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An Impossible Task But Everybody Has To Do It-- Teaching Legal Research in Law Schools

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Although instruction in legal research is offered by all American law schools, there is a widely shared view that law graduates have inadequate research skills. In trying to explain this anomaly, the author suggests that the thinking required in research creates problems for both training and evaluating the training process. While research instruction does not leave most graduates ready to do efficient research immediately, it is likely that this training increases the speed with which they adapt to research work once they begin to practice law.

A provision of endless apparatus, a bustle of infinite inquiry and research . . . may be employed to evade and shuffle off real labor—the real labor of thinking.—Sir Joshua Reynolds

Introduction

All law schools now provide some training in the use of the law library and online resources, but a variety of observers, over an extended period, have reported that graduates rarely have adequate research skills. This essay considers some reasons for this failure and assesses the prospects for improvement. A primary focus is on the relationship between finding legal material and thinking about that material. The relative importance of legal research among the practical skills of lawyers is also considered, with attention called to recent research indicating that the value placed by lawyers on this skill has fallen significantly over the past twenty years.

“Legal research” is not merely a search for information; it is primarily a struggle for understanding. The need to think deeply about the information discovered is what makes legal research the task of a professional lawyer.¹

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1. Most references in this essay are to paper forms of research materials. As online and electronic tools come to dominate legal research, the process is changing, but the categories will remain much the same, and it is suggested that for the foreseeable future the most effective introduction to sources such as citators, digest systems, A.L.R., and looseleaves will come from examination of paper copies, no matter how available these sources are in digital forms.

Claims that law schools inadequately prepare new lawyers to do research are seen in a different light when this observation is remembered. The need to think and other practical realities impose limits on the possibilities for outstanding achievement in training law students to do legal research.

This essay will begin by considering different types of legal research to emphasize that *understanding* the material is usually more important than finding the greatest possible amount of relevant material, particularly in the research for which law students need to be trained. I will emphasize that, while law librarians understand the form of research typically used by practicing lawyers, the librarians' own research experience is different. This difference sometimes colors the librarians' discussion of legal research and keeps them from anticipating the reactions of other participants in the discussion of research training. I hope librarians will find parts of this essay provocative so that they will anticipate objections and participate to maximum effect in the debate on research training.

I will discuss recent comparisons between research training that uses writing exercises for reinforcement and training that uses "treasure hunt" exercises. I will attempt to bring balance to this one-sided debate by pointing out that however sensible it may be for students to reinforce research instruction by writing memos and briefs, the process still has inherent limitations; in addition, "treasure hunts" have significant virtues that everyone knows but that are seldom listed in print. I will conclude that the methods of training in legal research in use at present all have flaws that make impressive gains in performance unlikely unless more pervasive research experience is required by schools. I will also conclude that the true value of legal research training in law school may be in the predisposition it gives to graduates to pick up necessary skills more easily when their jobs demand them.

Before concluding, I will consider data extracted from a recent survey of how lawyers feel about the training in fundamental skills received in law school. Legal research was one of a large number of skills examined in the survey. Some surprising conclusions may be drawn, and others inferred, as to what lawyers think about the importance of legal research and the effectiveness of law school instruction.

Types of Legal Research

It is not possible to limit the term *legal research* strictly to problems requiring the struggle for understanding of legal doctrine. Certainly, there are research questions that are directed to information that requires little further analysis. Some of these "information problems" may require technical vocabulary or expertise in choice of sources, but a librarian or an experienced paralegal may still be the best choice for such an assignment. For example: what is the statute of limitations for collection of a past due alimony payment in Ohio? If a search

warrant issued in Ohio says on its face that it is to be served within three days, what is the effect if it was issued the day before a weekend or a holiday? If a Michigan resident dies without a will, how is the property divided?

None of these questions is simple. Delayed collection of alimony in Ohio is limited by laches, not by a statute of limitations; the answer is found in case law; statutory indexes will not help. Weekend days and holidays don't count against the validity of a warrant whether federal or state, but the researcher needs to distinguish between jurisdictions to have the correct citation for the answer. Statutes governing "intestate succession" are difficult to locate for one without the right vocabulary. But in each case, once the correct source is found the research is over. A whole lot of thinking is not going on.

Contrast these with the problem presented by a manufacturer whose competitor has used exact copies of its product—forms in the shape of small animals to be used by taxidermists in arranging skins.² Any information search will lead to the copyright act,³ to the definitions of "pictorial, graphic and sculptural works" and "useful articles," to a paragraph from a committee report on the 1976 Copyright Act, and to four important cases in the United States Court of Appeals (three in the Second Circuit, one in the D.C. Circuit). These authorities inform the researcher that copyright protection is limited to features that are separable from the utilitarian aspects of an article, and that the separation may be physical or "conceptual." The meaning of "conceptually separable" is obscure enough that the four cases have led to seven opinions in the appellate courts, presenting four distinct theories. The researcher must strive to understand all of these theories and relate each to the statutory definitions, the committee report, and the facts of the client's particular problem.

Understanding is not achieved simply by locating and reading cases and statutes. Those who have done this sort of legal research are familiar with the way that reading a case may cast new light on another case read earlier, requiring it to be reread, or the way that insight into meaning of a case may arise unexpectedly while one is thinking about something else. Puzzles about the working of the mind are not my subject. I only wish to remind readers that

2. This is the situation involved in *Superior Form Builders v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488 (4th Cir. 1996), and *Hart v. Dan Chase Taxidermy Supply Co.*, 39 USPQ 1310 (2nd Cir. 1996). For the purpose of discussion here and later, I will assume that the problem arises at a time when the *Dan Chase* cases were new enough that a researcher might not find them without special effort.

3. There are, no doubt, some researchers who would take a long time to realize that the question involves copyright, but their problem does not arise from inadequate training in research methods.

locating and reading material does not mean understanding that material immediately, no matter how learned the lawyer.⁴

Time spent finding information surely does not amount to one-tenth of the time spent thinking about a complex problem such as the copyright situation proposed above; indeed, it may be far less. For instance, in this problem, finding one source will quickly lead to all the others. All the cases refer to statutory and legislative history. Any treatise or law review article will cite the statute, the committee report, and the important cases. The annotated statutes give all the cases, and the later cases cite the early ones. Basically, then, one case (plus a citator) locates everything? In some other research problems the search for material is more closely interwoven with thinking about the problem, because the theory to be pursued arises out of thinking about the material found, and research trails are tried, thought about, and discarded for a better theory.

