is an episodic, separate skill much less important than the analysis, thought, and oral brilliance of case method classrooms and that substantial writing in law school is essentially a matter of personal choice. In sum, the separate and limited first year writing course reflects and reinforces the widespread assumptions in law schools that writing is merely a neutral instrument or skill for transferring independently conceived thoughts and therefore that the only relevance of "legal writing" is as a finished product.¹⁰⁴ This assumption misses or detracts from the possibility of acquiring much invaluable professional knowledge by employing writing as a learning process.¹⁰⁵ Of course, this assumption also protects the traditional case method law school from significant changes.

Second, many law schools today are investing additional resources in research and writing courses, and there is a marked attempt in these courses to integrate research, methods of legal reasoning, and writing.¹⁰⁶ But limited resources and the fragmented structures of these courses diminish the

¹⁰² See Boyer, *supra* note 77, at 323–24; Gross, *supra* note 7, at 294–96. On a successful experiment using frequent writing exercises to teach basic legal analysis, see Feinman & Feldman, *supra* note 8, at 534–44. On the instrumentalist writing of final examinations, see Kissam, *supra* note 15, at 500.

¹⁰³ See Rideout & Ramsfield, *supra* note 5, at 77; Shapo, *supra* note 77, at 720–21.

¹⁰⁴ Cf. Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION & COMM. 76, 77–79 (1982), reprinted in RHETORIC AND COMPOSITION: A SOURCEBOOK FOR TEACHERS AND WRITERS 3, 4–6 (Richard L. Graves ed., 3d ed. 1990) (teaching English composition as a separate skills course emphasizes writing as a finished product and denigrates the values of writing, teaching writing, and understanding writing as a basic method or process for acquiring substantive knowledge).

¹⁰⁵ See Reed Dickerson, *Teaching Legal Writing in Law Schools: With a Special Nod to Legal Drafting*, 16 IDAHO L. REV. 85, 86–89 (1979); Kissam, *supra* note 12, at 144; Rideout & Ramsfield, *supra* note 5, at 51–52, 61–74, 84–85, 88–90, 96–97.

¹⁰⁶ See Neil Feigenson, *Essay Review: Legal Writing Texts Today*, 41 J. LEGAL EDUC. 503, 511–16 (1991); Shapo, *supra* note 77, at 724–28.

opportunities for effective integrated experiences and contribute to the prevailing view that writing is but a neutral instrument and that law school writing therefore is, and ought to be, a subordinate subject. Many research and writing courses are taught by adjunct part-time professors or third year students under the variable supervision of full-time faculty, and these instructors are unlikely to have or acquire much experience in teaching legal writing.¹⁰⁷ Even when full-time instructors are employed, they are often young lawyers or writing instructors who are neither recognized nor paid as law professors and who experience rapid turnover.¹⁰⁸ The basic facts that most writing supervisors are not full-time professors and that the research and writing course "typically carries less academic credit than any other first-year offering" surely signal that writing is not to be taken as seriously as substantive law school courses.¹⁰⁹ Further, some courses still provide instruction in legal bibliography, legal reasoning, and legal writing in separate units, reducing the possibility of tacit learning from integrated exercises and reinforcing the perception that the mission of the course "is to perfect [the] production of specific written forms."¹¹⁰ Research instruction by part-time adjuncts and third year students also may tend "to be more idiosyncratic and anecdotal than instruction informed by a more comprehensive study of the types of research materials available in the law school library."¹¹¹ The limited resources and fragmented structures of writing courses thus help eliminate the challenges from the writing process to the case method/final examination law school.

Third, the first year research and writing course is often perceived as mere practice or training in performing the same analysis that is demanded by law school classrooms and, more significantly, by final examinations.¹¹² Typical problems for research memorandums and other writing assignments are often similar to final examination problems that invite arguments about applying rules to given facts on tightly defined issues;¹¹³ thus, many students may perceive research and writing courses merely as ancillary means to help them negotiate the case method/final examination system. In this perspective, legal research and writing become an integral, if supplemental, part of the case method law school and is no threat at all to traditional teaching methods.

¹⁰⁷ See Gopen, *supra* note 78, at 356; Shapo, *supra* note 77, at 725.

¹⁰⁸ See Rideout & Ramsfield, *supra* note 5, at 37-38 n.5, 87-88; Shapo, *supra* note 77, at 722.

¹⁰⁹ Douglas E. Abrams, *Integrating Legal Writing into Civil Procedure*, 24 CONN. L. REV. 813, 817-18 (1992); Rideout & Ramsfield, *supra* note 5, at 77-78.

¹¹⁰ Feigenson, *supra* note 106, at 510.

¹¹¹ Shapo, *supra* note 77, at 725.

¹¹² See Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 299-300 (1980); Macauley & Manne, *supra* note 88, at 390.

¹¹³ See, e.g., Kalven, *supra* note 73, at 111-12; Macauley & Manne, *supra* note 88, at 390.

Finally, the traditions of the university law school infiltrate writing programs in certain ways and thereby limit the possibilities for obtaining a rich education in tacit professional knowledge acquired through the writing process. Most directly, the law school often insists upon typical law school grading of law student writing, particularly in first year research and writing courses when the distribution of competitive grades is most important to establishing the class rank of students. The imposition of law school grading curves on the writing process diminishes the possibilities for sympathetic, constructive, and individualized feedback from writing instructors, who must grade the finished product, to students, who are required to produce the finished products "themselves" in order to ensure a fair race for grades. Under the regime of law school grading curves, in which many low grades must be dispensed and justified to students, there is also less incentive for genuine collaborative work between instructors and students, less incentive to create revision assignments (for a revised document will constitute work of both the instructor and the student), and greater tendencies to emphasize negative or delphic sorts of feedback as an easy, if tacit, way for instructors to avoid participating too much in the revision of documents.¹¹⁴

A common explanation for the fragmented, limited reality of law school writing programs, of course, is scarce economic resources. But this explanation disguises a more fundamental if less attractive explanation; the unwillingness or distaste of most full-time law professors for "teaching writing, research, and analytical skills to each student individually."¹¹⁵ The basic ideology of the university law school supports this unwillingness, intolerance, and indifference in several ways. Most obviously, the university law school's pressures on faculty to publish frequently or think of themselves primarily as scholars rather than teachers may cause many professors to fear possible commitments of any additional time to supervising individual students even though commitments may depend upon the artfulness with which writing exercises are constructed.¹¹⁶ Many faculty also may sense the personal risks and painfulness involved in articulating to students what is wrong with their writing and how it may be improved.¹¹⁷ Moreover, many faculty may fear that if they must read many versions of student

¹¹⁴ See Kissam, *supra* note 12, at 169–79; Rideout & Ramsfield, *supra* note 5, at 91–93.

¹¹⁵ Macauley & Manne, *supra* note 88, at 388.

¹¹⁶ For example, using upperclass students to supervise ungraded exercises written by students in large doctrinal classes may not require much if any extra time from a law professor. See generally Jay M. Feinman, *Teaching Assistants*, 41 J. LEGAL EDUC. 269 (1991). In addition to fear about time, however, there also may be a "professional fear" among many law professors about delegating their authority to "lesser experts" like teaching assistants, a fear which seems to result from the university law school's incentives for law professors to model expertise and for students to seek instruction only from "top experts." See Kissam, *supra* note 12, at 164–68. This fear may be even harder to overcome than fears about the loss of time. See *infra* notes 217–20 and accompanying text.

¹¹⁷ Cf. Kissam, *supra* note 15, at 472–73 (describing the problems that the presence of tacit knowledge creates for discussing final examinations with law students).

writing on the same problem, they will simply experience more of the same boredom they do when reading examinations.¹¹⁸

In addition to these fears or beliefs, many professors and students in the university law school appear to hold traditional views or misperceptions about writing, legal writing, and the writing process, which obstruct effective education through writing.¹¹⁹ One view is that good legal writing is just good writing and there is no need to teach "legal writing" as such beyond teaching particular forms or remedial writing skills. Another view is that good writing is based primarily on "natural talent" and cannot be taught, a view that would limit law school writing programs to teaching legal bibliography, legal forms, and remedial grammar and syntax. Other views perceive legal writing merely as ancillary means to the more important "analysis" taught by the case method, views which relegate the teaching of legal writing to writing instructors or practicing lawyers instead of full-time professors. As a consequence, many law professors seem to believe that teaching by writing is "anti-intellectual" or "low value" work by comparison to their classroom performances, scholarship, and consulting work; thus, they ignore the values of learning by writing and tend to keep specialized writing instructors out of law schools or at least cabined within a subordinate niche.¹²⁰ These views are understandable in light of the paradigmatic significance the case method, final examinations, and much instrumentalist writing by law students and law professors have come to assume within the university law school. These views, however, are also tragic in terms of enriching contemporary legal education.

