Embracing the Writing-Centered Legal Process

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Men don't boggle at speaking nonsense which they would hesitate to put permanently down upon paper.[1]

ABSTRACT: According to the U.S. media and popular culture, the primary role of the lawyer in our legal system is that of oralist. However, the U.S. legal system is in fact one in which writing, rather than speaking, is the preferred mode of communication.

This Article argues that our "writing-centered" legal process is unique among common law nations, most of which have adopted a "speech-centered" legal process modeled after that of England, where oral argument is the dominant mode of advocacy. Using the English legal system as an example of one that is speech-centered, the Article compares the roles of oral argument, written argument, and written judicial opinions in speech-centered and writing-centered systems.

In seeking to explain why the oral tradition has persisted relatively intact in England for over 700 years, and why the United States chose to reject this tradition early in its history, the Article examines the historical development of each tradition. It argues that the oral tradition has endured, in part, because the English believe that the legal system can be accountable to litigants only when they can see the judicial decision-making process take place in open court. In contrast, the writing-centered legal process views accountability as arising from a fully deliberated written judicial opinion, informed by comprehensive written legal arguments of lawyers in the case.

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1. LORD COCKBURN, 2 JOURNAL OF HENRY COCKBURN 154 (1874). As this Article will establish, Lord Cockburn's skepticism about the value of oral communication is not shared by the majority of his countrymen.

The Article then examines the effect of a writing-centered legal process on the development of the common law and the resolution of legal disputes. Drawing on cognitive theory, it argues that the writing process fosters both creative and critical thinking. This process results in better-reasoned legal arguments and judicial decisions than those that emerge from a speech-centered legal process. The Article concludes by proposing that greater emphasis be placed on teaching lawyers to become more effective writers so that they may become more effective participants in the writing-centered legal process.

INTRODUCTION

One of the great popular misconceptions about the U.S. legal system is that it is propelled by the collective breath of half a million lawyers orally arguing their cases in court. According to this myth, the central role of the lawyer in our legal system is that of oralist. The news media, the entertainment media, and even members of the legal profession all celebrate those activities of lawyers that involve oral communication. The lawyer making an impassioned plea to the jury, sparring orally with judges over points of law, or belligerently cross-examining witnesses—these are the "heroic acts" of the legal profession we invariably see portrayed on television, in movies, and in the news media.[2]

But this portrait of the legal profession, while ripe with dramatic possibilities, does not reflect the reality of legal practice in our country. Behind every display of oral pyrotechnics in a courtroom, one will likely find a carefully crafted set of written arguments. Any attorney who has practiced law for more than a few months recognizes that writing, not speaking, is the preferred medium of communication in the U.S. legal process, even if it is not the most celebrated.

What may not be as obvious to many practicing lawyers is that our legal system is unique in its emphasis on the written over the spoken word. No other common law legal system, past or present, has relied so persistently on the written word as a vehicle for legal communication.[3] Our commitment to the written expression of ideas influences not only the way in which lawyers communicate with judges, but the way in which judges decide cases and communicate their decisions to others, and the way in which lawyers communicate with one another.[4]

The fact that writing occupies a status superior to speech in our legal system is truly revolutionary when viewed from both a cultural and an historical perspective. One of the persistent themes in Western thought since Plato is that speech is a superior form of communication to writing.[5]

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2. *See* Philip C. Kissam, *Thinking (by Writing) About Legal Writing*, 40 VAND. L. REV. 135, 142–43 (1987) (noting that the acts of lawyers deemed worthy of widespread acclaim include not only oral litigation activities like arguing before the Supreme Court, but also negotiating oral agreements such as one for a complex merger acquisition or for an international treaty).

3. *See infra* notes 19–20 and accompanying text (noting that in England and other common law countries, such as New Zealand, Hong Kong, and Australia, speech rather than writing is the dominant mode of communication for lawyers).

4. *See infra* notes 15–18 and accompanying text (noting the significance of written briefs at both trial and appellate levels, and of written appellate opinions in the U.S. legal system).

5. *See generally* JACQUES DERRIDA, OF GRAMMATOLOGY 141–64 (Gayari Chakravorty Spivak trans., 1976); PLATO, PHAEDRUS 95–103 (Walter Hamilton trans., 1988); Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105, 106–09 (1998) (arguing that the speech-writing hierarchy is a dominant part of the law school culture and has influenced the law school curriculum in negative ways).

Moreover, the English, from whom we derived the most salient characteristics of our legal system, have a long tradition of orality in both trial and appellate courts, which continues to this day. In England, and in most other common law countries, appellate argument is still predominantly oral, and there is no role at all for a written brief at the trial level.[6]

Lawyers in the United States, however, began to reject that oral tradition from the early days of the Republic and developed a unique document known as the "appellate brief."[7] Over the past 150 years, appellate courts (and more recently, trial courts) have increasingly limited the role of oral argument, and have relied more heavily on written briefs in their decision-making processes.[8]

The written judicial opinion, as well, is a salient feature of legal practice in the United States.[9] Our reported opinions are written by the judges themselves, after lengthy deliberation. This practice provides a stark contrast

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6. Only within the past fifteen years have English appellate courts required written submissions of any type to be lodged in advance of the hearing, and these submissions provide only a summary of the arguments to be made in court. *See infra* notes 31–33 and accompanying text.

7. *See infra* text accompanying notes 120–46 (discussing the development of the written brief requirement in the United States Supreme Court).

8. For over thirty years, scholars have debated the comparative virtues of written and oral advocacy. Some argue that the appropriate response to the work-load crisis of appellate courts is to decrease our reliance on oral argument and decide more cases based solely on the written brief. *See generally* ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES (1990) [hereinafter MARTINEAU, APPELLATE JUSTICE] (comparing English and U.S. systems of appellate justice and concluding that the U.S. system, in which judges decide cases on the basis of both written briefs and oral argument, is superior overall to the English system, in which judges decide cases solely on the basis of extended oral argument); Robert E. Holmes, *In Support of Appellate Briefing*, 50 OHIO ST. B. ASS'N REP. 1016 (1985) (observing, from a judicial perspective, that most cases are won or lost on written rather than oral argument); Jack Leavitt, *The Yearly Two Foot Shelf: Suggestions for Changing Our Reviewing Court Procedures*, 4 PAC. L.J. 1 (1973) (advocating curtailment of oral argument where judges determine that it will provide no benefit); Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to Conventional Wisdom*, 72 IOWA L. REV. 1 (1986) [hereinafter Martineau, *The Value of Appellate Oral Argument*] (arguing that the societal costs of oral argument far outweigh the benefits, and advocating elimination of oral argument as an integral part of decision-making process in intermediate federal and state appellate courts). Other scholars have suggested that it is the written brief that is superfluous, and that many cases could satisfactorily be resolved solely on the basis of oral argument. *See generally* Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35 (1986) (rejecting Professor Martineau's thesis that oral argument is an "expensive habit," and arguing from judicial perspective that oral argument is helpful in substantial number of appeals); Shirley M. Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971) (suggesting that appellate courts require only skeleton written argument for cases in which the court is reviewing "for correctness" of the trial court decision rather than reviewing the case "for institutional purposes"); Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732 (1983) (arguing that requirement of both written and oral argument is redundant and inefficient, and that greater emphasis be placed on oral advocacy as in the English system).

9. *See infra* notes 151–52 and accompanying text (noting that written opinions supplanted oral opinions early in the development of the U.S. legal system).

to the English tradition, in which appellate judges historically issued the majority of their judgments orally from the bench at the conclusion of oral argument.[10] Emphasis on written expression is also a distinguishing feature of legal practice within U.S. law firms and other legal practice settings. Lawyers in the United States tend to memorialize their research and share ideas with one another in writing to a far greater extent than do foreign lawyers.[11]

Why is it that so much more ink is spilt by U.S. lawyers and judges than by their counterparts in other common law countries? Does all of this scribbling, in the end, result in better common law and better resolution of legal disputes? This Article will attempt to answer those questions.

In Part I, I establish the uniqueness of our writing-centered legal process by contrasting it with the speech-centered legal process long employed in other common-law countries. Using the English legal system as an example of one that is speech centered, I describe the ways in which oral communication has dominated the English process of oral argument as well as that of judicial decision-making.

In Part II, I seek to explain why the U.S. and English legal cultures have diverged so dramatically by tracing the historical development of the oral tradition in English law and the written tradition in U.S. law. I note that while the oral tradition originated of necessity in medieval England because of low literacy levels and the unavailability of modern printing technology, the tradition has endured through modern times. The rational explanation for the durability of the oral tradition is that the oral procedures are regarded by the English as essential in holding the judicial system accountable; the more compelling reason for its longevity, however, may simply be that English judges, attorneys, and litigants are comfortable with it.

The United States, however, was not hampered by tradition from incorporating a significant writing component into its legal process. And it did so by developing a unique written form of legal argument, which we know as the appellate brief, and by developing a comprehensive system of written, published judicial opinions. I conclude that the key distinction between the U.S. and English legal cultures, which explains their differing emphases on orality and writing, is the manner in which they seek to achieve

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10. *See infra* notes 40–44 and accompanying text (discussing the tradition of "extemporaneous oral judgments" in England).

11. *See generally* SURVEY OF FOREIGN LAWYERS IN LL.M. PROGRAM AT NORTHWESTERN UNIVERSITY SCHOOL OF LAW ON FOREIGN LAW FIRM PRACTICE (2003) (on file with the Iowa Law Review). Note, however, that although the internal office memorandum is not as much a fixture in foreign law firms as it is in the United States, barristers in England and some other commonwealth nations do communicate with their instructing solicitors by means of a document called an "opinion," which is a hybrid of an office memorandum and a client advice letter. *See* INNS OF COURT SCHOOL OF LAW, OPINION WRITING 43–44 (2001) (describing the nature of the English "opinion").

accountability. The English legal system evolved from a belief that it could not be fully accountable to litigants unless they could witness all phases of the litigation and decision-making process. In contrast, the U.S. legal system rests on the notion that accountability depends, not upon being able to *see* a judge decide a case, but upon being able to *read* a fully-reasoned judicial opinion explaining the basis of the judge's decision.

In Part III, I explore the effect of our writing-centered legal process on the development of the common law and the resolution of legal disputes. I conclude that this process is not simply a historical accident or a tradition to which we have sentimental attachment, but that it serves a crucial and positive function in our common law system. Drawing on cognitive theory from the fields of anthropology and writing composition, I argue that writing is essential to the development of both legal rules and legal reasoning. Writing is not merely a way to transmit a message, but a way "to grow and cook a message."[12] The writing process serves both a creative function in generating ideas, and a critical function in allowing the writer to identify ambiguities and inconsistencies in her reasoning.

This process, I argue, results in clearer, and often more persuasive legal arguments by lawyers. Moreover, judges are better able to understand and determine the merits of an argument made in writing as compared with one that is delivered only orally. Finally, when the judge herself goes through the process of setting her ideas down on paper in drafting a written opinion, she also benefits from the critical perspective offered by the writing process. The result, I believe, is better reasoned, more just judicial decisions than those that emerge from a speech-centered legal process.

I conclude that because writing plays such a critical role in our legal system, we must place a higher value on teaching our lawyers how to be effective writers.[13] The culture of our law schools, like that of the legal profession generally, is currently one in which oral expression is valued and rewarded more highly than written expression. While the media may continue to portray lawyers "as persons for whom speech and oratory are indispensable qualities,"[14] lawyers themselves should recognize that it is the development of writing that has made our common law system possible and it is the writing-centered legal process that will continue to best serve the common law.

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12. PETER ELBOW, WRITING WITHOUT TEACHERS 15 (1973).

13. A decade ago, the American Bar Association's "McCrate Report" issued a clarion call for greater emphasis on skills training (including legal writing) in law schools. *See generally* A.B.A. SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992). The report, however, has not led to significant change in law schools' investment in their writing programs. *See* Eichhorn, *supra* note 5, at 116; *infra* notes 216–30 and accompanying text.

14. M. ETHAN KATSH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW 203 (1989).

I. OF BARRISTERS AND BRIEFS: ORALITY AND WRITING IN CONTEMPORARY ENGLISH AND U.S. LEGAL SYSTEMS

I have chosen the phrase "writing-centered legal process" to describe the U.S. legal system because of its emphasis on the written expression of ideas, an emphasis that I will argue is unique in the common law world. While oral argument is certainly a salient feature of litigation at both the trial and appellate levels in the United States, it is through writing that lawyers most fully communicate their legal arguments to judges.