Other problems less information-rich than the copyright problem presented above nevertheless still require more thinking than searching. There are many research problems (especially in smaller jurisdictions) that involve routine fact situations as to which other jurisdictions have reached a conclusion, though the jurisdiction in question has not. In such instances, a thorough understanding of the viewpoint(s) of other jurisdictions must be attained to argue successfully for the adoption of one that favors the client and the rejection of one that does not.

Often, however, the question remains unresolved because the authorities that have been discovered in the research process do not clearly cover the situation presented. The researcher must understand the authorities well enough to form theories and apply them to a set of facts for which they do not present an immediately obvious answer.⁵ In this indeterminate situation the lawyer seeks to find the argument most useful to the client; sometimes this

4. Jill and Christopher Wren suggest that, with proper instruction, reading a case is the same as understanding it: "Until researchers read the authorities they have retrieved from the library shelves, they cannot know whether they have found the law they seek and cannot tell whether they should continue their search. They haven't found the law; they have only found law books. Similarly until researchers read the authorities they have located they cannot determine the authorities' significance and therefore cannot update the law . . . students learn effective reading techniques . . . through instruction that expressly explains to students the purposes, techniques, and thought processes involved in reading the law." Christopher G. Wren & Jill Robinson Wren, *Teaching Legal Research*, 80 L. LIBR. J. 7, 47 (1988). The suggestion is that students can be taught to read so that they will quickly understand the law as they read cases. I suggest that even highly intelligent and experienced lawyers (outside of their specialty) often read and misunderstand—and knowing they haven't quite got it, they read again and sit and think, read other cases and commentary and think some more, and then, maybe, the light dawns.

5. This is not intended to suggest that there is a right answer for such questions, a correct application of the authorities to which all right-thinking lawyers will assent. The nature of such problems is that the authorities are inconclusive; for this reason, the deeper the researcher's understanding of the authorities, the more convincing will be the argument resulting from that understanding.

requires the imaginative connection of authorities that are not obviously relevant to the present fact situation.⁶

This client-centered research requires imagination and hard thinking. I have sometimes characterized the most difficult of these as “stare-at-the-wall problems” because approaches emerge, if at all, from some internal source not available on command. This is a critical step in doing legal research, a major difficulty in law school research training, and a stumbling block for librarians in their evaluation of research abilities of lawyers and students.

Further tipping the balance between searching time and thinking time is the fact that the time spent writing up one’s conclusions must be included in the latter category. This is because the real difficulties in writing come from the need to organize—a thinking problem—and from the frequency with which the act of writing reveals the weak spots in one’s thinking. Needless to say, writing out the results of the search for the order of intestate succession and similar problems does not require much thinking.

Client-centered research differs from scholarly research in important ways. Consequently, one whose major experience consists of scholarly research must exercise care in making judgments about the research training appropriate for law students. Scholarly legal research is comprehensive and directed toward general conclusions. A professor, or a lawyer writing a scholarly piece, surveys a broad legal topic, or takes a very general view of a more restricted legal question, attempting to find and discuss (or at least mention) all relevant authorities and to reach general conclusions. Although the scholar may begin with desired conclusions, the typical scholar is free to follow the argument where it leads. And the scholar is not overly concerned with how long a project takes; a line of thought may be followed without too much worry as to whether it will serve the purpose of the present project. Scholarly librarians work with similarly general intentions. The typical product of the scholarly librarian is a comprehensive bibliography that includes all published writings on a topic, sometimes annotated with evaluations of the sources, sometimes a simple list.

What practicing lawyers do when they conduct research is quite different from this. The research of a lawyer is concerned with the discovery and application of legal authority relevant to the precise question presented by a client. Usually the research is directed at problems presented by events that have already happened, though sometimes, usually in business-planning contexts, the research is directed more broadly toward the consequences of several possible courses of action. Even this more general research is almost always more narrowly focused than the scholar’s broad-based approach. Lawyers have

6. It may now seem obvious in 1997 that *Griswold v. Connecticut*, 381 U.S. 479 (1965), might be the basis for a claim that state abortion laws violate a fundamental right, but in 1970 it was a more imaginative jump. The use of authority even more distant from the question at hand than *Griswold* was distant from abortion is a frequent possibility in legal research.

their clients' interests at heart and seek arguments that will benefit the client. The lawyer's time must be controlled, since the client pays an enormous price for it. Some who have commented negatively on student legal research skills appear to base their evaluation on experience in scholarly research and to value comprehensive research on broad questions more than is appropriate for lawyer-researchers.

Finally, the legal research experience of lawyers differs widely according to type of practice. A very small number of new graduates are employed by large firms and spend a large proportion of their first year in practice doing legal research on diverse topics as they are rotated through firm departments or snagged by older lawyers for miscellaneous projects. Such diversified research is not the normal experience of new graduates, most of whom practice solo or in small firms, or find employment with government agencies or corporations. Nevertheless, it is the model for legal research training, and it is difficult to imagine a different model or a more restricted goal, since only a few law students can predict with certainty the type of employment or the area of specialization in which they will spend their lives.⁷

It still might seem that the new lawyers who are employed in large firms, though atypical, would be the best available subjects upon which to base an evaluation of research skills taught in law school because they do a lot of it and because they are at firms most likely to employ librarians who could observe the quality of their research. But it must be remembered that those firms usually employ graduates of elite schools. Since these graduates are highly selected for intelligence, they are not a representative group; even though librarians think them poorly trained, they might be superior in skills to the graduates of less prestigious schools. On the other hand, there is reason to believe some elite schools have not concentrated much effort on legal research training, confident that their graduates will have the ability to work it out on their own in a short time; so maybe some graduates of humbler institutions have a short-term advantage.⁸

7. See I. Trotter Hardy, *Why Legal Research Training Is So Bad: A Response to Howland and Lewis*, 41 J. LEGAL EDUC. 221, 222 (1991). Some graduates find employment as judicial clerks in which they do a great deal of research, but this experience cannot serve as the model for evaluating training, since they rarely start from scratch, instead beginning with the briefs of parties that explain the issues and present the materials that a lawyer has already unearthed.