In sum, deep assumptions of the university law school regarding theoretical knowledge, the case method, and the values of the final examination/grading/class ranking system help entrench a fragmented reality of writing activities that is far removed from any ideal conception. The significant challenges to the case method/final examination law school from the professional reform of law school writing and the basic principle of learning by writing are thus kept under wraps, and the case method/final examination system retains a privileged position.

¹¹⁸ On the substantial boredom that law professors experience reading final examination answers, see Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1086 (1986); George C. Christie, *The Recruitment of Law Faculty*, 1987 DUKE L.J. 306, 310, 315.

¹¹⁹ See Rideout & Rarnsfield, *supra* note 5, at 40-48.

¹²⁰ See *id.* at 47-48.

B. Clinical Education

But is it not plain that, without giving up entirely the case-book system or the growing and valuable alliance with the so-called social sciences, the law schools should once more get in intimate contact with what clients need and with what courts and lawyers actually do?

—Jerome Frank¹²¹

'Clinics' were a frightening prospect to the traditional academic teachers.

—William Pincus¹²²

Clinical education, broadly defined, involves the performance of legal roles by students in some kind of supervised setting.¹²³ Students may represent live clients in either in-house clinics or externships, and they may participate in simulated clinical work in subjects such as trial advocacy, negotiations, interviewing, or counseling.¹²⁴ The basic point of clinical education is to integrate doctrinal knowledge with skills in ways that involve the complicated and unruly worlds of clients, facts, and problems to be solved, and this reform too, at least implicitly, threatens basic values of the case method/final examination system.

Law schools began to develop clinics in the 1960s although a few models and clinical critiques of legal education existed much earlier.¹²⁵ Several overlapping forces provided a mixture of ideas, resources, and regulatory pressures that encouraged law schools to develop clinics. Many clinics were established with the purpose of providing student-centered, practice-oriented kinds of learning as a model for what good legal education should be.¹²⁶ Some clinics were also initiated with the primary purpose of providing better legal services to low-income persons through direct services, law reform projects, and law student training in the representation of low-income persons.¹²⁷ The organized bar also has taken an interest in promoting law school clinics. Initially the legal profession sought help in serving the increasing numbers of indigent persons who sought

¹²¹ Frank, *supra* note 72, at 913.

¹²² Pincus, *supra* note 80, at 422.

¹²³ See, e.g., Marc Feldman, *On the Margins of Legal Education*, 13 N.Y.U. REV. L. & SOC. CHANGE 607, 612–17 (1984–1985); *In-House Clinic Report*, *supra* note 5, at 511.

¹²⁴ See, e.g., Michael Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 173–91 (1974); *In-House Clinic Report*, *supra* note 5, at 511–17; Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31, 32–39 (1993).

¹²⁵ See PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION 3–7 (1998); Grossman, *supra* note 124, at 168–69; see generally Frank, *supra* note 72 (offering a major early critique advocating clinical training in the 1930s).

¹²⁶ See SCHRAG & MELTSNER, *supra* note 125, at 5–6; Grossman, *supra* note 124, at 186–93; Pincus, *supra* note 80, at 420–22.

¹²⁷ See Grossman, *supra* note 124, at 173–80; Tarr, *supra* note 124, at 32.

free or low-cost legal services under the mandate and influence of judicial decisions and the federal government's "War on Poverty" in the 1960s.¹²⁸ More recently, the organized bar has used accreditation measures and reform studies to increase the pressure on law schools to provide at least minimal amounts of clinical training to all interested students.¹²⁹ Importantly, private foundations, especially the Ford Foundation, and the federal government have made substantial grants to help law schools initiate and develop clinical programs, although this support is now receding.¹³⁰

The basic instincts of the university law school have been to resist, limit, and incorporate clinical education into itself in fragmented, compromised ways. Thus, clinical training is a closely watched and regulated domain, especially because its teaching methods and underlying philosophy markedly contrast with the case method/final examination system. In essence, the university law school has constrained clinical education by separating clinics from the core curriculum, by marginalizing clinics in terms of its space, budget allocations, prestige, and conceptualization and by infiltrating clinical programs with traditional techniques of the university law school.¹³¹ Thus limited and tamed, clinics today help legitimate the university law school as an institution of professional education, provide transitional bridges to practice, and provide temporary places of refuge or resistance for students (and faculty) who desire relief or escape from the routines of the core curriculum, case method, and final examinations.

The diffuse nature, purposes, and methods of clinical training¹³² make it somewhat difficult to generalize about this movement, but an ideal conception or tacit jurisprudence of clinical education might be outlined as follows.¹³³ First,

¹²⁸ See Grossman, *supra* note 124, at 173–78.

¹²⁹ See ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 405(e) (1992) (stating that the approved "law school should afford to full-time faculty members whose primary responsibilities are in its professional skills program a form of security of position reasonably similar to tenure and prerequisites reasonably similar to those provided other full-time faculty members"); ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 302(a)(iii) (1974) (stating that the approved "law school shall . . . offer instruction in professional skills"); MACCRATE REPORT, *supra* note 4, at 330–34 (urging law schools to expand their training in "professional skills and values").

¹³⁰ See SCHRAG & MELTSNER, *supra* note 125, at 4–7; Pincus, *supra* note 80, at 421; Tarr, *supra* note 124, at 37–38.

¹³¹ On the marginalization of clinics in general, see Feldman, *supra* note 123, at 607–11; Tarr, *supra* note 124, at 40–43; see generally Mark V. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 GEO. WASH. L. REV. 272 (1984).

¹³² See *In-House Clinic Report*, *supra* note 5, at 611–17; Tarr, *supra* note 124, at 32–39.

¹³³ The following sketch draws heavily upon Anthony G. Amsterdam. See generally Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984); Feldman, *supra* note 123, at 612–17; Frank, *supra* note 72; Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231 (1995).

students are asked to perform legal roles that provide experience in practical contexts that differ from the basic context of appellate court opinions and the case method. In these contexts, facts are uncertain, contested, and, in some cases, unknowable, and must be established through the instruments of the imperfect memories, judgments, and intuitions of human agents. Clients often have goals that are diffuse, unclear, and changeable, and these goals must be pursued and clarified through ongoing discourse between attorneys and clients. Clients, witnesses, and opposing parties also have their own emotions and ideas about law that enter into client-attorney interactions. The clinical experience thus exposes students to interactions with complex subjectivity and humanity, unruly factual situations, practical judgments, and ethical issues that are essentially absent from the case method, which typically assumes or stipulates to the facts and assumes a standard abstract client with the simple goal of winning a lawsuit in appellate court.¹³⁴

Second, students perform these roles under the supervision of experienced instructors who try to provide helpful feedback and evaluation of the student's work that will promote a client's interests and enhance the student's learning. In principle, this supervision guides students through varied exercises that involve applying doctrinal knowledge and skills in an integrated way to obtain practical results. At its best, this work involves collective reflections upon the types of ethical issues, situational evaluations, and practical judgments that must be made in the legal profession. Thus, clinics ideally provide a supervised practice that helps students acquire the kinds of tacit professional knowledge and related skills of reflection that inform high quality professional practices.¹³⁵

The specific purposes of clinics are so numerous, so often in conflict or competition, and so complex that all of them may be impractical to achieve in any particular clinical program.¹³⁶ In general, clinics attempt to provide individually supervised work experience that helps law students acquire the experience and knowledge, including tacit knowledge, to make sound practical, rhetorical, and ethical judgments under the stress of actual or simulated practice conditions. This

¹³⁴ See generally Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993).

¹³⁵ See generally, e.g., Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981); Michael Meltsner et al., *The Bike Tour Leader's Dilemma: Talking About Supervision*, 13 VT. L. REV. 399 (1989); Schön, *supra* note 133; Nina W. Tarr, *The Skill of Evaluation as an Explicit Goal of Clinical Training*, 21 PAC. L.J. 967 (1990); Amy L. Ziegler, *Developing a System of Evaluation in Clinical Legal Teaching*, 42 J. LEGAL EDUC. 575 (1992).