At the trial level, the memorandum of law submitted in support of a motion provides the judge with a structured and analytically complete argument that states the relevant facts, identifies the relevant legal principles (together with supporting authority), and applies those principles to the facts of the case. The appellate brief is a more formal and even lengthier document that provides the same type of structured, comprehensive argument.[15] By contrast, oral argument is short in duration[16] and does not provide judges with a complete exposition of the parties' legal arguments. It is employed merely as a supplement to the written brief, a means of clarifying arguments that were expressed initially in written form. Indeed, in some instances, a court will dispense with oral argument altogether and decide a case solely on the basis of the written brief.[17]

Writing is also the medium through which U.S. appellate judges and, in some cases, trial judges communicate their decisions to litigants and the world at large. Written opinions are generally produced over a period of weeks or months, with the assistance of a professional staff, and often are the product of extensive research, drafting and editing.[18]

The written appellate argument and the written, thoroughly deliberated appellate opinion are deeply entrenched characteristics of our legal system. Indeed, the writing-centered nature of our legal process is so well accepted

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15. The significance of this document in the appellate litigation process is evidenced by its length, as well as the elaborate rules governing its form and content. For example, the Federal Rules of Appellate Procedure specify that a brief must include not only an argument, but also a table of contents, table of authorities, statement of issues, statement of the case, statement of facts, jurisdictional statement and corporate disclosure. FED. R. APP. P. 28(a). Moreover, the rules provide detailed requirements pertaining to the brief's cover, binding, paper size, line spacing, margins, typeface and style. FED. R. APP. P. 32(a)(1)–(6). The substantive portion of the brief may run as long as thirty pages. FED. R. APP. P. 32(a)(7)(A). Briefs filed in the United States Supreme Court are subject to even more rigorous formal requirements, see SUP. CT. R. 24, 33(1)(a)–(f), and may run as long as fifty pages. SUP. CT. R. 33(1)(g).

16. Supreme Court Rule 28(3) limits argument to thirty minutes per side. SUP. CT. R. 28(3). The Federal Rules of Appellate Procedure provide no express limit on the length of oral argument, but in practice, oral argument in the federal Courts of Appeal does not exceed thirty minutes per side, and is usually no more than fifteen to thirty minutes per side. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 215.

17. *See* FED. R. APP. P. 34(a)(2)(A)–(C); *see also* text accompanying notes 149–50.

18. *See* Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 25–26 (1993).

in our country that we may not even be aware how truly extraordinary it is. In other common law countries, however, speech rather than writing has been the dominant mode of communication for both lawyers and judges. The oral tradition in advocacy and judicial decision-making had its origins in England, and the English passed that tradition on to the countries in the British Commonwealth. With the exception of Canada, which has a relatively long-standing practice of written appellate advocacy,[19] virtually every Commonwealth country has adhered to some degree to the English tradition of orality, and has historically relegated writing to an inferior position.[20]

In England, however, the tradition of orality has been perpetuated in its most robust form. Oral advocacy is the heart of the English legal system.[21] Informed by the principle that justice must be seen in order to be done,[22]

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19. The Supreme Court of Canada (Canada's court of last resort) has, for many years, required the submission of a "factum," which closely resembles the U.S. appellate brief in format, length and analytic complexity. *See* CAN. SUP. CT. RS. 35, 36, 42 (2002), *available at* http://www.scc-csc.gc.ca/actandrules/rules/index_e.asp (on file with the Iowa Law Review). In the Federal Court of Appeal (the intermediate appellate court), however, the litigants are required to file only a memorandum of fact and law, which is a shorter, more informal document. CAN. FED. CT. R., Part 6, § 346 (1998), *available at* http://www.fja.gc.ca/fed_rules/index_e.html.

20. The primacy of oral expression in these countries is evidenced by the absence of a formal written argument and the extensive use of oral argument as the principle means of informing judges about the legal issues in the case. Traditionally, common law jurisdictions have required nothing more than submission of an outline of legal points and supporting authorities prior to oral argument in an appeal. For example, under New Zealand law, counsel in the Court of Appeal (the intermediate appellate court) must submit only a "concise, tightly focused" summary of the argument and, where appropriate, a chronology of the case. N.Z. CIV. P.: PRIVY COUNCIL & CT. APP. § 105 (2003) [hereinafter LAWS OF NEW ZEALAND], *available at* LEXIS, Legal (Excluding U.S.) Library. In the Judicial Committee of the Privy Council (the highest appellate court in New Zealand), counsel submit a "form of case," a document "stating as concisely as possible, the circumstances out of which the appeal arises [and] the contentions to be urged by the party lodging it." *Id.* at § 59. Nowhere in New Zealand's procedural rules is there any limit on the length of oral argument on appeal. Similarly, the rules of civil procedure in Hong Kong provide no restriction on the length of oral argument, see generally CAMILLE CAMERON & ELSA KELLY, PRINCIPLES AND PRACTICE OF CIVIL PROCEDURE IN HONG KONG (2001), and require the appellant in the Court of Appeal to submit a "skeleton argument" that is "as succinct as possible." H. K. PRAC. DIRECTION 4.1(21)–(22) (1999), *available at* http://www.judiciary.gov.hk/en/legal_ref/prac_directn.htm. Submission of a skeleton argument by the respondent is optional. *Id.* at 4.1(21). Until very recently, the Australian High Court (the highest appellate court) required counsel to submit only a list of authorities two days before arguments, and an outline of contentions, "not to exceed three pages, in open court on the day of argument." Harry Gibbs, *Appellate Advocacy*, 60 AUSTL. L.J. 496, 499 (1986). In 2000, however, the High Court's procedures were amended to require "detailed written submissions of the parties to an appeal . . . so that Justices may better understand the contentions of the parties before the hearing of the matter commences." AUSTL. PRAC. DIRECTION 1 (2000), *available at* http://www.hcourt.gov.au/filing_04.html (on file with Iowa Law Review).

21. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 101.

22. Daniel J. Meador, *English Appellate Judges from an American Perspective*, 66 GEO. L.J. 1349, 1363 (1978).

each step of the litigation process at both the trial and appellate levels has historically taken place in open court. The public is able to observe not only the presentation of evidence and counsels' legal arguments, but also, in some cases, the judges' deliberations and the announcement of their decision.[23]

A U.S. lawyer visiting an English appellate court for the first time would likely find the process of oral argument taking place there to be a revelation. Instead of succinct presentations in which counsel address key legal issues in fifteen to thirty minutes, she would see protracted arguments lasting from several hours to several days.[24] Considerable time might be spent by English barristers simply informing judges of the record and relevant case law.[25] A visitor would see barristers quoting at length from previous judgments and scholarly writings. [26] The judges would take their time, as well, absorbing the information presented to them at oral argument. Periodically, there might be a pause in the proceedings so that each judge could read his own copy of a document, or peruse a case.[27]

Those accustomed to the relatively efficient U.S. oral argument might question why English judges would sit patiently for hours listening to attorneys merely transmit information, as opposed to actually advance legal arguments, or why judges would devote oral argument time to silent study of relevant authority. The English practice, however, becomes more comprehensible when one considers that English barristers do not file a comprehensive written argument prior to their oral presentation. Until as recently as the late 1980s, judges came to court a virtual "blank slate," having read only a brief outline of counsel's contentions and a chronology of the facts. There was no requirement that counsel inform the judges in advance of argument of the specific facts, legal principles, or legal authorities upon which they would rely in their appeal.[28] Thus, whatever judges learned about the case, they learned during the oral argument.[29]

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23. *Id.*

24. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 120, 123–26; Telephone Interview with Joseph M. Kosky, Barrister, Ross & Craig (London) (Dec. 30, 2003) [hereinafter Telephone Interview] (on file with the Iowa Law Review). The median length of an oral argument in the English Court of Appeal is slightly over one day. FRANK M. COFFIN, ON APPEAL 27 (1994).

25. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 120. It has been observed that in both English and U.S. appellate arguments, the actual amount of time devoted to the heart of a legal argument is only fifteen to thirty minutes per side. *Id.* at 131. The difference is that in England, it may take several days to reach this point. *Id.*

26. *Id.* at 125; Telephone Interview, *supra* note 24.

27. Meador, *supra* note 22, at 1364–65.

28. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 127–30; Meador, *supra* note 22, at 1364.

29. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 128–33. Indeed, the oral tradition requires that the court consider only those authorities cited to it by counsel. *Id.* at 102. No additional research by judges is required, or even permitted. *Id.* The assumption is that counsel

Not until 1989 did the Court of Appeal (England's intermediate appellate court)[30] require barristers to file a written "skeleton argument" prior to oral argument.[31] This requirement has streamlined the oral argument process in the Court of Appeal somewhat, but its drafters have emphasized that these documents are intended to be only "a very abbreviated note of the argument and in no way usurp any part of the function of oral argument in court."[32]

Similarly, in England's highest appellate court, the Appellate Committee of the House of Lords, an argument summary known as a "case" is now required to be filed prior to hearing.[33] Even since the advent of pre-hearing written arguments, however, oral arguments in a typical case still consume the better part of a day.[34]

The rationale behind this seemingly inefficient form of advocacy is that judges are more likely to reach a fair decision, free of bias, if they approach the argument with few preconceptions about the case. The concern is that if judges have an opportunity to read and fully consider the arguments in chambers before they are presented in court, a crucial part of the decision-making process will take place in private, outside the public view.[35]

Apart from this rationale, the extended oral argument has some obvious virtues. First, attorneys benefit from being able to witness the

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are competent and that the adversary system will reveal all relevant authority. *Id.* A judge may, however, ask counsel to consider the implications of a case that has not been cited. *Id.*

30. The Court of Appeal is the final appellate court for the majority of cases because appeal to the House of Lords, like that to the U.S. Supreme Court, is discretionary and is granted sparingly.

31. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 129; U.K. CIV. PROC. 52, PRAC. DIRECTION 19–20 (2003), *available on* WESTLAW, Database Identifier UKCP-CPR, The White Book from Sweet and Maxwell [hereinafter U.K. CIV. PROC.].

32. U.K. CT. APP. CIV. DIV. PRAC. DIRECTION 3.1.1, *at* http://www.hrothgar.co.uk/YAWS/practice/pd-ca03.htm (last visited Mar. 16, 2004) (on file with the Iowa Law Review), *repealed by* U.K. CIV. PROC., *supra* note 31. The skeleton argument in the Court of Appeal contains "a numbered list of points stated in no more than a few sentences which . . . both define and confine the areas of controversy. Each point [is] followed by references to any documentation upon which the appellant proposes to rely." U.K. CIV. PROC., *supra* note 31, at 52.20, 5.10. The original Practice Direction requiring the skeleton argument noted that "[t]he purpose of a skeleton argument is to identify and summarise the points, not to argue them fully on paper," and thus the argument should be "as succinct as possible," or no more than ten to fifteen pages. U.K. CT. APP. CIV. DIV. PRAC. DIRECTION, *supra*, at 3.5.1–3.5.2.

33. U.K. H.L. CIV. DIV. PRAC. DIRECTION 15.3 (2003), *available at* http://www.publications.parliament.uk/pa/ld199697/ldinfo/ld08judg/bluebook/bluebk-1.htm (on file with the Iowa Law Review). The Practice Directions describe the case as a "succinct statement of a party's argument in the appeal," and specify that it "should be confined to the heads of argument which counsel propose to submit at the hearing." *Id.* No page limit, format or content is specified beyond the requirement that cases include a "numbered summary of the reasons upon which the argument is founded." *Id.* at 15.6. Parties are also required to file an appendix of relevant documents, *id.* at 12, and copies of relevant legal authorities, *id.* at 17.

34. Telephone Interview, *supra* note 24.

35. *Id.*

judicial decision-making process; they can observe the judges' thought processes, as evidenced by the judges' questions, and can tailor their arguments accordingly.[36] Attorneys have ample opportunity to respond to judges' concerns, add support to arguments that seem not to be persuading the judges, and refute the arguments of opposing counsel.[37] Perhaps more importantly, because any courtroom observer can literally see the judges come to a decision, such an observer will likely come away from oral argument with confidence that the judges have considered all the points raised by counsel, and only those points.[38]

Thus, even while the English have finally acquiesced in the submission of pre-hearing written argument summaries, they have emphasized the limited role of such arguments. The purpose of having the judges read a pre-hearing submission is "not to form any view of the merits of the appeal, but to familiarise [the judges] with the issues and scope of the dispute and thereby avoid the necessity for a lengthy . . . opening of the appeal."[39]

Perhaps the most impressive feature of England's speech-centered legal process is the issuance of extemporaneous oral judgments by appellate judges after the oral arguments. Although ex tempore judgments are now rendered in a minority of cases, for more than 600 years they were a centerpiece of the English appellate process.[40] In rendering an ex tempore judgment, the presiding judge will, with minimal or no preparation, present a remarkably organized, coherent speech lasting from thirty to sixty minutes. The judge will typically state at length the facts of the case and the issues that have been raised on appeal. He will explain how the court is deciding the case and give a brief explanation of why he reached his decision, but he will cite little precedent and will provide only a superficial analysis of the legal issues. Then the other judges on the panel will describe their own independent rationale for the result, providing evidence that they have, in fact, done their own thinking.[41]

Over the course of the past ten years, the Court of Appeal has moved away from the tradition of ex tempore judgments and will generally "reserve judgment," i.e. delay making a decision and articulating reasons for it [42] In the House of Lords, all judgments are now reserved and are never given until the law lords (the House of Lords judges) have had a chance to consider the case more thoroughly. In practice, however, the justices do not

36. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 102–03.