8. Gregory Koster, Director of the Law Library at CUNY Law School at Queens College, has published an account of an extended legal research course that, he asserts, leaves students better prepared for law office assignments than students from other schools. Evidence is anecdotal, and a planned survey has not yet appeared. See Gregory Koster, *Teaching Legal Research: The View from Utopia*, in EXPERT VIEWS ON IMPROVING THE QUALITY OF LEGAL RESEARCH EDUCATION IN THE UNITED STATES 53 (1992) (hereinafter EXPERT VIEWS). It would be strange if some schools did not have legal research programs that produced better results. However, the matter is closely watched, and if any conclusive evidence of the superiority of one program should emerge, surely most schools would consider the modifications of their curriculum necessary to achieve similar results.

Librarians' Outlook on Research Training

On the basis of interest, skill, and opportunity, experienced law librarians are undoubtedly best qualified to judge the ability of new lawyers to use basic research tools. However, the research experience of law librarians often predisposes them to a limited view of research that emphasizes the comprehensive search for all relevant sources over the struggle to understand authorities that are found in the context of a restricted problem controlled by the client's interests. This is not to cast doubt on their observations that law students and recent graduates have an inadequate grasp of basic research tools—the observations are too consistent to challenge—but rather to suggest that librarians may be too hopeful regarding what can be achieved in law schools.

Librarians assisting lawyers, students, or other library patrons are familiar from start to finish with the "information problem" (such as the statute of limitations for alimony or the order of intestate succession) because librarians often accompany the patron at least until the discovery of an index entry that seems reliable. One pleasant part of the law librarian's job is that interesting problems are presented, some material is located, and then, while the lawyer or law student settles down to the struggle for understanding, the librarian goes on to the next patron. Thus all problems may look, to the librarian, like information problems.

Furthermore, the research projects pursued by academic librarians are most likely to be scholarly projects for which comprehensive research is required. Again, this reinforces the view that finding material takes precedence over interpreting the material. It is noteworthy that this partial view, to which librarians' experience directs them, is also a view promoted by the vendors of the online legal databases, LEXIS and WESTLAW, which boast of the ability of their systems to locate far more relevant material than can be found with old-fashioned book research.

Criticism of New Lawyers

At a conference sponsored by one of the online vendors, a well-known law librarian offered observations that, in context, appeared to summarize firm librarians' criticisms of the research skills of new lawyers. I believe they also reveal inescapably the bias of the academic perspective.

What is even more disturbing, and this also came out repeatedly, is that what the young attorneys are producing is based on tip-of-the-iceberg research. They often find an amount of information on a subject and assume they have found everything. They might have just found twenty cases, four law review articles and a couple of treatises on the subject. They say, "Hey, this is great, this is all I need to know," and

off they go. Not only might [it] be incorrect information, but it is almost always incomplete information.⁹

This casual comment demonstrates an expectation of comprehensive searching while neglecting both the problem presented by the need for "thinking" and the client's interest in limiting the time spent on research.

Analysis of the Criticism

The "subject" a practicing lawyer researches is most likely to be very narrow. Not "what is the liability of one who trades stock based on inside information?," but "what is the liability of a person trading stock after receiving inside information that an officer will resign, revealed by the officer's cousin whom the trader served as a masseuse?" With such a question, twenty cases, two treatises, and four law review articles can be a significant, even an excessive, amount of material. The client who is paying the freight, and the partner who is approving the bill, may prefer the "tip-of-the-iceberg" approach in such a situation.

"This is all I need to know," says the hypothetical researcher according to the criticism. If, however, the researcher reads the twenty cases, she can't avoid seeing that each case refers to other cases. The law review articles and treatises have profuse references to cases and other authorities. The researcher may find that for the narrow question in which she is interested, the cases form a closed circle, each source referring to most of the others. This is a reassuring outcome. Otherwise, even the poorly skilled researcher has notice of the need to look to other cases. In addition, the researcher who is unaware of the use of citators to find later cases referring to the first twenty cases is poorly trained indeed.¹⁰

"They might have just found 20 cases . . . and off they go." The implication of this part of the criticism is that a lawyer proceeds at his task like a librarian attempting to compile a thorough bibliography. This is usually not the case at all. The researching lawyer, rather than attempting to find all the authority relevant to the problem, is attempting to *become* an authority on the problem. The process is not divided into finding first, analyzing later. The new lawyer whose research skills cause alarm hasn't researched four other insider trading problems. She remembers very little of the law of insider trading from law school. She did not make a list of the two treatises, four articles, and twenty cases and carry her list away to publish in a newsletter. Rather, if she has some

9. *The Transformation of Law and Its Consequences for Legal Research*, in GRAYLYN CONFERENCE REPORT 1990, at 24, 37 (Remarks of Joan S. Howland) (Donald Dunn ed., 1991).

10. Although law librarians report that new lawyers often do not fully understand the nuances of *Shepard's Citations*, see, e.g., Joan S. Howland & Nancy J. Lewis, *The Effectiveness of Law School Legal Research Training Programs*, 40 J. LEGAL EDUC. 381, 386 (1990), it is unlikely that they have missed the very idea of a citator.

sense, she found one treatise, or even an encyclopedia, and read the parts relating to trading on inside information—that's where she found some of the twenty cases.¹¹ Then she read a few of the cases that seemed important, finding some references to more cases. In the cases she found a reference to a law review article and the second treatise. Reading the law review article, she found references to the three other law review articles (two of which almost certainly turned out to be worthless for her limited problem), as well as more case references. From the second treatise she found a few additional cases. Fairly early in the process, she also discovered that a statute was involved and that a very few "leading" cases dominate all discussions of this topic. More significant, from reading and thinking about the first cases, articles and treatises, she came to have an understanding of the law in the area. That allowed her to reject some articles on the point as shallow or eccentric, and to distinguish cases that have particular importance from those that are on point but not eminent.

"Not only might [it] be incorrect information, but it is almost always incomplete information." What is it that can be "incorrect" about the "information" that has been found? Presumably we are here talking about cases, journal articles, and treatises discussing a point of law. "Incorrect" suggests factual errors and is a misleading term when applied to legal authorities, even those that reflect poor reasoning or judgment.¹² The poorly reasoned decision of a single federal district court is rarely "incorrect" in the sense of conflicting with a decision of a higher court that is clearly on point. Similarly, the author of a journal article or treatise might express ideas other scholars regard as unwarranted, and the courts may later bear out that negative judgment; but the ideas criticized are rarely incorrect in a factual sense.