¹³⁶ See *In-House Clinic Report*, *supra* note 5, at 511-17 (describing nine "principal goals" of live client in-house clinics and arguing that "clinics provide the best opportunity in the curriculum to integrate these manifold teaching goals," but also recognizing that "none of us can be perfect exemplars of all of these qualities, and no one can teach all of these goals in our clinic with perfect emphasis").

experience should also help establish useful perspectives on the complex interrelationships between lawyers, uncertain clients, unruly facts, legal problems, and social institutions.¹³⁷

This ideal conception of clinical training threatens important aspects of the university law school.¹³⁸ From the clinical perspective, the case method's elimination of most aspects of the client from basic training can be perceived as artificial and misleading.¹³⁹ The relentless insistence of the case method and final examinations on rule-oriented analysis and judgments also may be perceived as a poor way to train professionals for work that involves tacit knowledge and making practical judgments in many uncertain and constantly varying situations. Should such perceptions take hold, the case method/final examination system might be limited to a small part of the curriculum to teach case analysis and provide practice for bar examinations. More effective techniques such as lectures, out-of-class readings, a variety of nonexamination writings, and computerized exercises might be employed to teach doctrinal knowledge and basic legal skills.¹⁴⁰ In this event, "pre-clinical" or "quasi-clinical" methods and courses that included much writing by students and much individually supervised student work could replace case method classes.¹⁴¹ Law professors might even begin to devote more time to professional instruction and less to producing the quantities of scholarship that are emphasized by the assumptions and practices of the traditional university law school.¹⁴²

This has not happened, of course, and economics, institutional inertia, and the "frightening prospect" of clinics to "traditional" law professors are the usual

¹³⁷ On the importance to effective practice of making sound practical judgments, see KRONMAN, *supra* note 1, at 11–162 (discussing the importance of making good practical judgments). On the importance of employing tacit knowledge and relying upon "perspectives," respectively, see generally SCHÖN, *THE REFLECTIVE PRACTITIONER*, *supra* note 96; John O. Mudd, *The Place of Perspective in Law and Legal Education*, 26 GONZ. L. REV. 277 (1990–1991); Schön, *supra* note 133 (discussing the role of tacit knowledge in practice and educating law students for practice).

¹³⁸ See Feldman, *supra* note 123, at 621–45.

¹³⁹ See generally Shalleck, *supra* note 134.

¹⁴⁰ See, e.g., Walter Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL EDUC. 1, 3 (1964) (recommending lecturing in second and third year courses to cover doctrine); James Boyd White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be*, 36 J. LEGAL EDUC. 155, 164 (1986) (recommending reading that is not discussed in class as a means of introducing students to necessary doctrinal materials); *infra* Part IV (describing nonexamination writing exercises).

¹⁴¹ See *infra* Part IV (describing "a quasi-clinical law school"); cf. Rideout & Ramsfield, *supra* note 5, at 61–74 (recommending a comprehensive research and writing program for law schools).

¹⁴² Cf. Elson, *supra* note 3, at 356–75 (arguing that this is what law professors should be doing on the grounds that good teaching is relatively more valuable than most current scholarship).

explanations or justifications for the limited place of clinical training.¹⁴³ The concepts and deep assumptions of the university law school infuse and strengthen this resistance to clinical training, and one can perceive three distinct strategies by which the university law school instinctively has acted to limit the clinical threat. These consist of certain dividing tactics, which keep clinical education separate from the case method/final examination system, tactics that marginalize and subordinate clinical programs, and tactics of infiltration by which clinics are used to serve the purposes of the university law school.

Clinical education has been kept separate, even invisible, from the rest of legal education as a matter of curriculum, space, and time, thereby preventing contamination of the university law school's basic concepts and structures. Clinical education is found mostly in the third year curriculum, and thus occurs only after the lessons of the case method/final examination system have been absorbed. Live-client clinics typically operate in spaces located on the periphery of law school buildings, in basements or at greater distances from the main halls of learning, thus keeping clinical faculty, clinic students and their learning spatially as well as temporally separate from nonclinical faculty and students.¹⁴⁴ Many students also become fully engaged in clinical work as they spend more hours working in clinics than in other courses,¹⁴⁵ and rather extreme time demands are placed on clinical faculty because of their need to supervise many students, publish as well as teach, and manage what in effect are small or medium-size law firms.¹⁴⁶ In effect, curricular organization, spatial relationships, and time keep nonclinical faculty and students from learning much about clinical education, and these dividing factors diminish the possibility that clinical faculty and students will have either the resources or incentives to educate others in the values of supervised practical learning.

The university law school also marginalizes clinical education by tacitly subordinating the value of clinical knowledge in subtle ways.¹⁴⁷ Most clinics provide services to indigent clients who are among the "low status" clients of the profession,¹⁴⁸ thus signaling that clinical knowledge is inferior to or less

¹⁴³ See, e.g., Pincus, *supra* note 80, at 422.

¹⁴⁴ See Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 926–29 (1991); see generally Marjorie Anne McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239 (1990).

¹⁴⁵ See *In-House Clinic Report*, *supra* note 5, at 546–48.

¹⁴⁶ See *id.* at 551–60.

¹⁴⁷ See generally Feldman, *supra* note 123; Spiegel, *supra* note 16; Tushnet, *supra* note 131.

¹⁴⁸ See generally John P. Heinz & Edward O. Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111 (1978); Edward O. Laumann & John P. Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 AM. B. FOUND. RES. J. 155 (describing how the prestige of lawyers correlates with the social success of their clients).

important than the doctrinal knowledge and analytical skills acquired in case method classrooms.¹⁴⁹ The often distant, crowded, and utilitarian spaces within which clinical work proceeds¹⁵⁰ symbolize a vulnerability, an otherness or inferiority, especially when clinic spaces are compared to the grand or imperial nature of the architecture within which the core curriculum is studied.¹⁵¹ Limited academic credits for clinical work and different grading practices also may signal to both students and faculty that clinical education belongs at the margins of legal education.¹⁵² The unwillingness of many schools to provide substantial economic compensation, status, or security of tenure to clinical faculty also marginalizes clinics both symbolically and materially within law school communities.¹⁵³

More insidiously, the university law school infiltrates clinical programs by imposing its concepts and values on clinics and their participants. Both nonclinical and clinical faculty may seek to stress "academic rigor" in the clinical work of students, in effect insisting upon faculty-controlled rather than student-centered learning experiences in order to emulate the rigors of the case method/final examination system. Thus law schools often favor development of simulated clinical courses over live client clinics because the former provide more predictability and faculty control.¹⁵⁴ Some schools or faculty may maintain academic rigor by imposing typical grading patterns on clinic work, which can diminish incentives for close supervision or joint work between students and their supervisors.¹⁵⁵ Ideas of academic rigor, grading, and close faculty supervision may also encourage faculties to impose undue restrictions upon the less expensive, more diverse opportunities of attorney-supervised externships.¹⁵⁶ Clinical faculty themselves may incorporate the university law school's ideal of the law professor as a paragon of doctrinal expertise into their work as clinical supervisors, thus tending to limit student opportunities for the exercise of discretion and treat ambiguous situations as opportunities to exercise an expert's persuasive rhetoric rather than as opportunities for learning-based inquiries with

¹⁴⁹ See Tushnet, *supra* note 131, at 274.

¹⁵⁰ See *In-House Clinic Report*, *supra* note 5, at 527; Schlag, *supra* note 144, at 926-27; see generally McDiarmid, *supra* note 144.

¹⁵¹ See Tushnet, *supra* note 131, at 273.

¹⁵² See Tarr, *supra* note 124, at 40.

¹⁵³ See *In-House Clinic Report*, *supra* note 5, at 536-41, 551-60; Tarr, *supra* note 124, at 40-43.

¹⁵⁴ See Grossman, *supra* note 124, at 170-72, 184-86; Tarr, *supra* note 124, at 35-36.

¹⁵⁵ Cf. *supra* text accompanying note 114 (discussing the grading of legal research and writing courses).

¹⁵⁶ Compare Stephen T. Maher, *Clinical Legal Education in the Age of Unreason*, 40 BUFF. L. REV. 809, 809-34 (1992) (arguing that clinical faculty in law schools have tended to exclude external live client clinics for political reasons), with Tarr, *supra* note 124, at 38-39 (arguing that the "main disadvantage" of external clinics is "the lack of control over the quality of the educational experience").

students that advance the acquisition of professional knowledge.¹⁵⁷ These various infiltrations by the university law school limit or interfere with opportunities for students and instructors to concentrate on the delicate interplay among student performances, sympathetic but constructive feedback, collective reflections, self-evaluations, and ultimately the acquisition of a tacit knowledge of skills, intuitions and attitudes that constitutes the necessary basis for making sound professional judgments.