37. *Id.* at 103.

38. *See id.* at 102–03; Meador, *supra* note 22, at 1364–65.

39. U.K. CT. APP. CIV. DIV. PRAC. DIRECTION, *supra* note 32, at 3.3.1.

40. PATRICK S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 279 (1987); MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 106.

41. Meador, *supra* note 22, at 1366–67.

42. Telephone Interview, *supra* note 24.

engage in significant research or consultation prior to issuing their opinions, partly because of tradition and partly because they have no law clerks to assist them in their research.[43] Even where a judgment is reserved, the oral tradition persists to the extent that the justices will issue their opinions orally in court after their period of deliberation. The justices no longer read their opinions in full, but do give an oral summary of how they would dispose of the appeal.[44]

The defining characteristics of the speech-centered legal process, therefore, as it exists in contemporary England are (1) extensive oral argument; (2) abbreviated written argument; and (3) appellate judgments delivered orally (either composed extemporaneously or based on a written opinion). The writing-centered legal process, as it exists in the contemporary United States, in contrast, is characterized by (1) concise oral argument; (2) extensive written argument; and (3) appellate decisions rendered in writing after deliberation.

II. A TALE OF TWO LOVE AFFAIRS: HISTORICAL ROOTS OF THE ORAL TRADITION IN ENGLAND AND THE WRITTEN TRADITION IN THE UNITED STATES

That writing plays such a vital role in the U.S. legal system is an anomaly. This is true not simply because our English legal heritage emphasizes orality, but also because speech has been the favored mode of communication throughout the history of Western thought. In our culture, speech has traditionally been characterized as dynamic and alive, while writing has been regarded as static and unresponsive.[45]

The speech-writing hierarchy probably has its origins in the Socratic dialogues of Plato, who believed that knowledge was best acquired through an interactive process of oral questioning and response.[46] In Plato's *Phaedrus*, Socrates observes that the written word is the mere shadow of the spoken word, and is incapable of communicating thoughts as precisely as the spoken word.[47] Although written words may seem to "understand what they are saying, . . . if you ask them what they mean by anything they simply return the same answer over and over again."[48] Socrates analogizes writing to the planting of a seed "in the black fluid called ink," an unsuitable soil that

43. ATIYAH & SUMMERS, *supra* note 40, at 279–80.

44. HOUSE OF LORDS, BRIEFING: THE JUDICIAL WORK OF THE HOUSE OF LORDS (2003), http://www.parliament.uk/documents/upload/HofLBpJudicial.pdf (on file with the Iowa Law Review).

45. Eichhorn, *supra* note 5, at 106–09; *see* WALTER J. ONG, ORALITY AND LITERACY 79–80 (1982).

46. PLATO, *supra* note 5, at 95–103.

47. *Id.* at 98.

48. *Id.* at 97.

produces "discourses which cannot defend themselves . . . or give any adequate account of the truth."[49] In contrast, Socrates praises good speech:

> when a man employs the art of dialectic, and, fastening upon a suitable soil, plants and sows in it truths accompanied by knowledge . . . . such truths can defend themselves as well as the man who planted them; they are not sterile, but contain a seed from which fresh truths spring up in other minds . . . .[50]

The notion that a communicator must be physically present in order to express ideas successfully is echoed in the work of more modern philosophers.[51] According to Jacques Derrida, Western thinkers have placed a high value on "presence," and deemed speech to be more "present" than writing.[52] Derrida argues that speech is more closely connected to the immediate thoughts of the communicator than writing because of its ability to convey the communicator's intent and emotion through inflection.[53] "Speech is immediate, unambiguous, and sincere; writing is distant, ambiguous, and potentially misleading."[54]

As discussed in Part I above, the English legal system evidences a similar bias favoring speech over writing, based, in part, on the notion that judges must have a significant opportunity to question and interact with attorneys personally in order to fully understand the legal issues in a case.[55] This oral tradition was well entrenched in England at the time our nation was formed. It is striking, therefore, that the U.S. legal profession would choose to reject the traditional hierarchy of speech over writing and instead favor writing as their medium of expression.

Nowhere is this break with tradition more manifest than in the emergence of the written brief as the cornerstone of the U.S. appellate process. To understand the significance of our departure from the English tradition of orality, and to seek to explain it, one must first examine the history of the oral tradition in England.

A. *THE EVOLUTION OF THE ORAL TRADITION IN ENGLAND*

The origins of England's oral tradition can be traced to the Middle Ages, when the legal profession was in its infancy and most litigants

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49. *Id.* at 98–99.

50. *Id.* at 99. Anthropologist Walter Ong has suggested that the objections urged by Plato against writing are essentially the same objections urged against computers today. In each case, society resisted the "technologizing of the word" for fear that technology would render the word less authentic, less personal. ONG, *supra* note 45, at 79–80.

51. J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 755 (1987).

52. DERRIDA, *supra* note 5, at 101–268 (discussing the works of Jean Jacques Rousseau and Claude Lévi-Strauss).

53. *Id.* at 98.

54. Balkin, *supra* note 51, at 756.

55. *See* text accompanying notes 36–37.

represented themselves in court. Many of these individuals had limited reading and writing ability.[56] Moreover, the printing press had not yet been invented[57] and methods of producing formal documents were still crude.

In the thirteenth century, which was a formative period in the development of the English legal system,[58] a civil suit was conducted in two phases: the pleading phase and the trial phase.[59] In the pleading phase, the litigants appeared before a judge, outside the presence of the jury.[60] The plaintiff was required to orally allege the facts which he believed entitled him to relief. If the defendant disputed any of the facts alleged by the plaintiff but did not raise any substantive legal issues, the case was sent directly to the jury for trial.[61]

If the defendant raised an issue of law, however, the judge would conduct a preliminary discussion of the issue before sending the case to the jury.[62] Although the judge was not permitted to dismiss the case himself on the basis of a legal issue, he could warn the plaintiff that his plea was insufficient to state a claim, or warn the defendant that he had failed to allege sufficient facts in denial of the plaintiff's plea.[63] In some cases, the judge would force the pleader to reframe his plea in more precise terms before sending the case to the jury.[64] The judge could also settle a point of

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56. Literacy was a comparatively rare skill in medieval England. JEFFREY L. SINGMAN & WILL MCLEAN, DAILY LIFE IN CHAUCER'S ENGLAND 47 (1995). At the end of the fifteenth century, the male literacy rate was only about 10%. *Id.* at 50. That rate was certainly lower in the thirteenth century when the English legal system was in its formative period. *Id.*

57. The printing press was invented in 1454 and was not introduced in England until 1476. In 1481, the first legal texts were printed and "[i]n 1537, the first printed reports [of cases] appeared." KATSH, *supra* note 14, at 39.

58. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 78 (1953). *See generally* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 22–31 (5th ed. 1956) (discussing the history of the English legal system in the thirteenth century).

59. A. K. R. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW 331 (4th ed. 1958); PLUCKNETT, *supra* note 58, at 399–400.

60. KIRALFY, *supra* note 59, at 331.

61. *Id.* In the trial phase of the litigation, the plaintiff was required to prove the facts which he had alleged in his pleading. By the thirteenth century, archaic modes of proof such as trial by ordeal or by battle, were falling out of favor and the litigants offered proof by means of their own sworn testimony or "oath," supported by a number of "oath-helpers." The testimony of witnesses was also beginning to be offered as a means of proving or disproving the allegations in the plaintiff's plea. 2 SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 598–606 (2d ed. 1923).

62. KIRALFY, *supra* note 59, at 331–32. As is the case today, the most common legal objection to a plaintiff's plea was that it failed to state a claim for which relief could be granted.

63. *Id.*

64. *Id.* at 332–35.

law on which the jury's verdict might turn.[65] Indeed, most of the substantive law of the period evolved during these preliminary proceedings.[66]

The pleading stage of the litigation was critical to a litigant's ultimate success in a case, and it increasingly demanded skills of oral advocacy which the ordinary citizen did not possess. At some time during the thirteenth century, therefore, parties began to hire professional pleaders or "narrators" to state their case in court.[67] The narrator should be distinguished from another type of lawyer known as an "attorney," who was hired as the litigant's agent to appear in court in his stead.[68] An attorney had the power to bind his principal to a particular plea, but did not necessarily have the oratorical skills required to tell the principal's story in a persuasive manner. For this, a narrator was required.[69]

From its earliest days, therefore, the legal profession in England was a divided one. The medieval narrator and attorney are the progenitors of the modern-day barrister and solicitor.[70] Like the modern barrister, the narrator held the more glamorous and respected of the two positions.[71] It was the narrator who engaged in clever dialogue with the court, and who used his quick wit and resourcefulness to conceal facts from his opponent while ferreting out those his opponent concealed from him.[72] The narrators of the thirteenth and fourteenth centuries were known for their intellectual

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65. *Id.* at 332–33.

66. *Id.* at 331. It is the transcripts of these proceedings which ultimately were reported as the case law of the period.

67. Scholars are not entirely certain exactly when the hiring of professional legal advocates began, but there is evidence that by the end of the thirteenth century such advocates were practicing in the courts. PLUCKNETT, *supra* note 58, at 215–17; POUND, *supra* note 58, at 78.

68. POUND, *supra* note 58, at 78–79.

69. *Id.*; PLUCKNETT, *supra* note 58, at 216–17.

70. The English profession is bifurcated between (1) barristers, who serve primarily as advocates and have sole right to conduct litigation in the higher courts, and (2) solicitors, who primarily advise clients, negotiate and draft documents, and prepare cases for trials that will ultimately be conducted by barristers. A member of the general public has direct access only to a solicitor, and must go through the solicitor in order to hire a barrister. There are approximately nine times as many solicitors in England as there are barristers. Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 CONN. J. INT'L L. 185, 186 (1994).

71. PLUCKNETT, *supra* note 58, at 220–23. Plucknett observes:

> The *narratores* whose nimble fencing at the bar of the court became so essential to the success of an action at law must have seemed to the public, as well as to the students, the embodiment of all those qualities which are appreciated by lovers of intellectual combat. When the common law was still young and just setting out to extend its jurisdiction and enlarge its store of doctrine, a career at the bar must have been intensely exciting, and profoundly important for the development of the law.

Id. at 220–21.

72. *Id.* at 222.

brilliance; they were consulted by Parliament on difficult questions and were frequently recruited by the Crown to serve as judges.[73]

By the end of the fourteenth century, the narrators, who had come to be known as "serjeants", became a closed guild and exercised complete control over the legal profession.[74] Judges were drawn exclusively from the ranks of serjeants, and only serjeants could be heard in the principal court of the time, the Court of Common Pleas.[75] The power exercised by the serjeants (and later, the barristers) over the English legal profession accounts, in part, for the persistence of the oral tradition in England.[76]

The only significant deviation from the oral tradition in trial practice that has occurred in over 700 years is the replacement of oral with written pleading, which took place during the sixteenth century.[77] That is as far as the English legal system ever came in incorporating writing into its trial-level practice.

The English legal system's failure to incorporate any form of writing into the appellate process until late in the twentieth century is perhaps even more remarkable than the absence of writing in the trial process, given the complex, law-based arguments typically made in an appeal. Throughout much of its history, however, the English legal system possessed no independent appellate judiciary, and no procedure equivalent to the modern-day appeal (i.e., review of an inferior court decision on the merits by a higher court). At common law, the King's Court, which had both original and appellate jurisdiction, was the only court entitled to review the propriety of a trial court's judgment. The judgment of a trial court could be reviewed exclusively for procedural error, although questions of substantive law may have been implicit in such errors. In order to obtain review of a trial court judgment, the unsuccessful litigant was required to procure a written record of the trial court proceedings; he then made oral arguments before the King's Court about whether that record was accurate, and whether the trial court's actions were procedurally proper.[78] The Court rendered its

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73. *Id.* at 223.

74. *Id.*

75. *Id.*; POUND, *supra* note 58, at 82–83.