This notion of incorrectness is important, however, because it seems as likely to refer to particular authorities contrary to the dominant theory, the sort of error that is only detected by clear thinking. If an extended search turns up twenty more cases, and several more journal articles some of which are "incorrect," it is not the best researcher but the best thinker who will distinguish the correct from the incorrect opinion. Besides, the one case that does not

11. A startling misconception as to when research begins is found in CHRISTOPHER WREN & JILL ROBINSON WREN, *THE LEGAL RESEARCH MANUAL: A GAME PLAN FOR LEGAL RESEARCH AND ANALYSIS* (2d ed. 1986). They identify "critical fact-related steps that must precede research in law books. These steps are: (1) gathering the facts; (2) analyzing the facts; (3) identifying the legal issues raised by the facts; (arranging the legal issues in a logical order for research." *Id.* at 29 (emphasis added). The identification and ordering of issues before using law books presumes that the researcher has a thorough knowledge of the area of law in her mind. Specialists have such control over a single area; law school graduates rarely do; law students never do. Instructors may be well advised to select problems for which first-year students have some background, but even experienced lawyers arrive at issues by a recursive analysis, starting with facts and impressions of law, looking at a source, reconsidering the facts, finding another source, etc.

12. In the context of legal analysis, the term bears a connotation similar to the currently popular phrase "politically correct," but in its original, nonpejorative sense.

follow the dominant view may represent the best thinking (or the only thinking useful for *this* client).

An alternate meaning of "incorrect" is that the researcher is pursuing a theory that is too far from the standard analysis of the problem at hand to have any value. This problem, however, has little to do with legal research skills.

For the researcher, an increase in understanding is of primary importance. Finding the maximum number of cases is of little importance, and finding all the law review articles on the subject is of no importance whatsoever. The understanding achieved is limited by the researcher's innate capacity to think and by the amount of attention given to the matter, but research skills make only a minor, though basic, contribution to the process. If the researcher understands the problem and the way courts analyze it, she can construct an explanation or an argument. Normal updating of the cases she has judged to be "leading" should allow the discovery of a recent development that revolutionizes the treatment of the problem, although such revolutions are, in reality, quite rare.

Particular Sources

I have suggested that librarians are, quite naturally, apt to overrate the importance of exhaustive information searching. Another peculiarity found in librarian literature about legal research skills is the insistence that law students should be better at compiling legislative histories and finding and updating administrative regulations.¹³ The infrequency with which new lawyers will need to use these skills suggests that concern should be suppressed. A sense of proportion is required. The failure of a new lawyer to understand the uses and interrelations of treatises, encyclopedias, citators, digests, ALRs, or the West key number system is a cause for grave concern. Legislative history materials and administrative materials are both harder to use and far less frequently needed. There are some matters for which librarians may expect to retain their near-monopoly of expertise. This is not to say that research training in law schools ought not to discuss the *Code of Federal Regulations* or show how to find legislative committee reports. Information like this needs to be presented as a display of good faith; it is best if graduates at least have a vague recollection that "this information was presented to me in law school." However, the reinforcement necessary to cause students to retain this information cannot be anticipated, especially when there are other materials so much more basic to research to which primary attention should be directed.

13. See, e.g., Thomas A. Woxland, *Why Can't Johnny Research? Or It All Started with Christopher Columbus Langdell*, 81 L. LIBR. J. 451, 462 (1989); Joan S. Howland & Nancy J. Lewis, *supra* note 10, at 386; Donald J. Dunn, *Why Legal Research Skills Declined, or When Two Rights Make a Wrong*, 85 L. LIBR. J. 49 (1993).

The Primacy of Thinking

A poor understanding of a lawyer's problem might arise from failure to locate the right material, but it is more likely to arise from inadequate thinking about the material.

The new lawyer's understanding of a legal problem and of the cases located during research on the problem cannot be separated from his or her legal research skills because the level of understanding will determine the direction the research takes. The level of understanding, however, is more important than the quality of research. Research can be directed by understanding, but research does not produce understanding—it only discovers that which is to be understood. A good understanding can often make up for imperfect research.

It is possible to have found all relevant case material but not to understand the problem. Legal writing classes often do a "closed memorandum" problem where students are asked to produce a memorandum based on a specified universe of assigned resources. Since all students use the same "research" material, the great divergence of grades in such an assignment is due to differences in writing skill and understanding of the problem. I believe that understanding is far more important than the ability to form correct sentences,¹⁴ and that it is usually possible to detect both the person who understands well but writes poorly, and the person who writes acceptably but has not understood the cases.

An experienced lawyer evaluating a legal problem, before or after an associate has produced a memorandum, can often assert "there must be a case that says approximately." The experienced lawyer may sometimes be mistaken, in which case the researcher spends a frustrating afternoon, but very often the veteran will be correct. This demonstrates a way in which understanding is more basic than research skill.

After sketchy research, the lawyer who understands a problem may be confronted with relevant material he or she had overlooked. A strong understanding will usually permit that new material to be easily incorporated into an argument or successfully distinguished. It is worth noting that in many controversies the opposing parties cite to the same authorities but apply them in different ways. I do not wish to say that one must be right and the other wrong, or that there is only one way of understanding a problem. There may be several ways of understanding and arguing a problem, but each of these ways of thinking may be deeply or poorly grasped by the lawyer. And it will rarely be the case that a poor understanding of the problem is suddenly illuminated by finding one more case.

14. It is difficult to distinguish writing problems from thinking problems. The expression of muddled thinking may give the impression that writing skill is inadequate, but in fact, clear thinking cures many apparent writing problems.