The university law school also establishes incentives for clinic participants to seek status under the norms of law school communities in ways that may detract from the optimum clinical experience and discourage expansion of the clinical influence. Clinical law faculty may become concerned that "their more intimate relationships with students negatively influence the perceptions of students and faculty toward clinicians"¹⁵⁸ or that "students who participate in the clinic are not given the stature of law review participants by their academic community,"¹⁵⁹ thus implicitly limiting or discounting their most effective work with others. The university law school also creates incentives for clinical faculty to concentrate their efforts on conventional or well-established forms of scholarship rather than contributing to the less developed, less well-recognized literature on lawyering and clinical teaching, because conventional scholarship is usually the safer path to satisfy the university law school's scholarship criteria for tenure, promotions, and salary increases.¹⁶⁰ These incentives cabin or limit the influence of clinical education by keeping clinicians focused on traditional norms of the university law school.

More generally, the university law school infiltrates the clinic conceptually. Today, thirty years after the birth of the law school clinic, most law professors, including clinicians, many or most law students, and perhaps many practicing lawyers still characterize and discount clinical programs as "practical skills education" in contrast to the "theoretical education" of the case method/final examination law school.¹⁶¹ This is a mischaracterization, to be sure, but it is an effective way of tacitly devaluing or subordinating clinical knowledge as inferior

¹⁵⁷ Compare Robert J. Condlin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. LEGAL EDUC. 604, 604–12 (1983) with Gary Bellow, *On Talking Tough to Each Other: Comments on Condlin*, 33 J. LEGAL EDUC. 619, 619–23 (1983) (agreeing with Condlin's findings but expressing reservations about their implications) and Norman Redlich, *The Moral Value of Legal Education: A Reply*, 33 J. LEGAL EDUC. 613, 613–18 (1983) (questioning the extent or applicability of Condlin's findings and theory); see generally Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223 (1980).

¹⁵⁸ *In-House Clinic Report*, *supra* note 5, at 554.

¹⁵⁹ Tarr, *supra* note 124, at 40.

¹⁶⁰ Cf. *In-House Clinics Report*, *supra* note 5, at 557–58 (arguing that law schools should encourage scholarly writing about clinical methods, legal pedagogy, and legal practices).

¹⁶¹ See generally Spiegel, *supra* note 16.

to knowledge that is treasured by the research university. The association of clinics with vocationalism and the interests of students in using clinics to obtain professional employment support this theory-practice distinction and helps quietly denigrate or subordinate clinical knowledge. These distinctions tacitly limit clinics and privilege the case method/final examination system in terms of the basic loyalties of law professors. After all, law professors, including clinical professors, tended to be among the best experts in the case method/final examination setting as law students. Thus divided, marginalized, and infiltrated, clinical education serves the traditional university law school in significant ways. As Mark Tushnet explains, "Clinical education pacifies student demand for practical experience and social productivity. It also eases the conscience of liberal law professors who are uncomfortable because few of their students practice the public interest law that those professors consider important."¹⁶²

Clinical training also helps legitimate American lawyers in two other ways: by suggesting to regulators and the public that legal education produces sufficient practical legal competence in new lawyers, and by providing services to indigent clients that helps the legal profession profess its ideal of public service. Thus, as an integral part of the university law school, the ideal conception of the clinical movement legitimates law schools while the clinical movement in fact is limited to avoid upsetting the case method/final examination system.

C. Professional Ethics

We take up lawyer ethics because we have an unarticulated sense that something is wrong, that we are drifting, and being pulled by strong currents into dangerous waters.

—James R. Elkins¹⁶³

"Legal ethics," "professional ethics," "professional responsibility," and "professionalism" are protean terms in law schools and there are good political reasons for this malleability. On the one hand, the organized profession, like other professions, has historically sought to legitimate lawyers, legal services, and statutory monopolies for lawyers by promoting ideals of public service and professional self-regulation that assure the public and external regulators that lawyers provide high quality ethical services.¹⁶⁴ In pursuit of this goal the

¹⁶² Tushnet, *supra* note 131, at 273. On the nature of a similar "ideological work" that the university law school provides for left law students, to help them reconcile their values with taking jobs at large corporate law firms, see ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 143-97 (1992).

¹⁶³ James R. Elkins, *Symptoms Exposed When Legalists Engage in Moral Discourse: Reflections on the Difficulties of Talking Ethics*, 17 VT. L. REV. 353, 361 (1993).

¹⁶⁴ See ABEL, *supra* note 57, at 142-50; Marie Haug, *The Sociological Approach to Self-Regulation*, in REGULATING THE PROFESSIONS 61, 62-63 (Roger D. Blair & Stephen Rubin

organized bar has sought to improve "ethical training" by law schools throughout the twentieth century and, since Watergate, this interest has intensified.¹⁶⁵ On the other hand, law schools and law faculty generally have resisted the profession's calls for ethics training. They have tended to ignore or dismiss the profession's proposals as irrelevant or counterproductive to their business of teaching doctrine and analytical skills, and they have raised the common if contradictory objections that ethics training will either be ineffective, because one's ethics are acquired as a personal matter, or constitute impermissible "indoctrination" or a violation of "academic neutrality."¹⁶⁶ Within this contradiction there is a story of substantial threats to the values of the case method law school; it is thus not surprising that restraining devices have been imposed on ethics education similar to those placed on writing and clinical education.

Conceived expansively, professional ethics education has at least five dimensions, and these may be taken as an ideal conception of ethics instruction in law schools.¹⁶⁷ One dimension is teaching the legal doctrine of the statutes, regulations, judicial decisions, and ethics committee opinions that regulate lawyers' practices with regard to representing client interests, conflicts of interest, confidential information, and the management of client properties. A second consists of studying the practices of lawyers and regulatory bodies in managing and responding to both the specific legal duties and aspirational aspects that define the lawyer's "role morality." A third dimension concerns relationships between the lawyer's role and an individual's self-concept and the ethical dilemmas that the role morality of lawyers can impose on individual lawyers.¹⁶⁸ The fourth concerns the sometimes substantial "ethical discretion" that lawyers have vis-à-vis their clients when law is uncertain, open, or contested and how, in these situations, lawyers may often need to or be invited to advise their clients about business or personal goals and methods as well as the law.¹⁶⁹ The fifth dimension to professional ethics training involves normative questions about the legal system as whole, its rules, its adversarial practices, and its capacity or

eds., 1980).

¹⁶⁵ See Rhode, *supra* note 5, at 34-41.

¹⁶⁶ See *id.* at 36-41, 44. For an earlier and similar discussion of law faculty fears and dismissiveness of professional ethics, see KELLY, *supra* note 83, at 23-27.

¹⁶⁷ See KELLY, *supra* note 83, at 29-43; Ian Johnstone & Mary Patricia Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 75-86 (1991); Rhode, *supra* note 5, at 38-50.

¹⁶⁸ See, e.g., William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 65-67 (1991).

¹⁶⁹ See generally Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43 (1991); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

incapacity to provide effective services to all sectors of society.¹⁷⁰

The implementation of ethics training is complicated by the range of diverse purposes and methods for teaching professional ethics and by the controversies that surround choices among these purposes and methods. Least controversial are the goals of making students aware of professional ethics issues and sharpening their analytical skills for dealing with them, especially when the issues involve the codified rules of legal ethics covered on bar examinations.¹⁷¹ More controversial are the more complex goals of enhancing students' "capacity for reflective moral judgment," providing systematic instruction in ethical reasoning, and attempting, if indirectly, to influence the moral attitudes and conduct of lawyers.¹⁷² There is also contention about the proper methods of instruction, which range from providing special courses, to teaching ethics in clinics, to employing the "pervasive method" of teaching ethics throughout the law curriculum.¹⁷³

The history of ethics training in law schools is much clearer. From the late 1890s through the 1960s, law schools made only minimal efforts to consider ethics. They generally provided lectures by visiting judges or attorneys or a single low-credit, ungraded course that might or might not be required and was often taught by adjunct faculty.¹⁷⁴ The organized bar and conferences of law school leaders expressed concerns "lamenting the inadequacy of ethics instruction," but it was not until Watergate implicated many lawyers in unethical and illegal behavior that the bar and law schools took actions to reform ethics training in law schools.¹⁷⁵ In 1974 the ABA mandated law schools to require "instruction in the duties and responsibilities of the legal profession."¹⁷⁶ States soon began to require an examination on professional ethics for admission to the bar, and today most states require that candidates for licensure pass a multistate multiple-choice examination.¹⁷⁷ As a result, virtually all law schools offer a required course in ethics, usually for two credits, and this course concentrates on preparing students to pass the bar exam. This course generally is perceived as ineffective instruction, is treated as an unattractive teaching assignment by faculty, and is often if not always staffed "by a reluctant, rotating cadre of junior faculty and outside

¹⁷⁰ See, e.g., KELLY, *supra* note 83, at 35-37; Johnstone & Treuthart, *supra* note 167, at 86.