76. *See infra* note 98 and accompanying text (noting that modern-day barristers, who wield great power in the English legal system, consider a system of written advocacy as a threat to their power and perhaps their survival).

77. *See* KIRALFY, *supra* note 59, at 335–39. Note, however, that even in the thirteenth century, a litigant was allowed in some circumstances to submit a written plea in lieu of an oral one. For example, if a litigant was unable to engage in the skilled argument which oral pleading required, but could not afford to hire a serjeant to speak in court for him, he could for a lesser fee hire an attorney or scrivener to draft a written plea. The litigant was then allowed to read the plea in court. A litigant might also file a written plea if his counsel refused to orally plead a fact because counsel doubted its truth. *Id.* at 338.

78. POLLACK & MAITLAND, *supra* note 61, at 666–68; *see* PLUCKNETT, *supra* note 58, at 387–88. Indeed, an "appeal" as we currently know it (i.e., a review of a lower court judgment by a

decision orally, and written reports of these oral decisions were highly selective.[79]

The oral tradition in English appellate advocacy was a natural outgrowth of the oral tradition at the trial level. Until the mid-nineteenth century, there was no independent appellate judiciary in England.[80] Appeals were heard by a panel of trial judges, including the judge who originally tried the case.[81] In addition, there existed no written record of trial proceedings or significant body of written legal authority upon which a written argument might have been based.[82] Judges were allowed to review only errors of law evident from the face of the trial court pleadings, supplemented by the judge's written summary of his rulings and counsel's exceptions to them.[83] Because the amount of written material relevant to the appeal was so small, it was read to the judges by counsel during the oral argument; no written materials were submitted in advance.

Even after an independent appellate judiciary was created, full trial transcripts became available, and reports of prior judicial decisions became published more frequently—the oral tradition continued.[84] It was not until the middle of the twentieth century that any serious reform of oral appellate

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higher court) did not exist in England until the latter part of the ninteenth century. Prior to that time, a judgment rendered by an inferior court could be questioned by means of a complaint of "false judgment." This procedure was directed against the lower court itself, rather than against the prevailing party in the court below. If the judgment of the court was deemed to be erroneous, it was annulled, and in some cases the county or manor in which the court was located was assessed damages. A complaint of false judgment, however, could not be brought against the King's Court. The procedure for questioning a judgment of that court was to bring a "writ of error," which was not an accusation against the judge and did not require the judge to mount a defense. *Id.*

79. The decisions of both trial courts and reviewing courts began to be selectively reported in the late thirteenth century. Handwritten summaries of the courts' decisions appeared in Year Books, which were presumably prepared by an independent third party not involved in the litigation. These reports, however, were not originally intended to be cited to or used by judges. In the fifteenth century, with the advent of the printing press, some of these reports began to be printed. For reasons that are not clear, printed Year Books were discontinued in the sixteenth century, and were replaced with reports prepared by an individual barrister or the judge involved in the case, and printed under his name. These reports were issued sporadically and often were delayed until long after a judgment had been rendered. The report contained arguments of counsel and the reporter's summary of the judgment. This system continued until 1865, when the Council of Law Reporting for England and Wales took on the task of reporting judgments. These reports had, and still have, preferred status. But they were, from the start, highly selective. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 104–05.

80. In 1851, the Court of Appeal in Chancery, an independent intermediate appellate court with permanent judges, was created. The Judicature Acts of 1873 and 1875 established the Court of Appeal of the Supreme Court, a separate intermediate appellate court for common law. I WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 633–50 (1972).

81. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 116.

82. *Id.* at 117.

83. *Id.* at 116–17.

84. *Id.* at 117.

procedure in England was ever attempted.[85] In 1953, a committee was organized to study appellate court practice and procedure in England. But it quickly rejected the U.S. practice of written brief and limited oral argument.[86] The committee disfavored the U.S. approach because it believed that (1) the English practice of allowing unlimited oral argument permitted a more complete discussion of the legal issues; (2) the English practice of judicial deliberation in open court resulted in fewer dissents; (3) the U.S. practice of written briefs and decisions delayed both the hearing of a case and the judges' ultimate decision; and (4) requiring a written brief would increase the cost to litigants.[87] Since then, the English have periodically re-evaluated their appellate system, and have resisted reforms aimed at curtailing oral argument or requiring submission of written briefs.[88]

The English bar has even been suspicious of attempts to institute pre-argument reading of key documents by judges. In 1962, some judges of the Court of Appeal (the intermediate appellate court in England) experimented with the practice of reading the trial court judgment and some other documents before oral argument in order to save the time devoted to reading such documents at oral argument.[89] This minor, seemingly benign, reform was greeted with hostility by the practicing bar, who were concerned that they would not know whether the judges properly understood the documents unless those documents were read in open court.[90] The judges ultimately abandoned the pre-trial reading procedure because they simply did not have the time to do it, and because there had been no rigorously enforced requirement that counsel submit the relevant documents in sufficient time for the judges to be able to read them in advance of trial.[91]

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85. *Id.* at 127.

86. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 127; MICHAEL ZANDER, THE LAWMAKING PROCESS 325–28 (2d ed. 1985).

87. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 127–28. It should be noted that the committee had consulted with U.S. Supreme Court Justice Felix Frankfurter, and with a prominent U.S. attorney, John Davis, both of whom were critical of the U.S. system and favored oral argument over briefs. *Id.* at 128.

88. *Id.* at 127. The one instance in which an English court accepted a U.S.-style written brief is notorious because the brief filed was 116 pages long and was followed by a reply brief. One disgruntled judge on the case stated: "Both of these matters were wholly irregular and contrary to the practice of the court and in my opinion should not be allowed as precedent for future proceedings." ZANDER, *supra* note 86, at 535. A study of English appellate practice in 1978 reconsidered and rejected the adoption of the U.S. brief, and limited oral argument because of expense to litigants and because thirty minutes of argument was deemed insufficient to explore issues in depth. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 129.

89. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 103.

90. *Id.*

91. *Id.*

It took another twenty years before the Court of Appeal resurrected the practice of pre-reading selected documents. In 1982, the Court of Appeal also began requesting counsel to submit a skeleton argument identifying the principal points and authorities to be raised at oral argument.[92] Seven years later, filing of these skeleton arguments became mandatory rather than discretionary.[93] Lord Donaldson, the chief judicial officer in England at the time, attempted to quell fears that England was heading toward wholesale adoption of the U.S. system when he stated that "the English Court of Appeal remains firmly wedded to its long established tradition of oral argument in open court. For that reason . . . skeleton arguments should be confined to identifying points, not arguing them."[94]

The Appellate Committee of the House of Lords has had a long-standing practice of reading the lower court judgment and the printed case filed by the parties in advance of oral argument.[95] One of the justices, Lord Diplock, has emphasized, however, that pre-reading is designed to cut the length and cost of appeals; it is not intended to lead to the institution of U.S.-style briefs or to minimize the importance of oral argument.[96]

The continuing vitality of the oral tradition in England can be explained in part by its significant policy justification, namely that it is "the primary means for public accountability of the judicial system, both for trial courts and appellate courts."[97] Another possible reason for the persistence of the oral tradition is a political one—that barristers, who wield the majority of

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92. *Id.* at 121–22.

93. *Id.* at 129. These reforms are contained in a Practice Direction issued by the Master of the Rolls in March, 1989. The Practice Direction also (1) called for the appointment of a legal staff to review counsel's estimates of time required for oral argument, and to truncate the argument in appropriate cases, (2) requested "a greater commitment to pre-reading by the judges," and (3) instructed counsel to eliminate a statement of facts in their oral argument, and to only read the most essential parts of a legal opinion or the record in open court. Although these reforms do not substantially alter the oral nature of English appellate proceedings, they go a long way toward making it more efficient. *Id.* at 122–23.

94. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 129–30 (quoting Lord Donaldson, *Introduction*, PRACTICE DIRECTION OF THE COURT OF APPEAL (1989)).

95. *Id.* at 129.

96. *See* Yorke Motors v. Edwards, 1 W.L.R. 444, 444 (1982). Lord Diplock's statement anticipated the negative reaction of English lawyers to the practices of pre-reading and skeleton arguments. One solicitor attacked these practices on the ground that they precluded the judge from coming to the oral argument with an open mind. He viewed pre-reading and skeleton arguments as "the thin end of the wedge which will eventually lead to the American-style 'brief' and the practical elimination of oral argument." F. A. Mann, *Reflections on English Civil Justice and the Rule of Law*, 2 CIV. JUST. Q. 320, 324 (1983). A prominent barrister expressed similar fears that the judges' ability to keep an open mind would be impaired by reading skeleton arguments. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 130 (citing Litman, Written Briefs and Oral Advocacy, Papers Delivered at the Program on Judicial Techniques in Litigation and Arbitration, London 117 (Nov. 30, 1987)).

97. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 117; *see also supra* text accompanying notes 35–38.

power in the English legal system, perceive the U.S. system of written advocacy as posing a threat to that power, and possibly to their survival.[98]

At some level, however, the English opposition to the U.S. system of appellate procedure and their "belief in the virtues of the oral process is largely instinctive and unscientific."[99] Barristers are simply comfortable with, and indeed have revelled in, the theatricality of their oral procedures.[100] The English populace, as well, has long been attracted to and impressed by the "whiff of theatre about the courts."[101] The oral procedures at both the trial and appellate levels offer the spectator a "compact drama" that concludes cathartically with an "immediate, impromptu judgment" issued by the judge in open court.[102]

A final explanation for the continuing vitality of the oral tradition is simply inertia. Traditions are unlikely to change unless there is some catalytic event that forces them to be re-examined. No such triggering event occurred in England to force a re-examination of oral procedures.[103] And so the oral tradition continues to thrive in the English legal system today, not significantly altered from the form it assumed in the late eighteenth century when the United States asserted its independence from England and began to form its own legal system.

B. THE ASCENDANCE OF THE WRITTEN TRADITION IN THE UNITED STATES

The first sign that the new nation was charting its own course in developing a legal system was its decision to adopt a written constitution with a catalogue of individual rights. The English constitution is "unwritten" to the extent that its provisions do not appear in any single document and are an amalgam of customs, cases, statutes and judicial writings.[104] Our written constitution is arguably an outgrowth of the written charter which had governed the colonies prior to the formation of the republic.[105] Because the colonies had been governed for generations by the terms of written

98. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 132. The desire of barristers to maintain their monopoly over the appellate process cannot, however, be the primary explanation for the English attachment to the oral tradition. Solicitors, as well as barristers, have expressed resistance to reforms which would curtail oral argument and require more written submissions prior to oral argument. *Id.* at 130. In addition, there is theoretically no reason why the right to submit a written brief in appellate court could not be limited to barristers.

99. *Id.* at 130 (quoting Lord Wilberforce, Papers Delivered at the Program on Judicial Techniques in Litigation and Arbitration, London 120, 129 (Nov. 30, 1987)).

100. *Id.* at 117.

101. Schwarzschild, *supra* note 70, at 214.

102. *Id.* at 213.

103. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 117.

104. D. C. M. YARDLEY, INTRODUCTION TO BRITISH CONSTITUTIONAL LAW 3–4 (6th ed. 1984).

105. COFFIN, *supra* note 24, at 31.

instruments, which established and regulated the structure of government, "the conviction had been bred that only through matter of record could the metes and bounds of the fundamental law be secured."[106]

The United States did not diverge immediately from the English tradition, however, in its litigation practice. Early appellate practice in the United States was conducted almost exclusively on an oral basis, as it had been when the colonies were subsumed under the English legal system. Oral arguments lasting several days were not uncommon.[107] The early rules of the United States Supreme Court mention neither oral argument nor written briefs, but the Court expressly adopted the practice of the English courts and Chancery as a blueprint for its own practices.[108]

Nevertheless, a convergence of circumstances made it difficult for the oral tradition to take hold in the United States as it had in England. First, the new nation lacked a significant body of trained barristers to carry on the tradition.[109] In the seventeenth and early eighteenth centuries, many of the colonies enacted legislation hostile to professional lawyers and initially sought to conduct their legal proceedings with all litigants acting pro se.[110] Ironically, this attempt to lock out professional attorneys forced litigants to turn to untrained officers of the court, "sharpers and pettifoggers," to perform their legal work.[111]

By the beginning of the eighteenth century, most of the colonies recognized the need for responsible, trained practitioners of law and had set up a formal system to admit lawyers into practice.[112] A significant number of colonists became qualified as barristers by studying in England at the Inns of Court,[113] but they were not sufficient to handle the case-load of the colonial courts.[114] Although English-educated barristers were regarded as the best

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106. Julius J. Goebel, Jr., *Antecedents and Beginnings to 1801, in* THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1 (1971).