As suggested above, however, commentators on legal research skills typically focus on finding material and do not emphasize the need for thinking about the material found. Naturally an exaggerated view of the importance of finding all the cases on a topic is promulgated by the owners of LEXIS and WESTLAW. These systems are in many cases able to find more cases than manual research locates. However, if the primary goal is the understanding of a problem, locating extra cases that merely apply the dominant theories is of little importance. A more important concern might be whether the online use of material facilitates the process of thinking and leads to understanding.¹⁵

As the epigraph suggests, the process of research can divert from the often unpleasant task of concentrated thinking. We see this displacement in students who prefer to take physical possession of cases through photocopies and computer printouts rather than taking intellectual possession, which is much more difficult. The thinking process for the student or new lawyer is made awkward by an inevitably sketchy acquaintance with the subject matter.¹⁶

Overemphasis on quantity of information is well described by another law librarian, Lance Dickson, whose adverse comments were generously included in the report of a study of computer technology in legal education published by the University of Dayton and Mead Data Central, then the owner of the LEXIS computer-assisted legal research service:

The MDC/UD draft seems to assume that a law school, like some kind of news medium, is primarily concerned with receiving and disseminating information. This is surely not so. A law school is concerned with education and understanding, and with research and scholarship. In the course of these processes information is conveyed, but the transmission of information is not the primary objective of the school. If it were the Dean would report to the librarian, and not the other way around. The draft emphasized that one of the major benefits of computer technology is the ability to access ever vaster amounts of information. Any law librarian could explain that a shortage of information is not generally the problem in law school. Most law students are swamped by an excess of information. What they need to learn is how to reduce the available information to manageable proportions and how to establish its quality and relevance. Nothing in the draft seems to recognize or address this problem.¹⁷

Consider this possibility: a law firm partner wishes to evaluate two new associates. He is already familiar with the problem presented by seeking copyright protection for useful objects. When the client presents the problem

15. The use of printed material may in fact facilitate legal thinking due to the ease of scanning or of returning to a passage previously read, and the possibility of having several texts close together for comparison.

16. Their thinking process may be guided by a treatise or law review article, or even an encyclopedia, but it seems to happen most frequently in practice that the difficult problem falls just to the side of authoritative discussion. This sort of problem, naturally, is assiduously avoided in assignments given to students of legal research. It could not be otherwise.

17. JOINT COMM. TO STUDY COMPUTER TECHNOLOGY IN LEGAL EDUC., UNIV. OF DAYTON SCH. OF LAW & MEAD DATA CENT., INTERIM REPORT 16 (Remarks of Lance Dickson) (1993).

of the taxidermy forms referred to above, he assigns the two associates to research it independently. Researcher A reports after finding the major cases representing four theories and thinking deeply about the relation of each theory to the statutory definitions, the legislative history, and the new facts at issue. Researcher B finds the more recent cases from other circuits applying the theories to very similar facts and also notes a proposal¹⁸ to amend the statute in a way that might affect the problem, but his thinking about the theories is less impressive and he appears to misunderstand one theory. Which associate makes the more favorable impression? I suspect that the associate making the better analysis "wins"—it does not take long for someone with a good understanding of the problem to digest new cases, or statutes.

Most legal writing programs are devoted to teaching analysis; they can hardly avoid it if first-year students are to produce respectable memos and briefs. The difficulties of putting legal analysis on paper are faced in other courses only at exam time—and the feedback is minimal. With this monumental problem to confront, it is not surprising that the intricacies of using the library take second place in research and writing courses. However, the remainder of the law curriculum is devoted above all else to analysis; suggestions that more time needs to be devoted to research skills are met with skepticism because of the strong general belief that thinking is the primary task; and the best substantive law courses are about thinking.¹⁹

Are New Lawyers Adequate Researchers?

It is now generally agreed that law schools must impart to new lawyers a certain proficiency in legal research.²⁰ It is not easy to measure the research skills that have been attained in a way that permits comparison of either the skills or the programs that have produced them. Published commentary on the subject of the research skills of new lawyers comes primarily from librarians, and the conclusions of all those who have considered the matter are that the skills of new lawyers are inadequate.

Law firm librarians, experts in the location of legal literature, exchange

18. A purely imaginary supposition at the time of this writing.

19. It has always been the case that deep understanding of cases is the target. The distinction between knowing what a case says and understanding it is an old one.

[T]he reason of the law is the life of the law, for though a man can tell the law, yet if he knows not the reason thereof, he shall soon forget his superficial knowledge. But when he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but also many others, for *cognitio legis est copulata et complicata*, ["Knowledge of the law is interconnected and folded together."] and this knowledge will long remain with him. COKE, *FIRST INSTITUTES*, 183b.

20. As part of its "Statement of Fundamental Lawyering Skills and Professional Values," the ABA's MacCrate Report described the basic research skills essential for competent lawyering. See TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: *NARROWING THE GAP*, AM. BAR ASS'N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* 157 (1992).

anecdotes revealing the ignorance and inadequacy of the overpaid new lawyers whom they assist. The titles alone of articles by academic librarians reveal their view on the skills of graduates: "Legal Research Instruction in Law School, the State of the Art or, Why Law School Graduates Do Not Know How to Find the Law"²¹; "Why Can't Johnny Research? or It All Started with Christopher Columbus Langdell"²²; "Why Legal Research Skills Declined, or When Two Rights Make a Wrong."²³

Much published writing by law librarians and instructors in legal writing describes "successful" research programs or suggests improvements to research training,²⁴ but there is no data to establish that the successful or improved programs actually turn out graduates with measurably superior skills.

In 1988 a survey of law firm librarians was completed investigating the competence of summer clerks and first-year associates at selected law firms in eight cities.²⁵ The firms averaged 150 lawyers, and the clerks and associates were mostly drawn from law schools of high reputation. The study confirmed that firm law librarians have a very low opinion of the research skills of law students and new lawyers. A follow-up survey was promised but has not yet been initiated. It can be predicted that little will have changed.

In a response to this survey, Professor Trotter Hardy suggested that perhaps the present situation did not require major changes. He made a number of cogent suggestions. First, he pointed out that very few American lawyers work in firms as large as 150 lawyers—or even 50—and that the amount and diversity of research required by the largest firms is not needed for the vast majority of lawyers.²⁶ This point is undeniable but does not address the criticisms of the firm librarians, who found the new lawyers did not have adequate skills when using federal and state codes, citators, digests, and other tools basic to *any* research.

There appears to be no published research suggesting that new lawyers possess adequate research skills, and I do not advance that proposition. Rather I will now consider briefly some contentions about the way in which legal research skills are best taught. But first, I will point to a probable effect of law school research training that by its nature cannot be tested. A few law students

21. Robin K. Mills, *Legal Research Instruction in Law School, the State of the Art or, Why Law School Graduates Do Not Know How to Find the Law*, 70 L. LIBR. J. 343 (1977).

22. Woxland, *supra* note 13.

23. Dunn, *supra* note 13. The assumption implied in this title, that legal research skills declined, does not necessarily point to a golden age of research training. The complaints are consistent across the years; perhaps new graduates have declined from dumb to dumber.