¹⁷¹ See, e.g., Rhode, *supra* note 5, at 42-43; Simon, *supra* note 168, at 65-67.

¹⁷² See Johnstone & Treuthart, *supra* note 167, at 84-85; Rhode, *supra* note 5, at 42-43.

¹⁷³ See Johnstone & Treuthart, *supra* note 167, at 86-97; see also Rhode, *supra* note 5, at 38-50 (recommending that both special courses and a modified pervasive method be used as necessary elements in a "continuing method" of law school instruction in ethics).

¹⁷⁴ See KELLY, *supra* note 83, at 5-21; Rhode, *supra* note 5, at 35-36.

¹⁷⁵ See Rhode, *supra* note 5, at 36-39.

¹⁷⁶ ABA, STANDARDS FOR THE APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 302(a)(iii) (1974).

¹⁷⁷ See Rhode, *supra* note 5, at 40-41.

lecturers.”¹⁷⁸ The resistance of the university law school to ethics training remains intact.

The recent interest in professional ethics training has, however, engaged some full-time faculty in both teaching and scholarship within the field, and this work is producing new insights into lawyers’ ethics and possible reforms to ethics instruction in law schools.¹⁷⁹ This scholarship has focused on the nature of relationships between lawyers and clients and the “ethical discretion” that lawyers may exercise in advising clients about appropriate goals and methods for acting under legal uncertainty.¹⁸⁰ It also has focused on ways in which legal educators provide tacit instruction in a certain kind of amoral ethical behavior and on reasons why law schools ought to provide more comprehensive instruction in ethics and professional ethics throughout the curriculum.¹⁸¹

Taking ethics seriously could constitute a substantial threat to the case method/final examination law school. For example, providing sustained instruction in the major traditions of ethical thought could have percolating effects throughout the curriculum, adding a pervasive moral analysis that would tend to disrupt the flow of rule-oriented case method discourse that pertains to final examinations in doctrinal subjects. Raising pervasive questions about lawyers’ ethics could threaten the law school’s tacit conception of the good lawyer as an amoral, client-bound technician who employs an objectivist, discussion-closing rhetoric and dominating style. Raising pervasive questions about lawyers’ ethics would also question how law professors and legal education tacitly model or instruct their students in ethical behavior.¹⁸² Such changes and questions would also constitute a serious challenge to the ideal of the case method professor as an impersonal, authoritative, critical, rule-oriented judge, or charismatic, tough-minded advocate who makes authoritative statements about legal doctrine while neutrally analyzing the performances of students.

The university law school has divided, splintered, marginalized, and infiltrated ethics education in much the way it has treated law school writing and clinics. The multi-faceted nature of legal ethics and its various teaching methods have made ethics training a relatively easy target. Faculty indifference or unwillingness to appreciate the importance of ethical questions in law and legal practices or how law teaching tacitly instructs students in amoral advocacy can be explained by the tacit power and attractiveness of a rule-oriented case method for many law professors. The case method analysis of judicial opinions has worked

¹⁷⁸ *Id.* at 39–41.

¹⁷⁹ *See id.* at 44.

¹⁸⁰ *See generally, e.g.,* WILLIAM SIMON, *THE PRACTICE OF JUSTICE* (1998); Gordon, *supra* note 169; Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 *STAN. L. REV.* 589 (1985); Sarat, *supra* note 169; Simon, *supra* note 169.

¹⁸¹ *See generally, e.g.,* Elkins, *supra* note 163; Carrie Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 *J. LEGAL EDUC.* 3 (1991); Rhode, *supra* note 5.

¹⁸² *See* Menkel-Meadow, *supra* note 181, at 6–7.

well for them, and they understandably may have difficulty conceiving legal education as anything but the case method's rough amalgam of a skeptical, flexible positivism of rules and ad hoc policy arguments.¹⁸³ In this perspective, ethical questions and any systematic ethical analysis of the law or the lawyers' behavior will seem incidental, marginal, or even invisible to the case method/final examination law professor.

The apparent indifference of most law students to ethics training¹⁸⁴ also has causes that seem rooted in basic assumptions of the university law school. Within the case method/final examination system, law students learn tacitly to perceive of law as mostly rules, a lesson that helps prepare them to take law school examinations and bar examinations.¹⁸⁵ This lesson presumably encourages students to focus on ethics instruction merely as preparation for their bar examination and helps explain their indifference to instruction on the broader, more complex and less certain issues of professional ethics. Thus the case method/final examination law school generates student interests that match faculty interests in limiting ethics training to a study of the codified rules of legal ethics.

The university law school discourages consideration of ethical issues in a more pervasive way too. The "rigor" and "impersonality" of case method classrooms and fierce competitiveness of the law school's examination/grading/class ranking system tacitly teach the division and separation of human agents from each other and the limitations of relationships between human agents to formal, impersonal, hierarchical terms. Effective deliberation about ethics, however, requires a more open, more egalitarian, risk-taking and relatively unbounded discourse between persons, and this sort of deliberation puts one's self at risk in relating to others.¹⁸⁶ The case method/final examination law school fails to provide a supportive context for this kind of deliberation and reflection upon ethical issues in lawyering and the law.

Thus cabined in an upper class course of low status, ethics instruction incorporates the case method/final examination system and serves the interests of the university law school. The single course is typically oriented towards teaching doctrinal rules as a matter of both design and student interest, and ethics is kept

¹⁸³ Cf. Brest, *supra* note 14, at 1945–46 (describing "legal process" as "an amalgam of policy-oriented doctrinalism" and "the tacit core of most law teaching and scholarship today").

¹⁸⁴ See, e.g., Johnstone & Treuthart, *supra* note 167, at 88–92, 95–96; Rhode, *supra* note 5, at 40; see generally Ronald Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247. Clinical instruction in professional ethics may be an exception to this point about student indifference, since law students are often enthusiastic about their experiential learning in clinics. However, the elective nature, relative costs and other objectives and needs of clinics undoubtedly limit their practical effectiveness in providing ethics instruction.

¹⁸⁵ See Kissam, *supra* note 15, at 461–74.

¹⁸⁶ See generally Elkins, *supra* note 163.

separate from the rest of the curriculum. The focus on doctrinal rules avoids the more complicated, less certain, more creative and more embarrassing ethical questions that occur in legal practices, helping preserve the unclouded rationalism of the case method.¹⁸⁷ The separate course on ethics as well as the new ethics scholarship—as long as this scholarship does not disturb the university law school's basic structures—also contribute to legitimating lawyers and their services as ethical, and thus high quality. The university law school thus implicitly incorporates professional ethics to serve its purposes by helping to maintain good relationships between law schools and the organized bar and the public.

IV. WHY NOT A QUASI-CLINICAL LAW SCHOOL?

There is, then, a sense of chaos in legal pedagogy. Contemporary law schools employ an archaic nineteenth century methodology and maintain both explicit and tacit boundaries around the new forms of instruction that promise more effective and more democratic education. The archaic case method/final examination methodology serves important interests, to be sure. This system teaches minimally necessary skills and knowledge, allows for a relatively easy sorting of students into class ranks that provide both screening and credentials for legal employers, and provides law professors with much time to engage in scholarship and consulting. But what if the basic principles of the professional reforms could be effectively translated for use in mainstream courses, and implemented throughout the curriculum at little or no cost to the interests served by the case method/final examination system? If this could be done, the professional reforms would constitute not merely supplements, but the basis for developing a sound comprehensive form of legal education for the twenty-first century.

This Part outlines a way by which the principles of the three professional reforms could be implemented in mainstream teaching effectively and economically. It argues that relying upon the principle of learning by writing would be a good means to implement the basic principles of the professional reforms throughout the law school curriculum. Reasons why writing should be pursued by law schools more thoroughly are described first. Several ways in which writing exercises might be inserted into substantive courses to help law students acquire tacit professional knowledge, engage in ethical reflection, begin to make practical judgments, and improve their reading and writing habits and skills in general are then sketched out. Finally, the likely objections that will be made to the proliferation of writing in law schools are considered.

The basic principles of the professional reforms might be pursued by other strategies. For example, John Elson has argued that mainstream law teaching

¹⁸⁷ See generally Simon, *supra* note 168.

should adopt a pervasive use of “the problem method” to teach clinical or preclinical skills.¹⁸⁸ Or, following the University of Seattle, “mini-clinics” might be developed to supplement major doctrinal courses.¹⁸⁹ With relatively unlimited resources, these alternatives might very well be superior to the writing-across-the-curriculum approach. The basic claims for writing reform, however, are that writing exercises would not be inconsistent with these more elaborate reforms and that the principle of learning by writing fits easily with traditional law teaching and thus promises to be *an economical way* to reform the case method/final examination law school.