107. R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 AM. J. LEGAL HIST. 482, 483 (1994). For example, oral argument in *United States v. Crosby*, 11 U.S. (7 Cranch) 115 (1812) lasted five days, and argument in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 377 (1819), lasted nine days. Stephen M. Shapiro, *Oral Argument in the Supreme Court: The Felt Necessities of the Time, in* SUPREME COURT HISTORICAL SOCIETY, YEARBOOK 1985, at 22, 23 & n.10; *see* MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 108.

108. 5 U.S. (1 Cranch) xvi (1803) (adopted Aug. 8, 1791).

109. Martineau, *The Value of Appellate Oral Argument*, *supra* note 8, at 8–9.

110. POUND, *supra* note 58, at 135–42.

111. *Id.* at 142. John Adams observed in his diary that much mischief can arise when "deputy sheriffs, petit justices, and pettifogging medlers attempt to draw writs, and draw them wrong oftener than they do right." John Adams, *Diary (January 3, 1759), in* 2 WORKS OF JOHN ADAMS SECOND PRESIDENT OF THE UNITED STATES 58 (1850).

112. POUND, *supra* note 58, at 144–45.

113. More than 100 colonial-born lawyers were educated at the Inns of Court between 1760 and 1775. *Id.* at 157.

114. Martineau, *The Value of Appellate Oral Argument*, *supra* note 8, at 8.

trained and "best qualified type of practitioner,"[115] qualification as a barrister was not a pre-requisite to practicing before a colonial court.[116] Most colonial attorneys were trained by merely "reading the law" in the office of a practitioner.[117] Such was the nature of the legal profession at the time of the Revolution. Litigation was being conducted by attorneys who lacked the classic education and legal training of the English barrister, and who had no political motive to preserve a system based on oral advocacy; thus, the oral tradition was ripe for reform in the new nation.[118]

Another major factor that contributed to the demise of orality in the U.S. legal system is the sheer size of our country. Because individuals had to travel great distances in order to attend political meetings and participate in government, the written and printed word were becoming an important means of political and governmental communication. The development of the commercial printer facilitated such communication.[119] It was natural, therefore, that the courts would eventually come to rely on the written or printed word as a means of communication between lawyers and judges who were separated by significant distances.

The first sign of a writing requirement in the United States Supreme Court appeared in 1795, when the Court promulgated Rule 8 requiring that attorneys submit "a statement of material points of the case."[120] Supreme Court Rule 30 expanded this requirement in 1821 to "a printed brief or abstract . . . containing the substance of all the material pleadings, facts and documents . . . and the points of law and facts intended to be presented."[121] Although this was probably the first instance of the word "brief" being used to refer to a legal document submitted to a court on appeal,[122] briefs submitted pursuant to this rule did not resemble our modern appellate briefs; they generally contained only a list of points with no actual argument. Such submissions could only serve as a preview of, rather than a substitute for, oral argument.[123] There is only one known surviving example of the

115. POUND, *supra* note 58, at 157.

116. *Id.* at 144–56 (discussing the requirements for admission to the bar in each of the colonies); Martineau, *The Value of Appellate Oral Argument*, *supra* note 8, at 8.

117. *See* POUND, *supra* note 58, at 157–58.

118. Martineau, *The Value of Appellate Oral Argument*, *supra* note 8, at 9.

119. *Id.*

120. SUP. CT. R. 8, *established in* 3 U.S. (3 Dall.) 120 (1795).

121. SUP. CT. R. 30, *established in* 19 U.S. (6 Wheat.) xiii (1817).

122. The term "brief" in English practice refers to a document given by a solicitor to the barrister who will be arguing a case for the solicitor's client. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 62.

123. Cozine, *supra* note 107, at 486–87.

statements required by Supreme Court Rules 8 and 30,[124] and the cases suggest that non-compliance with the rules was a problem.[125]

In 1833, the Supreme Court first gave parties the option of submitting a case on the basis of a written argument in lieu of oral argument.[126] This rule apparently was instituted at the request of attorneys because the Court stated that "it has been represented to the court, that it would in many cases accommodate counsel, and save expense to parties, to submit causes upon printed argument."[127] The Court later clarified that such cases "shall stand on the same footing as if there were an appearance by counsel."[128] Written arguments submitted in lieu of oral argument were most likely more extensive than those submitted merely as a supplement to oral argument, but examples of briefs from the early nineteenth century are virtually non-existent.[129]

Perhaps the clearest sign that the United States was abandoning the oral tradition in appellate advocacy was the Supreme Court's promulgation in 1849 of Rule 53, which limited each attorney in the case to two hours of oral argument.[130] The Rule reiterated that in order to be entitled to a hearing, an attorney was required to submit a printed abstract, with a list of points and authorities to be raised; an attorney waived his right to oral argument if he failed to submit such an abstract and the case was heard ex parte for the other side.[131] Now, however, there was an additional incentive to file a written brief containing substantive legal argument; it was arguably necessary in order to make up for the time lost in oral argument.[132] Oral argument was further curtailed in 1858 by a rule that imposed a limit of two attorneys per side, thereby reducing oral argument to a maximum of eight

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124. Goebel, *supra* note 106, at 721.

125. *See* Schooner Catherine v. United States, 11 U.S. (7 Cranch) 99 (1812) (dismissing case for failure by appellant to furnish statement, and then reinstating with consent of the parties); Peyton v. Brooke, 7 U.S. (3 Cranch) 92, 92 (1805) (warning counsel that future cases will be dismissed or continued unless written statements were furnished to the court).

126. SUP. CT. R. 40, *established in* 32 U.S. (7 Pet.) iv (1833).

127. *Id.* The practice of submitting cases on written argument most likely predates this rule. Cozine, *supra* note 107, at 487 n.28. Indeed, the fact that attorneys initiated the rule suggests that they had some knowledge of the practice and recognized its advantages. *Id.*

128. SUP. CT. R. 44, *established in* 36 U.S. (11 Pet.) xvi (1837).

129. Cozine, *supra* note 107, at 492–93. We do have access to some examples of briefs submitted in lieu of oral argument in the latter part of the ninteenth century, however, and these written submissions would be deemed insufficient to serve as even supplementary briefs under modern standards. *Id.* at 488 n.31.

130. SUP. CT. R. 53, *established in* 48 U.S. (7 How.) iv (1849). Note, however, that there was no limit on the number of attorneys who could appear on behalf of a particular party, so a case in which each side was represented by three attorneys could conceivably involve twelve hours of argument.

131. *Id.*

132. Cozine, *supra* note 107, at 488.

hours.[133] In 1871, total argument time was cut in half, to a maximum of two hours per side.[134] As the written brief assumed more prominence in the appellate process, the Court set forth more specific content requirements for written arguments. A Rule promulgated in 1884 required "a brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with . . . reference[s]."[135]

The historical decline of the oral tradition in many of the state courts follows roughly the same pattern. The courts first required a minimal written submission to supplement oral argument; they then allowed a written brief to be submitted in lieu of oral argument; finally, they limited the length of oral argument in all cases.[136]

In some instances, the imposition of time limits on oral argument provided a clear catalyst for attorneys to submit more sophisticated written arguments. The State of New York, for example, limited oral argument to two hours in the middle 1850's.[137] Prior to this time, the typical brief submitted to the New York Court of Appeals was only one or two pages long and contained a number of broad assertions with no citations, or citations without explanation.[138] These briefs evidenced few of the persuasive techniques that we have come to associate with good appellate advocacy; they made no effort to build an argument or establish a connection between cited authorities and the specific facts of the case.[139] "While some attorneys were preparing well-reasoned, self-sufficient, persuasive written arguments in some cases that they also argued orally, others were willing to trust cases entirely to summary, unpersuasive, and opaque documents."[140]

By 1860, however, the standard written submission to the New York Court of Appeals resembled a fully-developed modern appellate brief.[141] The brief ranged in length from eight to fifteen pages, began with a statement of the facts of the case, and was organized in outline form with main propositions subsuming a series of narrower points. The arguments were written in fully developed sentences and paragraphs rather than brief, cryptic statements, and they sought to apply general legal principles to the facts of the particular case.[142]

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133. SUP. CT. R. 21, *established in* 62 U.S. (21 How.) xii–xiii (1858).

134. SUP. CT. R. 21, *established in* 78 U.S. (11 Wall.) ix (1870).

135. SUP. CT. R. 21, sec. 2(3), *established in* 108 U.S. 584 (1884), *cited in* Cozine, *supra* note 107, at 489.

136. *See* Cozine, *supra* note 107, at 498–523 (examining the development of written appellate briefs in the states of Massachusetts and New York).

137. *Id.* at 515.

138. *Id.* at 518.

139. *Id.*

140. *Id.* at 510 (citations omitted).

141. Cozine, *supra* note 107, at 521.

142. *Id.*

One does not see as dramatic a change in the quality of briefs in other states or in the United States Supreme Court, as a consequence of curtailed oral argument.[143] Nevertheless, whether by revolution or by evolution, most of the written briefs filed in appellate courts by the end of the nineteenth century became more sophisticated, more intellectually rigorous, and more persuasive. They engage in a serious discussion of legal authorities, and make use of narrative techniques, hypotheticals and policy arguments, as well as emotional appeals.[144]

The history of appellate practice in nineteenth-century America, therefore, shows a movement from the use of oral argument as the court's principal means of learning about a case, with the brief as a supplement, to the use of oral argument as a supplement to the brief.[145] As noted above, the most likely explanations for this transition are the absence of a distinct class of attorneys trained as oral advocates, the practical difficulties of traveling to appear in court given the size of the country, and the increasing availability of typewriters and commercial printers.[146]

The history of appellate practice in twentieth-century America shows a similar (although less dramatic) movement toward reliance on written briefs and curtailment of oral argument. The Supreme Court continued to reduce the time allotted for oral argument, ending up in 1984 with a rule restricting oral argument to one counsel per side and limiting each argument to one half-hour.[147] In addition, the decision to allow oral argument at all has been discretionary in the Supreme Court since 1954.[148]

Similarly, the federal Courts of Appeal began adopting procedures for disposing of cases without oral argument around the middle of the twentieth

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143. *Id.* at 522. Indeed, Cozine observes that most attorneys did not exceed two hours of oral argument, even before oral argument time limits were imposed. "If the new limitation was the decisive factor in the change, then, it was more the threat of being cut off rather than actual experience before the Court that goaded attorneys to submit more complete and independent written argument." *Id.*

144. *Id.* at 523.

145. Martineau, *The Value of Appellate Oral Argument*, *supra* note 8, at 9–11.

146. Cozine, however, rejects the hypothesis that attorneys used written argument as a substitute for oral argument in the Supreme Court in order to save the trouble and expense of a trip to Washington, D.C. since most of the cases which relied exclusively on written argument originated in courts nearest to Washington. He also suggests another possible explanation for the practice of submitting a written brief in lieu of oral argument; it permitted attorneys who were not admitted to practice before the Supreme Court to submit a brief under the signature of an attorney who was a member of the Supreme Court bar, preferably a well-known attorney like Daniel Webster or Francis Scott Key. Cozine, *supra* note 107, at 494–96.

147. *See* SUP. CT. R. 28(3). Previous limits on oral argument were contained in Rule 22(3), SUP. CT. R. 22(3), *established in* 222 U.S. 586 (1911) (limiting argument to ninety minutes per side and, in certain cases, forty-five minutes per side), and Rule 28(3)–(4), SUP. CT. R. 28(3)–(4), *established in* 286 U.S. 616 (1931) (limiting argument to one hour per side for regular cases, and limiting summary docket cases to one counsel per side with thirty minutes of argument).

148. *See* SUP. CT. R. 45, *established in* 346 U.S. 951, 997 (1954).

century.[149] Federal Rule of Appellate Procedure 34 currently permits disposition of an appeal without oral argument where "1) the appeal is frivolous; 2) the dispositive . . . issues have been recently authoritatively decided; or 3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."[150]

Along with the rejection of the oral tradition in appellate argument, came a rejection of the oral tradition in rendering judicial opinions. Almost from the beginning, the written opinion has been a prominent feature of appellate review in the United States.[151] U.S. appellate judges, unlike their English counterparts, had little or no experience rendering oral opinions as trial judges and were not necessarily skilled as oral advocates. In addition, when our legal system was in its infancy, there was no binding precedent on which judges could rely. Thus, there was a strong incentive to produce well-reasoned written opinions and publish them.[152]

In recent years, however, some courts have cut back on the number of plenary written opinions they issue. The federal courts, as well as the courts of twenty states, have summary appellate procedures that allow an appellate court to affirm the decision below without a written opinion.[153] Nevertheless, the percentage of federal appellate cases resolved without a written opinion is still relatively small. In 1998, only 6% of all federal appeals decided on the merits were disposed of "without comment."[154] Moreover, both lawyers and judges have criticized the use of such summary dispositions on the ground that they undermine the accountability of the judiciary and lessen the respect for the judicial process.[155]

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149. Meador, *supra* note 8, at 734.