24. See, e.g., Koster, *supra* note 8; *Perspectives: Teaching Legal Research and Writing*, a journal distributed by West Group, is full of short essays suggesting ways to improve research and writing programs and courses.

25. See Howland & Lewis, *supra* note 10.

26. Hardy, *supra* note 7, at 222.

take to research training and grasp the main ideas like natural-born librarians. Some others find employment that requires them to use their research skills immediately for more than law school assignments. The majority, however, benefit from their training in a subtle way. Their knowledge lies dormant until they are employed to do legal research. Then, we may hope, their prior training shortens the time in which they blunder about. When the firm librarian explains what they should have done, it sounds familiar and takes root more easily because deep down there is a memory of earlier instruction. Unfortunately, the only "scientific" way to test this optimistic proposition requires the cooperation of some law schools to graduate students with no training in legal research so that they might be compared with those who receive training by present methods. This sort of human experimentation is not likely to be approved.

What Do We Teach When We Teach Legal Research?

I have suggested that when we do legal research, most of our time is spent thinking about legal texts. But that is not what we teach when we teach legal research (as distinct from writing and analysis). From this point it will be clear that I am speaking of research training, whether taught by librarians or legal writing instructors, as tied very closely to a program in legal writing. I am also assuming that if legal research training is not graded as part of the writing course, it is probably taught on a pass-fail basis.

When we teach research, we are teaching students how to find information using printed and computer-based tools. The subject matter is not a coherent body of thought; it is a mass of details, though much thought has gone into their compilation and organization. The end result of training is not a science; it is a skill, or a knack. Like most skills it must be used or it will decay. It is not a physical skill like playing the piano or riding a bicycle. These body skills once learned are hard to lose. Using *Shepard's Citations* or a West digest is a skill without a unique physical component. The knowledge fades quickly from disuse.

The skill of legal research can be compared to the use of a complicated word processing program. It is relatively easy to train someone in the use of WordPerfect, including cursor movements, use of columns and tables, tabs, margins, footnotes, macros, merges, and sorts. But do we expect someone who is trained but then hardly uses the program for a year to maintain any semblance of expertise? I don't think so. We remember it because we use it.²⁷

Legal research is much more complicated than the use of a word processing program. There are many sources using incompatible protocols. There is no template for the keyboard. And though there are guidebooks, we must take into

27. With legal research, as with word processing, there is probably an amount of practice after which the skill will remain despite a long period of disuse, but for legal research skills that period is surely longer than an academic year, and the amount of practice surely greater than that demanded from law students under any program likely to be adopted.

account the reluctance of many people to read the manual. This is particularly frustrating for librarians, avid manual readers. How many times is the inadequacy of new lawyers demonstrated by questions about citators which librarians solve by turning to the front of the book and reading to the patron the explanation of a code or abbreviation?

Legal research may be a skill, but in teaching legal research we do not teach that skill directly. What we teach is the use of a variety of sources; the content and methods of use of each of these sources differ. We do not often teach principles from which answers to particular problems can be deduced.²⁸ This is true whether legal research is a separate unit or integrated with a course on legal writing. It must be considered likely that the only way most willing law students will ever fix on this skill is by using it over and over again. This required reinforcement is what single courses cannot provide.

Methods of Reinforcing Legal Research Teaching

If research skills imparted by the law schools are inadequate, perhaps there is something wrong with the method of training.

A great debate on methods of training in legal research erupted a few years ago in the pages of *Law Library Journal*. The debate opened with an attack on the "bibliographic method" of research instruction by Jill and Christopher Wren, partisans of a "process-oriented" integrated instruction in research and writing.²⁹ The Wrens' approach was, in turn, criticized by Robert Berring and Kathleen Vanden Heuvel.³⁰

The "bibliographic method" describes the familiar process of introducing students to one research tool at a time. The books are held up and perhaps passed around, slides or overheads of pages to be discussed might be shown, or students might have a booklet of "sample pages" that reproduces examples of the works to be discussed. The function of the tool is described, and exercises are distributed that require use of the books to find a bit of information known to exist (e.g., "find the case from Illinois that distinguishes *Lason v. State*"). These exercises are familiarly known as "treasure hunts."

The Wren's "process-oriented" method, on the other hand, teaches the

28. The "principles" in this field are likely to be rules of thumb, such as Berring's "first rule of research" on his popular series of instructional videotapes. ROBERT C. BERRING, *COMMANDO LEGAL RESEARCH* (Legal Star Communications 1989) ("find someone who has done the work for you").

29. Wren & Wren, *supra* note 4.

30. Robert C. Berring & Kathleen Vanden Heuvel, *Legal Research: Should Students Learn It or Wing It?* 81 L. LIBR. J. 431 (1989).

process of legal research under three main headings: finding the law, reading the law, and updating the law. When you think about it, this hardly seems a terribly significant division. In fact, the section of their book concerned with updating the law covers *Shepard's*, pocket parts, looseleaves, and computer searches.³¹ All other research tools are described briefly in the "finding the law" section.

The response of Berring and Vanden Heuvel to the Wrens' article defended bibliographic instruction as a *part* of legal research training, admitting that a program consisting solely of description of the various sources would be dry and unsuccessful, but insisting that programs so limited were rare or nonexistent.³² The Wrens responded to this defense,³³ and then Berring and Vanden Heuvel called an end to the exchange.³⁴

Reading these essays, with an occasional glance at the Wrens' textbook *The Legal Research Manual*³⁵ and Professor Berring's videotaped lectures,³⁶ one is left with the feeling that the heart of the controversy is not clear from the published debate. It is evident that Berring and Vanden Heuvel feel that students should have more information about bibliographic resources,³⁷ while the Wrens would limit the information to what is strictly necessary for the process.³⁸ It appears that the Wrens feel that bibliographic instruction must be integrated with, and secondary to, practice at researching and writing briefs and memorandums; it is not clear that Berring and Vanden Heuvel disagree.

The debate begins to sound like another one on whether legal research ought to be taught by librarians or by legal writing instructors; regarding that debate I offer only two observations. If librarians are the ones teaching legal research, more information about the sources will be presented, if not absorbed, in the course. If legal research and writing instructors control the syllabus, however, the time devoted to legal research sources will inevitably decline.