A. *The Need for Writing-Across-the-Curriculum*

There are several reasons why law schools should provide additional opportunities for students to write law in ways other than final examinations. First, lawyers consider writing in general to be a very important practice skill, and they believe that law schools could do more than they currently do to enhance the writing abilities of their graduates. In a recent survey, new lawyers in Chicago and in rural and midsize-urban Missouri ranked “written communication” as the second most important legal skill, just behind “oral communication” and ahead of “ability in legal analysis and legal reasoning,” “knowledge of substantive law,” and “knowledge of procedural law”—in other words, ahead of the knowledge and skills promoted by the case method/final examination system.¹⁹⁰ These lawyers also ranked “drafting legal documents” just behind legal analysis and reasoning and ahead of the knowledge of substantive and procedural law.¹⁹¹ Both groups also believed that skills of written communication and legal drafting can be taught effectively in law schools and that current schools are doing but a fair to poor job of such teaching.¹⁹² Thus, one general but basic reason why more writing should be incorporated into the law school curriculum is that consumers want this service.

Another important reason, simply put, is that writing enhances or develops

¹⁸⁸ Elson, *supra* note 23, at 383–87 (proposing a pervasive use of the “problem method” in substantive courses to teach professional skills); *cf.* Frank, *supra* note 72, at 914–23 (outlining sixteen propositions for a “clinical lawyer-school”); Rideout & Ramsfield, *supra* note 5, at 74–91 (recommending a comprehensive research and writing program for law schools).

¹⁸⁹ See John B. Mitchell et al., *And Then Suddenly Seattle University Was On Its Way to a Parallel, Integrative Curriculum*, 2 CLINICAL L. REV. 1, 11–18 (1995) (describing the invention of one-credit live-client and simulated course components running parallel to related upper class substantive courses). Similarly, Syracuse College of Law has initiated 5 limited enrollment “applied learning courses” that attempt to integrate clinical skills with the study of advanced legal doctrine. Interview with Sarah Ramsay, Professor of Law, Syracuse College of Law, in Lawrence, Kan. (Feb. 16, 1999).

¹⁹⁰ Garth & Martin, *supra* note 51, at 473.

¹⁹¹ *Id.* at 473, 477.

¹⁹² See *id.* at 479, 481.

legal thought. Writing law in nonexamination situations can provide manifold opportunities for feedback to a writer about her ideas, and this kind of writing, when it becomes habitual, is an excellent way to improve a law student's grasp and use of doctrinal knowledge and analytical skills.¹⁹³ Further, since much useful feedback on writing can be provided quickly by faculty readers,¹⁹⁴ teaching assistants,¹⁹⁵ peer readers and, significantly, by the basic process of critically reading one's own writings,¹⁹⁶ much nonexamination writing about law could be added to the law school curriculum at quite modest costs. There are thus some very good pedagogical reasons for trying to satisfy the consumer demand that law schools provide more writing opportunities.

The more specific argument for expanding writing throughout the curriculum is that it would be a good way to implement the concepts of the professional reforms in mainstream teaching. Consider these concepts and how writing exercises could implement them in productive ways. Both clinics and professional ethics courses are designed to encourage ethical reflection, and writing short exercises on ethical issues in particular substantive fields would force students to contemplate and reflect with some intensity upon the nature of concrete ethical dilemmas faced by legal practitioners. Legal writing courses and clinics as well as mainstream courses are designed in part to teach the rhetorical judgments involved in making persuasive presentations to different kinds of audiences. Diverse writing exercises in different doctrinal courses would be an effective way to introduce students to writing for diverse audiences such as clients, other lawyers, judges, and administrative officials, and thus mitigate the habits that are formed by writing only for law professors on final examinations.¹⁹⁷ Clinics especially, but ethics and legal writing courses too, attempt to introduce law students to the process of making sound practical judgments in diffuse, complex, and variable contexts. Writing about diverse legal subjects would begin to engage law students in making many different kinds of practical judgments simply because the writing process itself involves deliberating on and choosing among alternatives by balancing their pros and cons within complex contextual backgrounds. More specifically, writing assignments can require students to practice making practical legal judgments such as choosing which legal

¹⁹³ See generally, e.g., Feinman & Feldman, *supra* note 8; Greenshaw, *supra* note 7; Gross, *supra* note 7; Rideout & Ramsfield, *supra* note 5.

¹⁹⁴ For example, such useful feedback on writing can be provided by commenting on brief outlines or short prospectuses for papers or memorandums. See Kissam, *supra* note 11, at 240 (discussing comments on three page prospectuses).

¹⁹⁵ See generally Feinman, *supra* note 116; Leon Trakman, *Law Student Teachers: An Untapped Resource*, 30 J. LEGAL EDUC. 331 (1979).

¹⁹⁶ See Kissam, *supra* note 12, at 140–41. Critical student reading of their own written texts can often be enhanced, of course, by providing general oral feedback in classrooms as students review what they have written in accordance with a faculty member's ideas.

¹⁹⁷ See generally Greenshaw, *supra* note 7; Kissam, *supra* note 15; Parker, *supra* note 7.

arguments to present to a decisionmaker or what decision to make when confronted with competing arguments.¹⁹⁸ All three professional reforms promote and depend upon the acquisition of many kinds of tacit knowledge that infuse legal practice, especially ethical reflection and making good rhetorical or practical judgments. Writing about diverse and complicated legal problems and obtaining constructive feedback in various ways is surely a good way for students to begin to sense and to acquire the diffuse *unspeakable* aspects of professional tacit knowledge. This knowledge is acquired only gradually, by trial-and-error, much like one must learn the right and wrong ways to hit good tennis shots or play the piano through frequent supervised practices. Writing many short exercises on diverse issues with quick feedback, provided by more experienced readers, would appear to be an effective and relatively low cost method of providing this instruction.

A fourth reason to expand writing throughout the curriculum is that this could do much to mitigate the poor reading and writing habits that seem to be inculcated in many law students (and perhaps many professors too) by their steady diet of writing (and reading) examination essays. Law students may enter law schools as relatively skillful readers and writers notwithstanding the perverse incentives and limited opportunities provided by the education of undergraduates in the contemporary research university. But the incentives and pressures to do well on classic issue-spotting, time pressured final examinations, in which “the rules of law” must be quickly recalled to spot issues and argue for their resolution, seem to inscribe in many students instrumentalist forms of reading and writing: that is, reading cases and treatises “merely to obtain the rules”¹⁹⁹ and writing by means of a “paradigm of good paragraph thinking/writing,” which generates many examination answers quickly but is often less successful in other forms of writing.²⁰⁰ In any event, whatever the causes, there is substantial concern in the legal academy today about the critical reading skills as well as writing skills of law students.²⁰¹ It may be that the best or even only way to inspire more critical and more imaginative reading by law students is to require writing projects that can be accomplished only if the writer must first delve deeply, imaginatively, and critically into complicated texts that have been written by others.²⁰² Writings of

¹⁹⁸ See Kissam, *supra* note 11, at 239 (describing the use of “limited research, analytical papers” in a constitutional law survey course in which students are required to develop “the best possible constitutional arguments” on two sides of a difficult issue and then advance “a reasoned judgment” to resolve their issue).

¹⁹⁹ See, e.g., Fajans & Falk, *supra* note 12, 163–70.

²⁰⁰ See generally Kissam, *supra* note 15; cf. Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1389–93 (1984).

²⁰¹ For example, in January, 1999, a day-long workshop on “critical reading” in law schools was conducted as part of the annual meeting of the American Association of Law Schools.

²⁰² See Ann Berthoff, *I.A. Richards*, in TRADITIONS OF INQUIRY 50, 52 (J. Brereton ed.

diverse kinds should also help students develop their writing skills even if they receive only limited instruction and feedback.

Finally, more writing would make legal education more democratic as well as more effective. Most fundamentally, writing practices by comparison to case method/final examination practices tend as a matter of structure to provide more equal attention to individual students in terms of supervision and feedback since faculty members, teaching assistants, or student peers who comment on student writings will be responding to and commenting on each student's writing. Contrast this with the variable and limited feedback that is provided to law student comments in the case method classroom, in which law professors in the interest of controlling the conversation do most of the talking and may commonly interrupt as much as they reply to student statements,²⁰³ and the even more limited feedback of a single grade on a final examination. In addition, law students have diverse learning styles, backgrounds, perspectives, interests, and talents, and the case method/final examination practices barely recognize this diversity. Instead, they tend to impose a fundamentally homogenous analytical, rapid-response, nondeliberative method upon everyone. More writing exercises, with their various kinds of feedback loops and extra time for deliberation, reflections, and revisioning, would provide more choices to students about how they acquire and apply legal knowledge. Thus, this method should nurture different learning styles and different legal interests in a much richer fashion than the case method/final examination system does.