150. FED. R. APP. P. 34(a)(2).

151. For a short time, in the nation's early years, the Supreme Court justices rendered their opinions orally, like their English counterparts. Eventually, however, the justices began to write out their opinions before reading them in court. And ultimately, the Court adopted the practice of having one judge write the opinion for the majority, without presenting it orally. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 110.

152. *Id.* at 117–18.

153. William C. Smith, *Big Objections to Brief Decisions*, A.B.A. J., Aug. 1999, at 34.

154. *Id.* at 36.

155. *Id.* at 34. Although some Courts of Appeal, such as the Eleventh Circuit, have embraced the use of no-comment decisions, others, such as the D.C. and Seventh Circuits, have tried to keep one-word affirmations to a minimum. In 1998, the D.C. Circuit issued only a single one-word affirmation, and the Seventh Circuit issued only thirty-seven (compared to the Eleventh Circuit, which issued 502). *Id.* at 36. And the Third Circuit, which once used summary orders as a case management tool, made a conscious decision to reverse that strategy. After issuing 404 no-comment decisions in 1998, the Circuit pledged to "virtually eliminate" such decisions as a means of case management because it "owed the bar more." *Id.* at 34 (quoting Becker, C.J.). In the first four months of 1999, the Third Circuit issued only fifteen judgment orders without opinion, down 95% from the 280 in the same period in 1998. The majority of the Third Circuit's no-comment opinions have been replaced with unpublished per curiam and memorandum opinions, which briefly explain the court's rationale. *Id.* at 36.

Thus, it is the oral component of the appellate process, rather than the written component, that has been curtailed more consistently in the interest of achieving greater judicial efficiency. In the U.S. legal system, it is deemed more palatable to eliminate oral argument than to eliminate a written opinion articulating the reasons for a court's decision. Just as the English have resisted opportunities to incorporate more writing into their legal process, so we have resisted opportunities to move our legal process toward greater orality.

III. OF SCRIBES AND SYLLOGISMS: THE IMPACT OF THE WRITING PROCESS ON LEGAL REASONING AND JUDICIAL DECISION-MAKING

According to one member of the English judiciary, the English have resisted change in their speech-centered legal process more because they are instinctively attached to tradition than because they have a rational belief in its superiority.[156] Can the same be said of our fondness for our own tradition? While every culture has a tendency to instinctively cling to that which is familiar, the writing-centered legal process, I contend, has endured in the United States because it has a rational basis and is more than a mere historical accident. It offers unique benefits that enhance the quality of legal arguments, the quality of judicial decision-making, and the accountability of our judicial system to litigants.

The nature of judicial opinions is necessarily affected by the nature of the process from which they evolve.[157] A judicial opinion that emerges from a U.S. appellate court is generally the product of extensive research, writing, and editing, not simply by the judge who authors the opinion, but by the judge's law clerk and the attorneys whose written briefs inform the opinion. Such an opinion will be more thoroughly researched and provide a more complete exposition of the judge's reasoning than one that is issued extemporaneously, on the basis of an attorney's oral arguments. The difference between the two opinions, however, is not simply that the U.S. judge has had time to deliberate and prepare his ruling. The writing process itself, I contend, performs both creative and critical functions that result in a better-reasoned opinion, one that is not only more thorough, but is more

156. *See* MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 130 (citing Lord Wilberforce, Papers Delivered at the Program on Judicial Techniques in Litigation and Arbitration, London 120 (Nov. 30, 1987)).

157. For example, it has been noted that the U.S. judge is more likely than the English judge to consider "what the law ought to be" because the U.S. system of written briefs and opinions allows time to research and consider broader issues of public policy. Schwarzschild, *supra* note 70, at 213. The English tradition of oral argument and extempore judgment results in opinions that are "crisper, more technical" and confined to the grounds raised by the parties. *Id.* (citation omitted). In the U.S. system, the judge is encouraged to serve as an active policy maker; in the English system, the judge is encouraged to serve as a "passive arbitrator whose business is to decide which of the rival contentions offered by opposing counsel is the better." ATIYAH & SUMMERS, *supra* note 40, at 280.

logically structured and more attentive to precedent. Such an opinion will necessarily serve as a more reliable precedent upon which to hang our common law analysis.

A speech-centered legal process, characterized by lengthy oral argument in open court and extemporaneous, oral judgments, may offer litigants the opportunity to see their legal process in action, but it does not necessarily make that legal process more accountable to litigants. Rather, accountability rests in a written judicial opinion that fully articulates the reasoning behind a judge's decision, an opinion that emerges from a multi-layered process of research, writing, and editing by lawyers as well as judges. Those skills of research, writing and editing are so vital to the writing-centered legal process that they must be considered vital, as well, in the training of U.S. lawyers.

A. WRITING AS A CREATIVE AND CRITICAL FORCE IN THE LEGAL REASONING PROCESS

The development of a sophisticated legal system depends on committing laws, rules, or norms into writing. Thus, we find written codes and records of legal decisions in every modern system of jurisprudence in the world.[158] Ancient literate cultures (such as those of Egypt and Sumeria) almost invariably had a legal system in which writing played a dominant role.[159] Conversely, we typically do not find lawyers in oral cultures or in societies with minimal literacy.[160]

Writing has been essential not only to the development of legal rules, but also to the development of legal reasoning. Anthropologist Jack Goody argues that "it was the setting down of speech that enabled man clearly to separate words, to manipulate their order and to develop syllogistic forms of reasoning."[161] To take this principle a step further, one could posit that the optimal functioning of any legal system, especially one based on common law, depends on lawyers and judges committing their legal analysis to writing.

When a lawyer is required to commit a legal argument, or a judge is required to commit a judicial opinion to writing, she becomes capable of a level of both creative and critical thinking that is not possible when legal analysis is expressed only in an oral form. "Writing, commitment of the word

158. JACK GOODY, THE DOMESTICATION OF THE SAVAGE MIND 11 (1977) [hereinafter GOODY, SAVAGE MIND].

159. For example, in ancient Sumeria, both sides in a legal dispute had to produce their "tablets" (i.e., written deeds relating to the case) at trial. And in ancient Egypt, all petitioners for civil redress had to submit their case in writing. If possible, they were asked to produce written documents (e.g., wills or contracts) in support of their case. Moreover, details of court cases were inscribed on the walls of Egyptian tombs. JACK GOODY, THE LOGIC OF WRITING AND THE ORGANIZATION OF SOCIETY 169 (1986) [hereinafter GOODY, LOGIC].

160. KATSCH, *supra* note 14, at 203.

161. GOODY, SAVAGE MIND, *supra* note 158, at 11.

to space, enlarges the potentiality of language almost beyond measure [and] restructures thought . . . ."[162]

Composition theorist Peter Elbow has described writing as an "organic, developmental process" that is not simply a means of transmitting a message, but "a way to grow and cook a message."[163] "Meaning is not what you start out with but what you end up with."[164] Elbow deems writing essential to what he calls "first-order" or creative thinking.[165] Through the writing process, particularly the process of free writing or exploratory writing, the writer may generate ideas that may not have been apparent initially to him. The writing process allows the writer to "exploit the autonomous generative powers of language and syntax themselves."[166] As the writer proceeds through multiple drafts, the message "grows and cooks," ultimately giving the writer "control, coherence," and a clear knowledge of what he wants to say.[167]

Writing enhances our ability to engage in "second-order" or critical thinking, as well as our ability to engage in creative thinking. Only by committing our own thoughts to writing can we "achieve the perennially difficult task of standing outside our thinking."[168] Once words are committed to paper, they are preserved and can be revisited at a later time when we may bring a fresh and more critical perspective to the work.[169] The recursive process of writing, reading a draft, and rewriting creates continuous

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162. ONG, *supra* note 45, at 7–8.

163. ELBOW, WRITING WITHOUT TEACHERS, *supra* note 12, at 15.

164. *Id.*

165. PETER ELBOW, EMBRACING CONTRARIES: EXPLORATIONS IN LEARNING AND TEACHING 57–59 (1986) [hereinafter ELBOW, EMBRACING CONTRARIES].

166. *Id.* at 59. Elbow observes further that "[w]ords call up words, ideas call up more ideas. A momentum of language and thinking develops and one learns to nurture it by keeping the pen moving." *Id.*

167. ELBOW, WRITING WITHOUT TEACHERS, *supra* note 12, at 15; *see also* JOSEPH M. WILLIAMS, STYLE—TEN LESSONS IN CLARITY AND GRACE 8–9 (4th ed. 1994) (arguing that the process of revising a draft results in greater clarity of thought). Williams notes that:

> When we revise that early confusion into something clearer, we understand our ideas better. And when we understand our ideas better, we express them more clearly, and when we express them more clearly, we understand them better . . . and so it goes, until we run out of energy, interest or time . . . .

Id.

168. ELBOW, EMBRACING CONTRARIES, *supra* note 165, at 58.

169. *Id.*; *see also* Kissam, *supra* note 2, at 140.

> [T]he critical writing process allows a writer's mind to function like a 'radar scope that plays continually over one's own text' in ways that can force the writer to confront and control hard issues more directly and more creatively than is possible with non-written thought. This special perspective thus can enhance the creation of new thoughts, the articulation of complex thoughts, and the recognition of the subtleties, nuances, and qualifications that are so important to the art of lawyering.

Id. (quoting Professor Richard Marius, Presentation at University of Kansas (April 9, 1985)).

dialogue between a writer's partially completed text and his thoughts.[170] Through this dialogue, the writer can engage in "a much fuller and richer consideration of contradictory evidence, counterarguments, and the complex elements of a subject than is ever possible in oral communication alone . . . ."[171]

Professor Goody has similarly observed that the ability to read what we have written "permits a greater distancing between individual, language and reference than speech, a greater objectification which increases the analytic potential of the human mind." The orator, as opposed to the writer, can more easily deceive himself and others with an internally inconsistent argument because the oral mode makes criticism more difficult.[172]

Who has not had the experience of listening to a gifted orator use her rhetorical powers to make a substantively weak argument? We may feel ourselves begin to question the logic or consistency of the argument, but that doubt cannot be pursued because the argument is accessible only to the ear, not to the eye. And the ear is a more forgiving critic of a tenuous argument, particularly when the ear is being seduced with pleasing rhetoric. The orator's words sail past so quickly that a lapse in her logic may appear and vanish before we have a chance to recognize it.

In contrast, ambiguities and inconsistencies in a piece of written work "stand out by themselves."[173] One can more easily

> perceive contradictions in writing than . . . in speech, partly because one can formalise the statements in a syllogistic manner and partly because writing arrests the flow of oral converse so that one can compare side by side utterances that have been made at different times and at different places.[174]

Because a work of writing is static and permanent in form, it can be studied, analyzed, and criticized both by its author and by its audience.

It might be argued that it is verbalization—the transformation of thoughts into words—rather than writing itself that is the crucial mental function allowing us to make abstract thoughts concrete and understandable to others. Certainly verbalization in oral form can perform some of the same salutary functions as verbalization in written form. Merely talking about our ideas may often help us to clarify them, allow us to recognize flaws in them, or inspire us to generate new ideas. And reading a written work aloud is

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170. Kissam, *supra* note 2, at 140.

171. *Id.* at 140–41. Ironically, it is the *absence* of dialogue that Plato identified as the primary weakness of written communication. PLATO, *supra* note 5, at 98–99. But even Plato benefited from the generative power of written language. "Plato's philosophically analytic thought . . . including his critique of writing was possible only because of the effect that writing was beginning to have on mental processes." ONG, *supra* note 45, at 80.

172. GOODY, LOGIC, *supra* note 159, at 142.

173. GOODY, SAVAGE MIND, *supra* note 158, at 50.

174. *Id.* at 11–12.

often recommended as a means of gaining distance from it by using the ear rather than the eye as the medium of critique.[175]

But reading aloud is only possible once ideas are committed to paper. Moreover, spoken discourse is not as useful as writing at enhancing our creative thinking because oral brainstorming and debate depend on having an engaged and responsive audience for our ideas.[176] Writing, on the other hand, is always available as a tool for igniting creativity and generating ideas.[177] Even if we have an audience to employ as a sounding board, the very presence of that audience may inhibit the creative process because it "puts pressure on us to make sense and avoid inferences we cannot explain."[178] Thus, "solitary writing for no audience is often more productive than speaking"[179] in the early stages of a project, when the generation of ideas is of paramount importance.