31. WREN & WREN, *supra* note 11, ch. 6 ("Step 3: Updating the Law").

32. *See id.* at 437. They also suggest that first-year students are not ready to learn. *See id.* at 441.

33. Christopher G. Wren & Jill Robinson Wren, *Reviving Legal Research: A Reply To Berring and Vanden Heuvel*, 82 L. LIBR. J. 463 (1990).

34. Robert C. Berring & Kathleen Vanden Heuvel, *Legal Research: A Final Response*, 82 L. LIBR. J. 495 (1990).

35. WREN & WREN, *supra* note 11.

36. BERRING, *supra* note 28.

37. "We think that students become much better users of *Shepard's* if we explain to them the dual function of the citators, how the *Shepard's* format evolved and how it has affected the way we think about law. We emphasize the *Shepard's* philosophy of providing every possible citation to a case or other cited material and discuss the different kinds of information available in the various *Shepard's*." Berring & Vanden Heuvel, *supra* note 30, at 445.

38. "[In our approach] the bibliographic information appears only in the amount necessary to advance an understanding of the legal research process . . . [I]n the course of explaining the actual process of researching legal problems and clarifying which law books to use to carry out each step in the legal research process . . . process-oriented instruction can cover less bibliographic information, but more precisely tailor this information to the researcher's practical need. Wren & Wren, *supra* note 4, at 18.

In practice, it might appear that the Wrens have the upper hand, since at most schools research instruction, whether taught by librarians or legal writing instructors, is integrated into a legal writing course, and the students use the information they acquire regarding bibliographic tools in the preparation of briefs and memos. This sounds like "process-oriented" education even if a bit of the history of legal publishing is included, and even if students learn about *Shepard's Citators* all at once with Berring instead of following the Wrens by first learning to find similar materials by Shepardizing a relevant case and later learning to update a case with the citators.³⁹

However, in the presentation of the legal research sources within a writing course, it is just as likely that instructors follow an approach similar to Berring, at least to the extent that they attempt to present full information about each source at one time, and to use short-answer questions to ensure some experience with particular aspects of a source.

Problems of Reinforcing Process-Oriented Research Training

An interesting aspect of the exchange of articles detailed above is that respondents Berring and Vanden Heuvel never went on the attack by saying "Your process approach has problems of its own." To the extent that process-oriented legal research training can be equated with research training integrated into a writing course, it has been in widespread use for many years as a first-year course. But the proficiency of new lawyers does not seem to have improved. Is there a defect in the process-oriented method that limits its success? I will suggest four problems.

First, like the "treasure hunt" exercises, the problems chosen by legal writing instructors for briefs and memoranda do not represent the real world of research problems, or at best, they represent only a small subset of those problems. They must be selected so that the problem can be readily understood by beginners and so that there is enough authority that can be found without deep understanding or the necessity of drawing analogies too sophisticated for typical first-year students. At the same time, the authorities must present enough confusion to offer some challenge to the students.

Second, unlike "treasure hunt" exercises, memo and brief-writing exercises are rarely designed to require a researcher to use multiple aspects of a research tool; they can hardly even ensure the use of a particular tool. In a "treasure hunt," to be conducted in a case digest, a series of questions can direct the student to the defendant-plaintiff name table, the descriptive word index,

39. Unfortunately, it appears that the Wrens' approach makes *Shepard's* the centerpiece of their section on "Updating the Law" (chapter 6), but neglects it in the section on "Finding the Law" (chapter 5), where the references to Shepardizing are brief, merely referring to chapter 6. WREN & WREN, *supra* note 11, at 74. This is a striking downgrading of what may be the most efficient method of proceeding with research once a good case has been found.

the topic outline, or a topic that has been renumbered. In a memo or brief-writing experience, it is not even easy to ensure students have experience with a digest, especially once the students have been introduced to LEXIS and WESTLAW.

Third, even with problems so selected, the time a student can be expected to devote to a single course precludes the use of many repetitions of the process, besides ruling out many potential fact situations and legal issues. A major point of this essay is that the thinking required in connection with specifying the problem, analyzing the cases while researching it, and writing up the results is so great, in proportion to the actual location of material, that the limited number of such problems appropriate for a single course cannot give very much experience in use of the library.

The fourth problem has to do with reinforcement of the skills acquired. To the extent the legal research process is a skill like playing the piano, only acquired by practice, a legal research and writing program cannot be devised that will provide experience comparable to that gained by an associate or summer clerk whose time is devoted in large part to research projects. Furthermore, a skill acquired by practice is generally lost rather quickly if use is not regular. We would not expect skills acquired in first-year legal research training to be retained after a semester or a year without continued practice. But the only law students who continue to practice are those employed as clerks. A program that would maintain the skills by requiring continued practice runs up against the problem of student and instructor time.

The problem of instructor time is a powerful limit on any expansion of existing programs. An integrated legal research and writing project requires an instructor who creates or updates problems, reads a number of student papers, corrects them with detailed commentary, and meets with the student to discuss the work and the corrections. This takes a great amount of instructor time for each assignment, even when some previously used problems are recycled. Any increase in student research assignments would require a corresponding increase in faculty time devoted to these problems.

I have taught a course in "advanced legal research" to a small group of upper-division students, many of whom were members of law review. In addition to information about a variety of research sources, I attempted to present the students with a number of problems each week that would resemble problems they would be assigned as an associate in a firm with a general practice. The creation of suitable problems required a large expenditure of time, and I could not have accomplished it without the assistance of two lawyer librarians with significant practice experience.

I required students to record their time and to keep track of the research trails they explored, but not to write memos on their legal conclusions. I requested they spend six hours per week on their research problems. Few of

them actually spent that much time after the first weeks, but most felt that they had gained in research skills, and all felt that the time spent on readings and research was too much for two hours' credit.

Compare this level of experience with that of a new associate or summer clerk in a law firm. Forty hours in a week—possibly more—and much, if not most, of it devoted to research. The amount of experience gained in one or two months of employment far exceeds anything I could have demanded from my class. And there are other differences. I spent a great amount of time creating exercises—at the law firm the client presents the problem and pays to do so. I did not evaluate the *legal* conclusions of my students, but at the law firm the researcher's work is evaluated in frequent conferences for which the client pays. While at the firm there may not be any effort to give useful advice as to improvements or to build self-esteem, the researcher's motivation to correct perceived inadequacy could hardly be more urgent.