B. Implementing Writing-Across-the-Curriculum

The critical task remains to persuade mainstream law professors that writing exercises can be employed throughout the curriculum at relatively little cost. In an attempt to do this, this Article describes some exemplary ways of incorporating learning by writing into basic doctrinal courses. These examples are taken from literature and personal experience teaching basic courses in criminal procedure and constitutional law. None of these methods can be guaranteed effective or mistake-free, of course, but they would appear to constitute a useful starting place for experimenting with the principle of learning by writing in the core curriculum.

Writing exercises can be used to enhance learning the doctrinal knowledge and analytical skills taught by the case method/final examination system. One direct way is simply to require students periodically to outline or write out

1985) ("Indeed, the old formula—students can only write as well as they can read—may be reversed as teachers come to understand what it means to say that writing is a mode of learning: *students can read only as well as they can write.*") (emphasis in the original).

²⁰³ See Elizabeth Mertz, *Linguistic Ideology and Praxis in U.S. Law School Classrooms*, in LANGUAGE IDEOLOGIES: PRACTICE AND THEORY 149, 153–59 (Bambi B. Schiefflin et al. eds., 1998).

ungraded answers to “practice exam questions.”²⁰⁴ These answers can be reviewed in many different ways depending upon available resources and a professor’s confidence in delegating a limited kind of teaching authority to others. The professor can simply describe “model answers” during class time, allowing students the opportunity to provide the direct feedback to their own work, or the feedback process may be enhanced by asking students to mark or comment on each other’s answers. This latter process can be substantially enriched at relatively low cost to the law school’s budget and the professor’s time by hiring upper class law students as “teaching assistants” who read, hypothetically grade, and comment on written student answers.²⁰⁵ This process saves classroom time by comparison to other feedback methods, provides substantial individualized feedback to students, and can engage some very committed upper class students (who often may have had prior teaching experience) as effective tutors of beginning students in large classes. The latter advantage seems especially significant because many students in large classes often seem more willing to approach teaching assistants than professors to obtain feedback or simply to ask (their self-defined) “stupid questions.”²⁰⁶ Most importantly, whatever the feedback, this kind of writing gives students many opportunities to improve their legal knowledge from the simple fact of having to write, and then read and reflect upon, their answers—especially since practice exam questions need not always be answered under the same time pressure as final examinations.

Another basic writing method to improve the learning of legal doctrine and legal analysis is the use of “take-home examinations” that may be written over a longer period of time (say eight hours, two or three days, a week, or an examination period) than the typical final examination.²⁰⁷ This process provides the same concrete feedback from text to writer that practice exam writing does, and this feedback is likely to be even more intense and more useful to learning because writing take-home examinations counts for grades. Essay answers written on a take-home basis are also likely to be better organized and more clearly written than essays written under time pressures, and one can usually require take-home answers to be typed. Thus readers of take-home examinations are more

²⁰⁴ Cf. Feinman & Feldman, *supra* note 8, at 534–44 (providing repetitive examinations to a first year course that integrated contracts, torts, and legal writing).

²⁰⁵ I experimented with this approach one summer teaching an intensive five-week course in pretrial criminal procedure law to first year students. Over the second, third, and fourth weekends of the course, sixty-one students were required to write an answer to a practice exam question, which was then reviewed and returned to the students prior to their next exercise by two upper class law students working as teaching assistants. The results in terms of generally sound final examination answers seemed significant to me, and the first year students were quite ecstatic about the help they had received from the teaching assistants.

²⁰⁶ On the pedagogical advantages of using upper class law students as teaching assistants, see Trakman, *supra* note 195, at 338–41.

²⁰⁷ On the value of take-home examinations, see Kissam, *supra* note 12, at 158–63.

likely to develop a generally favorable assessment of their students' potential as practicing lawyers, and this development might well enhance legal education by altering the rather negative view of students' general legal potential that so many law professors appear to acquire from reading final examination essays.²⁰⁸

A legitimate concern about take-home examinations is the possibility they offer for cheating, and another concern may be with their failure to provide the best possible practice for time-limited bar examinations. The possibilities for cheating can be dealt with, if a school's honor code is insufficient, by requiring in-class writing samples (for example, by collecting practice exam answers) that can be compared to suspect take-home answers, and by tailoring examination questions to classroom discussions in order to reduce the possibility of outsiders writing answers. With regard to the bar examination concern, one can provide bar examination practice in doctrinal subjects by adding one or two mid-term time-limited multiple choice examinations that either are graded or must be completed "satisfactorily."

Other kinds of writing exercises, including less formal ones, may be tailored to many aspects of legal subjects, including issues and practices not easily covered by final examinations. Quite simply, students may be asked periodically to write out or outline questions, statements, or answers that relate to a course's assigned readings, and then parts of class discussion can be based on the ideas articulated by these writings. Some of these writings can be done prior to class and others written in class, and based on personal experience, class discussions conducted upon these kinds of writings are typically much richer than ordinary class discussions and, in any event, these discussions are oriented towards the students' understandings of the subject rather than the professor's.²⁰⁹ To be sure, the feedback to these written texts will be less systematic and less substantial than the feedback of prior methods, but the benefits gained will include some focused writing on the law by students and class discussions that are thoughtful and effectively pitched at the students' levels of understanding.

One may also supplement final examinations with more formal writing assignments if a professor has the resources for providing supervision, feedback, and grading, and if the students have tolerance for additional assignments. These projects may involve drafting contractual, legislative, or litigation documents and writing memorandums or papers, even short ones, on critical ancillary topics such as ethics issues in the field. The major problem with this method, of course, is limited resources (of both professors and students). But a surprising amount of substantial, though brief, supervision and feedback can be provided by reviewing

²⁰⁸ On the dismal view of students' potential that law professors seem to take away from reading examination answers, see Feinman & Feldman, *supra* note 60, at 879–82; Janet Motley, *A Foolish Consistency: The Law School Exam*, 10 NOVA L. REV. 723, 723–24 (1986). On what this dismal or corrosive view may do to the character or personality of law professors, see Kissam, *supra* note 15, at 483–85.

²⁰⁹ See Kissam, *supra* note 12, at 157.

one-page outlines of writing projects, and these exercises need not be graded on the same complex grading curve applied to final exams. Upper class teaching assistants might be employed to review these assignments as another means of mitigating the resource problem. Surely this approach promises substantial benefits in terms of the effectiveness and diversity of legal training.²¹⁰ It could in the end convert many traditional courses into “pre-clinical” or “quasi-clinical” courses that help students integrate “theory” with “practice” and acquire rich experience in making practical judgments, employing tacit professional knowledge, and learning from a process of continual feedback and supervision.²¹¹

A more radical approach to implementing writing-across-the-curriculum would be to abandon final examinations in some subjects and substitute substantial writing projects. For example, in a required survey course in constitutional law (with sixty to one hundred students), the author now requires each student to write a “limited research, analytical paper” in lieu of a final examination.²¹² This project asks each student to choose a topic from a list of approved topics which all involve evaluating two alternative rules of constitutional law or other constitutional premises such as competing theories of interpretation or competing theories of the substantive purpose of particular doctrines. Each student is required to develop “the best possible constitutional arguments” for two alternative premises, and then to advance a “reasoned judgment” for choosing one of the premises over the other. After two months of the semester has passed, each student must submit a three-page prospectus that outlines their topic and indicates their research efforts to date. Comments are quickly given on these ungraded prospectuses, and a ten page paper is due during the final examination period. Opportunities to read and comment on one-page “structural outlines” of any student’s project after the prospectus has been submitted are also offered. In effect, this project is much like a constrained take-home examination, except that: (1) students have considerable discretion to choose a subject for their investigation; (2) the professor has opportunities to provide collaborative supervision and feedback that influence the final development of the projects; and (3) as the ultimate reader, the professor has the delightful task of reading many different constitutional analyses rather than one

²¹⁰ See Bean, *supra* note 10, at 277–78 (discussing supplemental drafting assignments in property and family law courses); see generally, e.g., Robert Batey, *Literature in a Criminal Law Course: Aeschylus, Burgess, Oates, Camus, Poe, and Melville*, 22 LEGAL STUD. F. 45 (1998) (using supplemental papers in a criminal law course).

²¹¹ Cf. Mitchell et al., *supra* note 189, at 11–18 (describing one-credit live-client and simulated clinical components of mainstream doctrinal courses).