Spoken discourse is also not as effective as writing at fostering critical thinking. Only writing offers us the opportunity to examine a text for internal logic and consistency. "[T]he difference between . . . the contemplation of the text and the pondering of the utterance, between the capacity to review a statement visually as well as internally, by eye as well as by ear . . . is of fundamental importance for the development of . . . reasoning."[180]

Of course, even the greatest orator is likely to put pen to paper at some point in preparing to make a speech. In doing so, she arguably will obtain the same benefits of creative inspiration and critical objectivity that the author of a written document enjoys. The discursive nature of the typical appellate argument in England,[181] however, suggests that many barristers do not fully exploit the benefits of pre-argument writing. The barrister who is preparing for oral argument presumably does not have the same incentive to use the writing process to clarify and refine legal analysis as does the author of an appellate brief.[182]

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175. *See* ELBOW, WRITING WITHOUT TEACHERS, *supra* note 12, at 82. "Hearing your own words out loud gives you the vicarious experience of being someone else. Reading your words out loud stresses what is most important: writing is really a voice spread over time, not marks spread out in space." *Id.*

176. ELBOW, EMBRACING CONTRARIES, *supra* note 165, at 58–59.

177. *Id.* at 59.

178. *Id.*

179. *Id.*

180. GOODY, LOGIC, *supra* note 159, at 142.

181. *See supra* notes 25–27 and accompanying text.

182. Although barristers are now required to submit skeleton arguments or cases prior to hearing, these documents have no prescribed format or organizational scheme, other than that arguments be listed or numbered. *See supra* notes 31–32 and accompanying text. They may consist of nothing more than a numbered list of factual and legal assertions, with no clear logical relation to one another and little or no citation to authority. *See, e.g.*, Skeleton Argument for Affected Third Party (Kent International Airport PLC) (July 5–6, 2000), http://www.m-a-g.fsnet.co.uk/facts/30_skeleton_argument_for_affected_t.htm (on file with the Iowa Law

Similarly, a judge who issues a decision extemporaneously from the bench lacks the time, if not the motivation, to exploit the writing process as an analytical tool. The classic speech-centered legal process, therefore, does not truly offer the same opportunities for self-reflection and critique offered by the writing-centered legal process.

Writing, I believe, is a superior genre of communication to speech in the context of the legal process, not because it is always more persuasive, but because it enhances the clarity and quality of legal analysis. Indeed, an oral argument has the potential to be more persuasive in some instances than a written one, for the very reasons suggested by Plato. Speech is dynamic and responsive. The oral advocate can respond to questions and concerns expressed by judges. He can see which issues the judges deem dispositive and focus on those. He can adjust his arguments if he sees that the judges are not accepting them.[183]

Moreover, oral argument is unquestionably more effective at communicating emotion than are the "cold page[s] of [a] printed brief."[184] Oral argument permits an attorney to convey "the sense of urgency under which [her client] may be operating"[185] by adding "the stress and verbal emphasis that cannot easily be communicated" by the written brief.[186]

But the enhanced persuasiveness of oral argument is not necessarily a virtue. An accomplished oral advocate may be able to pass off a poorly reasoned argument under the cloak of passionate, emotionally-charged rhetoric when a written presentation could not mask the argument's deficiencies. Even those scholars who believe emotion should play a critical role in judicial decision-making acknowledge that emotion must be employed in conjunction with reason.[187] Professor Susan Bandes, for example, argues that "unreasoned, unreflective emotion" poses a danger in the legal decision-making process because "it lacks a crucial component of understanding—critical distance."[188]

Review); Skeleton Argument on Behalf of Mr. Hockenjos (Apr. 22, 2003), http://www.fathercare.org/coa2003_skeleton.htm (on file with the Iowa Law Review).

183. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 103.

184. Judge Irving R. Kaufman, *Appellate Advocacy in the Federal* Courts, 79 F.R.D. 165, 171 (1978); *see also* Martineau, *The Value of Appellate Oral Argument*, *supra* note 8, at 15.

185. Bright, *supra* note 8, at 37.

186. Kaufman, *supra* note 184, at 171.

187. *See* Susan Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 410 (1996) (arguing that "neither empathy nor narrative can be considered an unmitigated good in the legal context—that each must be assessed in light of external normative principles"); Peter Brandon Bayer, *Not Interaction but Melding—The "Russian Dressing" Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with Suggested Maxims for Judges and Other Legal Decision Makers*, 52 MERCER L. REV. 1033, 1034 (2001) (observing that "emotions inextricably merge with reason in order to produce [judicial] decisions").

188. Bandes, *supra* note 187, at 401.

This is where the true weakness of the speech-centered legal process lies. In such a process, the judge cannot obtain a critical distance from either the emotional or the rational content of the argument. The judge does not have an opportunity to place in perspective the strong emotions that may be evoked by oral argument, to determine their origin and validity, and to evaluate those emotions in the context of rational legal principles. Nor does she have an opportunity to unpack the legal reasoning in the argument and scrutinize it for logic and consistency.

Perhaps nowhere else do ambiguity and inconsistency pose a greater danger than in legal argument. The fallacious legal argument propounded by an attorney, or by the judge himself, may find its way into a judicial opinion that determines the rule of law for generations to come. To the extent that a legal system depends exclusively on oral argument and the oral issuance of judicial decisions in generating its common law, therefore, it faces a greater risk that its common law will have a faulty foundation.

In a system where attorneys as well as judges are required to commit their legal arguments to writing, however, judicial decisions and opinions evolve from a multi-layered writing process involving both the advocate and the adjudicator. Writing is present at multiple stages of the process to serve as a means of both generating new ideas and as a means of subjecting those ideas to a rigorous critique. Each of these stages serves as a check to ensure the correctness of the judicial decision (i.e., the court's resolution of the legal dispute) as well as the rationality of the judicial opinion (i.e., the court's explanation of its judicial decision).

In the first stage of the appellate writing process, the attorneys produce written briefs. In doing so, they are forced to articulate arguments so that they will be understood and embraced by a judge with limited knowledge of the facts and law, and limited time to gain such knowledge. Because the written text is unresponsive and cannot "defend" itself,[189] the author is under an even greater burden than the oralist to make sure that her meaning is clear and unambiguous.

In the second stage of the process, the judge and her staff read the written briefs. During this phase, the judge has an opportunity, not permitted by oral argument alone, to read the brief at leisure in order to fully absorb and understand the facts and legal principles critical to a fair resolution of the case. It seems almost inconceivable to those of us schooled in the custom of the written brief, that a judge could fully absorb and comprehend the facts and legal arguments in a complex case solely on the basis of a transitory, spontaneous, and soon-forgotten oral argument.[190] And

189. *See* PLATO, *supra* note 5, at 97–99.

190. *See* Leavitt, *supra* note 8, at 15 (arguing that it flies in the face of common sense to believe that an oral argument can communicate an idea better than a carefully crafted brief that the judge can study for as long as necessary); *see also* Holmes, *supra* note 8, at 1021.

indeed, cognitive theory supports the notion that only a limited number of ideas can be retained from an oral presentation, regardless of how effectively that presentation is made or how intelligent the listener may be.[191] The brief provides the judge with an "absorption advantage."[192] Moreover, the brief provides her with an advantage in evaluating the merits of the parties' arguments because it permits her to scrutinize them in written form and detect any ambiguities or inconsistencies in them. The judge may check the record, reread cases and do further research. Thus, the judge's ultimate decision in the case benefits from the writing process engaged in by the attorney.

The third stage of the appellate writing process, in which the judge produces her own opinion in written form, affords the judge an opportunity to use the writing process herself to subject her own opinion to critical scrutiny. As Court of Appeals Judge Charles Merrill has noted, "[t]he very act of writing opinions reinforces the decisional process. Misconceptions or oversights may come to light in the course of articulation."[193] The judge who issues a written opinion necessarily chooses her words with greater care than one who issues an opinion extemporaneously from the bench. Additionally, such opinions almost necessarily provide a clearer articulation of legal rules, reasoning, and public policy than do ex tempore opinions. The critical perspective afforded by the opinion-writing process, moreover, may actually cause a judge to change her decision in a case.[194] Such a circumstance demonstrates the enormous potential of the writing process to shape and even alter the law.

The final stage of the appellate process in which writing plays a key role is the review of the majority opinion by other judges and their staffs. Again, the presence of a written document enables the decision maker to check the opinion for thoroughness, accuracy, and consistency. While the English judge tends to rely on the competence of the barristers to identify legal arguments and relevant authority, the U.S. judge will generally take time to supplement what has been offered by the attorneys.

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191. Leavitt, *supra* note 8, at 15; *see* ROBERT J. DOOLITTLE, PROFESSIONALLY SPEAKING 62–63 (1984) (stressing the limitations on cognition of ideas presented orally).

192. Holmes, *supra* note 8, at 1021.

193. Charles M. Merrill, *Query: Could Judges Deliver More Justice if They Wrote More Opinions?*, 64 JUDICATURE 435, 435 (1981). Because many judges use their law clerks to produce the first (and sometimes the final) draft of an opinion, the writing process may, in fact, be of more benefit to the law clerk than to the judge. Nevertheless, the opinion itself, regardless of its author, is the true beneficiary of the writing process.

194. Martineau, *supra* note 18, at 25–26. If the judge is authoring the opinion on behalf of a panel of appellate judges, she will send the draft opinion to the other judges, who may agree with the different result and adopt it as the majority opinion. Alternatively, if the other members of the panel favor the original result, the authoring judge may choose to file her opinion as a dissent. *Id.* at 26. For an example of such an opinion, see *Bellville Mining Co. v. United States*, 999 F.2d 989, 997 n.5 (6th Cir. 1993).

The requirement of written briefs and judicial opinions does not insulate our legal system entirely from shoddy advocacy, or from erroneous or poorly reasoned decisions. It does, however, enhance the overall quality of legal analysis by both attorneys and judges and enhance the likelihood that decisions will be correct.

B. *Dialectic, Efficiency, and Accountability in the Writing-Centered Legal Process*

The major criticisms that might be leveled at the writing-centered legal process are that (1) it does not offer sufficient opportunity for lawyers and judges to engage in dialogue and clarify points of misunderstanding as does a system that permits extended oral argument; (2) it is inefficient; and (3) it does not provide litigants with the same degree of accountability as a system in which one can observe judges actually deciding a case. None of these charges, however, withstands close scrutiny.

First, the writing-centered legal process is one in which both written and oral argument play an important role. In the majority of cases, attorneys have an opportunity to engage in spoken dialogue with judges during oral argument, to respond to their questions and concerns, and to clarify what has been written in the brief. Thus, we need not fear, as did Plato, that the written words of the brief will not be able to "defend themselves."[195] Indeed, because judges in our legal system have had the benefit of reading the attorneys' arguments in writing before oral argument, that oral argument "becomes an intense exercise in advocacy in which the lawyers and the judges immediately confront the key areas of dispute that require resolution by the judges."[196] In this sense, it more closely resembles the Platonic ideal of dialectic than does the leisurely, unfocused argument that is characteristic of the English system.

With respect to the charge of inefficiency, it must be conceded that U.S. lawyers spend a considerable amount of time putting their legal analysis into writing (whether in the form of an inter-office memo or a brief). The writing of judicial opinions similarly consumes considerable judicial resources and may delay the issuance of a final decision for weeks, and sometimes months.

Indeed, the primary reason why the English have resisted adopting a writing-centered legal process for so long is that they have perceived it to be inefficient and costly. Some of their specific concerns with adopting the U.S. system have been that (1) oral argument will be delayed because of the judges' time spent reading briefs; (2) entry of judgment will be delayed because of the judges' time spent writing opinions; and (3) the cost of

195. *See supra* text accompanying notes 46–50.

196. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 131.

litigation will increase because counsel will have to spend time writing briefs as well as preparing for oral argument.[197]

On the other hand, English attorneys and judges spend far more time than do their U.S. counterparts in presenting and listening to oral argument. As noted in Part I, appellate argument in an English court may run several days,[198] as opposed to roughly one hour in a U.S. court. And the majority of the oral argument in England is devoted to simply informing the judges of the record and the relevant law.[199] It typically takes an English barrister three or four hours to identify key issues in a case; the U.S. appellate advocate generally is able to do so in only fifteen minutes because the judges have already acquainted themselves with the essential facts and case law by reading the briefs.[200] In England, a relatively small percentage of the argument time is devoted to actual advocacy, and even less time to dialogue between judges and attorneys.[201] In both systems, the actual amount of time devoted to the essence of the case is only fifteen to thirty minutes per side; the distinction is that it may take an English barrister several days to reach this point.[202]

More compelling, however, are statistics indicating that the U.S. judiciary is overwhelmingly more efficient in disposing of cases than the English judiciary. In 1986, the median time interval from filing a notice of appeal to final disposition was about eleven months in the United States and fifteen months in England. The annual per judge case disposition rate was 118.5 in the United States and a mere 38.1 in England.[203]

Admittedly, even the U.S. legal system would be more efficient if judges were not required to author written opinions in every case. Most courts, however, have determined that the marginal efficiency achieved by dispensing with written opinions is not worth its cost because summary opinions undermine the accountability of the judiciary.[204] Litigants believe they have a right to know not only what decision a court has reached but how the court has reached that decision. The fully-reasoned judicial opinion shows litigants that their arguments have been considered, even if those arguments were ultimately rejected. Moreover, the written opinion is perhaps the most powerful method of holding the judiciary accountable

197. *Id.* at 127–28.

198. *See supra* notes 23–24.

199. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 120.

200. *Id.* at 123–24.

201. *Id.* at 121.

202. *Id.* at 130–31.

203. *Id.* at 170–71. The staff assistance available to U.S. appellate judges (i.e., law clerks and secretaries) accounts, at least in part, for their ability to dispose of almost three times as many cases as their English counterparts. *Id.* at 93.

204. *See supra* note 155 and accompanying text.

because it shows litigants the reasoning process employed by the judges deciding their case.

Ironically, "accountability" is the rationale that has been offered most frequently for the oral tradition in England. Public confidence in the legal system can be maintained, it has been argued, only when all phases in the litigation process take place in open court where the public can observe them.[205] Thus, the English system of ex tempore judgments was based on the presumption that the court's decision may be more palatable to the loser if he can see the judges' decision-making process.[206]

The accountability rationale for the oral tradition, however, "confuses the ability to see a process in action with accountability for the result of that process."[207] Accountability is a myth if one is able to see the judges reach a decision, but is not able to understand the reasoning process that led to the decision. It is only when a judicial decision is fully reasoned and widely accessible to the public that the judiciary becomes truly accountable.

Ultimately, the English legal system has come to recognize that the majority of appellate cases are so complex that they cannot be decided in open court, and warrant a deliberated, written judgment.[208] This change bodes well for the development of the English common law because the written judicial opinion is the official means by which the court develops the law and declares that law to the public and to the court below.[209] It is the vehicle through which the law is made and communicated to those who will be bound by it. A written opinion that emerges from a multi-layered process of writing, reading, and critiquing, that is allowed to incubate over time, will necessarily serve the common law system better than one that is issued orally and extemporaneously in open court.[210]

CONCLUSION: TOWARD AN ENHANCED ROLE FOR WRITING IN LEGAL EDUCATION

If, in the United States, we accept the premise that writing is a potent and positive force within our legal system, it follows that one of our highest priorities must be to foster superior writing skills in our lawyers. Unfortunately, writing is frequently undervalued or overlooked in the legal academy, just as it is in the news and entertainment media. The culture of

205. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 101.

206. Meador, *supra* note 22, at 1367.

207. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 118.

208. *See supra* notes 42–44 and accompanying text.

209. MARTINEAU, APPELLATE JUSTICE, *supra* note 8, at 110.

210. Even the "reserved judgment" written by English judges in some cases does not have the same indicia of reliability as a U.S. judicial opinion because it is drafted without the benefit of written briefs filed by attorneys.

our law schools tends to celebrate and reward the oral communication skills of students, and to marginalize their writing skills.[211]

Socratic dialogue, the oral exchange of questions and answers between professor and student, is the preferred mode of instruction in virtually all U.S. law schools. Moreover, in most law school classes, the only writing requirement is a final essay examination of approximately three hours duration. Such exams do not afford the opportunity for reflection and self-critique of more sustained writing projects. Indeed, a standard three-hour essay exam is arguably nothing more than a "simulated oral examination"[212] in the sense that it requires the student to formulate and express her ideas almost extemporaneously. During such an exam, a student seldom has time to do anything more than record verbatim in a blue book what otherwise would have been an oral response to the exam question. Under those circumstances, it is not surprising that the quality of a student's written expression plays a minor role, if any, in the professor's grading criteria.

Perhaps the most telling sign that our law schools marginalize writing skills is that law review membership, the most coveted honor in law school, historically has been bestowed more frequently upon those who excel at exams rather than those who have demonstrated their writing ability.[213] One of the great ironies of the law school culture is that while law professors assess their own merit almost exclusively on the basis of their scholarly writing,[214] they evaluate their students on the basis of oral performance in class and "simulated oral" performance on essay exams.[215] And yet, the kind of writing required in essay examinations bears little resemblance to the writing students will be required to produce as practicing attorneys: serious, sustained writing that fosters creative and critical thinking. This latter type of

211. Kissam, *supra* note 2, at 145; *see also* Eichhorn, *supra* note 5, at 105–06. Professor Eichhorn argues that the speech/writing hierarchy has "insinuated itself into the law school curriculum," making legal academicians distrustful of writing. *Id.*

212. Kissam, *supra* note 2, at 143 (emphasis removed).

213. At one time, academic performance in the first semester or year was the sole criterion for invitation on to law review at the "prestige schools." Although most law schools now provide one or more "write-on" methods for selection to law review, it is common to reserve between 50% and 80% of the spots on law review for "grade-ons." And even those schools that offer law review membership on the basis of a writing competition may use a composite score that considers grade-point average as well. The good news is that "[t]he trend [appears] to be definitely in the direction of increasing reliance on writing competition for selecting law review staff." Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 400–01 (1989).

214. *See* John S. Elson, *The Case Against Legal-Scholarship or, if the Professor Must Publish Must the Profession Perish?*, 39 J. LEGAL EDUC. 343, 354 (1989) (noting that "hiring, promotion, pay and collegial recognition" in law schools are all primarily a function of scholarship production). Elson argues, moreover, that the dominance of the scholarly mission in law schools exacts a significant cost in that it interferes directly with law professors' ability to teach legal practice skills effectively. *Id.* at 345.

215. *Id.*

expression, which is so central to the U.S. legal process, does not receive sufficient emphasis in many of our law schools.

Although all law schools now have required first-year courses that teach analytical legal writing, many schools place relatively little value on legal writing instruction, as evidenced by their poor treatment of those who teach these essential skills.[216] A significant percentage of legal writing faculty in the nation is under-compensated,[217] has minimal status within the law school,[218] and carries a student load that is excessive given the labor-intensive nature of writing instruction.[219]

The lack of commitment to legal writing is further evidenced by law schools' general failure to require legal writing courses beyond the introductory two-semester sequence.[220] In many instances, the introductory legal writing course represents the only opportunity a law student will ever have to analyze legal problems over an extended period of time, to communicate that legal analysis in writing, and to have her writing critiqued

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216. *See generally* Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997) (exposing the disparate treatment of legal writing faculty by law schools in terms of salary, job status, job security and working conditions); Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329 (2001) (same).

217. *See generally* Jan M. Levine & Katherine M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551 (2001). According to a recent survey conducted by the Association of Legal Writing Directors, the average salary of a full-time legal writing instructor in 2002 was $47,071, with some instructors earning as little as $26,000. ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INSTRUCTORS, 2002 ALWD/LWI SURVEY REPORT 34 [hereinafter ALWD SURVEY] (on file with the Iowa Law Review), *available at* http://www.alwd.org. A more complete survey of legal writing salaries conducted in 1998 revealed that the average experienced legal writing professor (with approximately four years of teaching experience and 10.5 years out of law school) was paid 57% of the average median salary paid to assistant, tenure-track professors; 51% of the average median salary paid to associate professors; and 40% of the average median salary paid to full professors. Levine & Stanchi, *supra*, at 577.

218. In 87% of the nation's legal writing programs, legal writing instructors are neither tenured nor on tenure-track. And in 61% of those programs, the instructors are on contracts of two years duration or less. ALWD SURVEY, *supra* note 217, at 31–44. Those who teach in well over half of all legal writing programs carry a title such as "instructor" or "lecturer" that does not include the word "professor." *Id.* The majority of legal writing instructors are either not allowed to vote at faculty meetings or are prohibited entirely from attending them. *Id.*

219. The average student load for a legal writing instructor is forty-two, but frequently exceeds sixty and may go as high as 190. *Id.* at 42. The Legal Writing Sourcebook recommends that a legal writing instructor's teaching load not exceed forty-five students. RALPH L. BRILL ET AL., AMERICAN BAR ASSOCIATION, SOURCEBOOK ON LEGAL WRITING PROGRAMS 74 (1997).

220. I make a distinction here between "legal writing" and "legal drafting." I conceive of the former as the kind of narrative, analytical writing one finds in a memo, a brief, or a scholarly paper. Legal drafting, in contrast, involves writing documents like contracts, pleadings, and corporate filings that do not attempt to communicate legal analysis. Although many schools offer either a required or an elective course in legal drafting, relatively few offer or require advanced courses that teach analytical writing. ALWD SURVEY, *supra* note 217, at 13–18.

by someone committed to the endeavor.[221] Seminar and research paper requirements may be a staple of the upper-level law school curriculum, but the writing process is generally given short shrift in such courses.[222] Students in seminars, or engaged in independent research projects, receive little or no instruction in how to write a scholarly paper, and often receive only a cursory critique of their writing by the supervising professor.[223]

Perhaps more significantly, writing plays no role whatsoever in most doctrinal instruction, even though writing can be an invaluable aid in analyzing complex legal issues.[224] One might offer several explanations for law professors' reluctance to incorporate writing projects into their courses. First, high student-faculty ratios in most doctrinal law school courses make it burdensome for the professor to read and critique student writing assignments.[225] Second, some law professors simply believe that writing should be taught by English professors,[226] or alternatively, that legal writing is just a skill and has little value in the loftier realm of legal doctrine and theory.[227] "According to the prevailing hierarchy of intellectual values, professional education is an intellectually uninteresting, rather undignified and vaguely disreputable . . . pursuit for a truly serious scholar."[228]

By devaluing written communication and rewarding oral communication (or its equivalent), law schools only reinforce the bias exhibited by the media and by the legal profession in favor of speech. It comes as no surprise that "many lawyers and . . . most law students [believe] good writing is merely a substitute instrument for conveying or supporting

221. *See* Eichhorn, *supra* note 5, at 122–23 (observing that legal writing classes tend to be the only ones that offer explicit instruction in critical reasoning and writing); Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: A Sharper Image*, 2 LEGAL WRITING 1, 4 (1996) (discussing legal writing curricula for first year law students).

222. Kissam, *supra* note 2, at 47–48.

223. *See generally* Elizabeth Fajans & Mary R. Falk, *Comments Worth Making: Supervising Scholarly Writing in Law School*, 46 J. LEGAL EDUC. 342 (1996). This article offers supervisors of student scholarly writing projects specific suggestions for providing meaningful feedback to their students both during the writing process and after the completion of drafts. *Id.* at 345–68. It also recommends that law schools offer workshops or a mini-course on legal scholarship and the process of scholarly writing, presumably to fill an existing gap in law schools' writing instruction. *Id.* at 369.

224. *See* Kissam, *supra* note 2, at 136–41.

225. *Id.* at 142. Some professors may also be reluctant to require written assignments in a doctrinal course because their students will evaluate them harshly if they do so. *Id.* at 148–49.

226. *Id.* at 142; *see also* Eichhorn, *supra* note 5, at 115 (noting that many doctrinal faculty in law schools tend to associate legal writing with comma usage and the diagramming of sentences).

227. Elson, *supra* note 214, at 354–55. Professor Elson argues that the law school hierarchy, which "places professional education at the low end and complex theory at the high end," removes the incentive for faculty members to create innovative approaches to skills training. *Id.* at 355.

228. *Id.*

legal thoughts that are most important and most exciting when delivered orally."[229]

Embracing the writing-centered legal process, however, means embracing as well the notion that writing is an essential component in the education of any competent practicing attorney. If law students are to become effective participants in the writing-centered legal process, they must receive rigorous legal writing instruction from experienced professionals in a setting where the teaching of writing is accorded respect. They must also have opportunities throughout the law school curriculum to engage in the critical writing process.[230]

Perhaps we will never see a time when the media extol the writing of a compelling appellate brief as a heroic act. But lawyers and law professors themselves should celebrate the written word, and should recognize that the power of the written word to deepen and refine legal analysis carries with it the power to shape and improve the common law.

229. Kissam, *supra* note 2, at 144.

230. Professor Kissam offers several suggestions for incorporating writing throughout the law school curriculum, including (1) increased use of take-home exams (especially those of longer duration); (2) increased use of short writing exercises in basic doctrinal courses, even if such exercises are ungraded or student-supervised; and (3) increased emphasis on writing ungraded first drafts in seminars and smaller classes. *Id.* at 158–70.


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