²¹² See Kissam, *supra* note 11, at 239. In order to ensure that students also focus on the basic rules of constitutional law and obtain relevant experience or practice for the bar examination, at times I have required a multiple choice “black letter law” examination that counted for a fraction of the grade. Currently I require only “satisfactory completion” of two mid-term multiple choice “practice exercises” as a better way to ensure coverage of bar examination issues without imposing excessive time demands on my students.

hundred or so answers to the same examination questions. As the final step in this process, a brief note of one page or less is sent to the students evaluating their paper and explaining their grade.

After a decade of experience, this project seems well designed to accomplish educational goals that extend far beyond what can be expected from any case method/final examination course and, importantly, this project takes little if any more of the professor's time than would be devoted to reading an equivalent number of essay examinations. It seems clear that most students experience the rhetorical process of putting together complex constitutional arguments and the judgmental process of making decisions in hard cases with considerable intensity and even enjoyment, which suggests that this kind of project advances some broad goals of clinical training and perhaps ethics training as well. Second, students obtain a good experience in complicated constitutional research, which reinforces their learning from the first-year research and writing course. Third, and most significantly, students are encouraged to read an ensemble of heterogeneous and complex constitutional materials with some care and some degree of criticism as they explore case law, law review articles, and constitutional treatises, if not other theoretical writings that are also relevant to their work. Thus a central concept of learning by writing—experiencing the ongoing feedback or collaboration between critical reading and critical writing—appears to have become a very substantial part of this writing project. Finally, there are the benefits of the joy of working with some intelligent, hard working persons to help them put together complex projects.

Of course, the idea of a limited research, analytical paper may not be adapted easily for other subjects or even for different approaches to teaching constitutional law. But in doctrinal subjects in which theory of some kind is important, or in which putting together arguments based on complex precedents and policy is important, or in which ethical considerations must or should be faced, this sort of project would seem to constitute a basis for experimenting with replacing final examinations by learning through writing.

C. Objections to Writing-Across-the-Curriculum

Several objections to writing-across-the-curriculum can be expected. Some of these can be answered with relative ease, but others point to more complicated trade-offs and ethical decisions by individual professors who teach in the basic curriculum. This section begins with objections that are relatively easy to answer and then considers the more difficult ones.

First, students may not obtain sufficient experience with comprehensive time-limited final examinations to prepare for passing their bar examinations. This is a weak objection for three reasons. Most writing projects will supplement rather than replace final examinations, and indeed many of these projects should improve a student's skills at taking final examinations and the bar examination.

Also, if substantial writing projects are substituted for final examinations, mid-term multiple choice examinations or other exercises can be provided to help students prepare for bar examinations.²¹³ Further, probably the best sort of preparation for bar examinations that law students obtain is a general practice in organizing and applying complex legal rules under time constraints, and there is no evidence that substituting writing projects for final examinations in some doctrinal courses would diminish greatly the quality of this learning.

Second, writing-across-the-curriculum projects will detract from the case method as a matter of time or student focus and attention. This could be an effect, although many of the writing projects suggested would probably enhance rather than detract from the case method. In any event, this objection seems wedded to a "rational myth" that the law school's case method is so good that it must be employed in a relatively exclusive manner even though empirical evidence that the method is a superior way to teach doctrinal knowledge and analytical skills is lacking.²¹⁴ Such rational myths do not ensure effective learning, of course, for they only assume a rational form that promises learning in a sea of uncertainty.²¹⁵ Furthermore, the case method was invented to help establish law schools within the research university of the nineteenth century that demanded "theory," "science," and "reason."²¹⁶ With the contemporary research university less demanding on this score, and the legal profession less centered upon litigation, we should no longer remain in thrall to the myth of the case method.

Third, a more difficult objection to assess is that writing-across-the-curriculum projects would require additional professorial time for teaching and thus take away a valuable resource from the scholarship and consulting services provided by law professors. One response to this is that many student writing projects could be substituted for other kinds of teaching time, and thus writing projects need not take substantial time from scholarship or consulting. For example, in a "quasi-clinical" law school, fewer class hours would be devoted to case method analysis in doctrinal courses and class hours might be reduced to permit more professorial attention to providing feedback on writing projects—through in-class comments, individual conferences, and brief written comments on a student's writing or outlines for a writing project.²¹⁷ Also, upper class

²¹³ *See id.*

²¹⁴ *See generally* Bryden, *supra* note 2; Paul Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 J. LEGAL EDUC. 167 (1986).

²¹⁵ On how "rational myths" that relate educational means to educational ends in a rational form pervade the educational process due to our fundamental uncertainties about teaching and learning, *see generally* JOHN W. MEYER & W. RICHARD SCOTT, *ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY* (1983); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977).

²¹⁶ *See supra* Part III.

²¹⁷ Brief comments on writing projects are likely to be more effective than longer

students could be employed as teaching assistants as another means of limiting the commitment of professorial time to student writing.²¹⁸ To be sure, an objection may be raised by both professors and students that teaching assistants are not as expert as professors, but the insistence that law professors be the only teachers or authoritative spokespersons about good writing and good legal thought is surely another “rational myth” of legal education, especially when law students are left to learn so much on their own from commercial outlines, student grapevines, and teaching assistants in research and writing courses.²¹⁹ A second response to the argument about additional professorial time, of course, could be that much professorial time currently committed to scholarship and consulting is not as socially valuable as we commonly think and that law professors should be committing more time to effective teaching.²²⁰

The most difficult objection may be that the introduction of substantial writing into basic courses would make imposition of the law school’s grading curve more difficult. This could result from two separate causes. First, if students are afforded opportunities to practice writing examination essays and given effective feedback on this practice, they may be quite likely to perform more effectively on final examinations. This could cause differences between student performances to narrow, making it more difficult to distinguish between performances for grading purposes.²²¹ In any event, improved examination performances by all students would at least make it more difficult psychologically for professors to impose the many low grades that are demanded by law school grading curves. Second, if substantial writing projects are substituted for examinations, the grading of this writing is likely to require more holistic grading methods, like the grading of clinical work and seminar papers, which are less capable of generating the many fine distinctions that a law school grading curve demands.²²² Furthermore, imposing a mandatory grading curve on writing projects may pose new psychological difficulties in that law students, while they eventually seem to acquiesce in low grades on examinations, are used to receiving only top grades on writing projects as a matter of their undergraduate experience. Thus obtaining lower grades for law school writing projects may cause special discontents.

Yet, while law school grading curves may raise psychological problems and

comments because they can focus students’ attention and dramatize the need for major revisions. We law professors unfortunately tend to emphasize length rather than brevity in our comments on student writing, perhaps because of our needs to demonstrate expertise or defend the relatively low grades that are demanded by law school grading curves.

²¹⁸ See generally Feinman, *supra* note 116; Trakman, *supra* note 195.

²¹⁹ See Kissam, *supra* note 12, at 165–66.

²²⁰ On this kind of response, see generally Elson, *supra* note 3; Schiltz, *supra* note 50.

²²¹ See Feinman & Feldman, *supra* note 8, at 545–51; Kissam, *supra* note 15, at 495–96.

²²² See Kissam, *supra* note 15, at 444–49.

have harmful educational effects when imposed on writing projects,²²³ grading curves are desired by law firms to help screen and hire new lawyers and this grading methodology is likely to be a feature of legal education for a long time to come.²²⁴ Thus law professors must be ethically concerned about applying their school's grading curve fairly between different classes and among students in their own courses. The temptation to stay with the traditional case method/final examination system may seem quite strong. Individual professors who wish to employ substantial writing projects in basic doctrinal courses may, it appears, have to struggle a bit to provide more effective education while administering a fair grading system within the parameters of grading curves. There are good reasons to undertake the struggle, as this Article suggests. But until a critical mass of law professors begins to teach by writing, the struggle to balance one's grading responsibilities with pedagogical responsibilities may be somewhat difficult at times.

This is not to say we should abandon this struggle or any other difficulties with teaching by writing. Rather we should continue to experiment with writing throughout the curriculum, for we owe this to our students if not also the legal profession and American society.²²⁵

²²³ See *supra* text accompanying note 114.

²²⁴ See generally Downs & Levit, *supra* note 58.

²²⁵ Cf. Paul Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 448 (1970) Savoy states the following:

If any real learning is to go on in our schools . . . then our first responsibility must be to the human beings who live in our academic house, not to the Bar, or the profession, or the alumni. That means that much of our academic planning must involve not the shaping of something called the "curriculum" but the removal of blocks and resistances within the educational organism so that students are free to achieve their own levels of integration.