Finally, consider this absolutely basic and practical bit of legal research knowledge: pocket parts update statutes, digests, many texts, and other sources. This knowledge is held by all law school graduates. Their research habits, however, do not inevitably employ this knowledge. I would guess that anyone reading this who has spent any amount of time doing legal research has at some time failed to use a pocket part, at significant cost in wasted time. If even experienced researchers have not learned to use such an obvious technique as checking pocket parts on all occasions, our hopes must be modest as to what can be achieved with training on more obscure practices.

Reinforcement of Bibliographic Instruction

Bibliographic instruction consists of presenting individual research sources to students, telling them more details about the work and its use than they would ever discover in a single research project, and requiring them to do an exercise consisting of a series of questions that can be answered by the use of the source. There are probably only a few law schools that use this method in isolation, without a complementary research and writing program. And there is no question but that students find it dull to be told in a large class about *Shepard's Citators* or *American Law Reports*. They certainly complain about the "treasure hunt" exercises.

However, a few things can be said in defense of this method. First, it is not the case that these exercises do not resemble the real world of research. The illustrations provided at the very beginning of this essay are examples of real-world treasure hunts: questions with a simple answer, self-validating when discovered. Another situation where real life presents a "treasure hunt" is the search for a case identified only by name. Such problems do not arise in law

school brief-writing assignments.⁴⁰ However, any law librarian knows that they often arise in practice.⁴¹ What does not occur in reality is the accumulation of several problems using different aspects of a single tool. This, however, is done solely for the convenience of the students.

Second, as stated earlier, the exercises can provide experience with using all the important components of each important research source. This simply cannot be done in a typical brief-writing or memo-writing exercise.

Third, the creator of the exercise can limit the intrusion of extraneous problems that only confuse the student without adding to what is learned about the particular tool, which, of course, is the object of the exercise.

Fourth, these assignments are simple and quick to correct. (If created with care they can also be done fairly quickly by the student who reads instructions.) The ease of correction is particularly important when considering whether it is possible to reinforce the skills learned in first-year courses by exercises required of second- and third-year students. Student assistants can quite properly be assigned this work so additional faculty time is not demanded.

It has been suggested that experience shows that such library exercises are ineffective in teaching research skills. When the exercises are used only in the first semester, however, experience proves only that such exercises, like the exercises of researching and writing memos and a brief, cannot provide knowledge that will be long retained without reinforcement. More important, reinforcement after the first year using the "treasure hunt" type of exercise is conceivable, where reinforcement by repeated assignments of brief-writing is not. It would be possible for a large proportion of the courses in law school to require completion of a very brief library exercise with tasks such as locate the Lanham Act in the *United States Code*; find an ALR annotation on the subject of trademark dilution; use a digest to find a 1990 case from Michigan involving some point of trademark law; Shepardize that case and give the cite of a case that distinguishes it; etc. Some professors, particularly those who teach subjects that have specialized research materials (such as tax and labor), already use such exercises. Until such exercises are used throughout the three years of law school, their effectiveness cannot be judged fairly.

40. They could easily be inserted when a memo-writing problem is distributed in a form resembling an informal assignment from an employer. The assignment could include the suggestion: "I think there's a case from Vermont, or maybe New York on this topic. The plaintiff's name (or maybe the defendant) was Rokeach. The facts involved a fire in a factory and I think it arose in the eighties."

41. I have a vivid recollection of the way in which I called upon this particular legal research technique on the occasions (about once a year) when I needed it when practicing law. My first reaction would be to think, "There's a source for that information, and I used to know it." Then after a pause of various durations I would have a mild "aha" experience, thinking, "Digest . . . volumes at the end." If it was a federal case sooner or later I would have another recollection about the division of the digest of federal cases by time period ("red for the oldest, green for more recent").

The Trouble with Law Students

Any proposal to teach law students must take into account the preferences of the students for how much attention and time they will devote to the enterprise. Law students consciously or unconsciously maintain many balances. When applied to legal research and writing courses, three levels are easy to distinguish. First comes the choice of how much energy (time plus attention) to devote to law school courses and how much to their personal life. Second is the choice of how much energy to devote to one course rather than another. The third significant choice arises in the context of each research and writing assignment: how much time to devote to the research, how much to the writing.

There is no consistency in these choices. Students differ in their level of ambition, competitiveness, diligence, prudence, fear of failure, and a host of other relevant characteristics. But as to the first choice, the balance between law school courses and personal life, there is much to suggest that law students in their first year are likely to devote more energy to their coursework than they ever will again. There are many reasons why teaching legal research should work better at some time *later* than the first semester, but this element favoring the first year should not be forgotten. Even by the second semester of law school, an order is established. Many students know by that time that, except by extraordinary exertions, they will not distinguish themselves in a course. A student satisfied with or resigned to Cs will shift the application of his energies toward personal concerns.

As to the second choice, the balance between competing courses, there is evidence that first-year students may devote *too much time* to legal research and writing. Ask any professor teaching a substantive first-year course about attendance and preparation in the week when a major writing assignment is due.

We might expect that students would attempt to balance the effort they put forth against the possibility of academic credit, so that each three-hour course would merit the same effort. But the legal research and writing course not only may require more effort than other courses with more credit hours, it also has several advantages that make it likely to get a larger share of student time when taught in the first semester. First of all, the time for effort comes when no other course typically has demands that will affect grades. You can procrastinate on outlining contracts, but your memorandum of law assignment has to be handed in by October 15. Related to this priority of due dates, the legal research and writing course is the first one in which a student receives a grade, and one of the few in which there is quick and meaningful feedback. Competitive urges and fear of criticism combine to encourage what might seem to be a disproportionate effort, considering that other first-year courses have equal and often even greater credit attached, so that the pure grade-economist would balance the effort.

While courses in research and writing are often taught by instructors rather than tenure-track professors, most students are aware that in the determination of grade point averages there are no distinctions based on status of professors. They may, however, naturally assume that courses about legal analysis have more dignity and professional standing than instruction in how to use library resources. This is inescapable. A balancing factor, however, is that many first-year students hope for part-time or summer employment as law clerks. They often believe that a high grade in the Legal Research and Writing course will be more attractive to an employer than a high grade in any other single course. Other things being equal, this may be true. To the extent some students do not exert themselves fully for legal research and writing, the status of instructors is unlikely to be the reason; it is far more likely to be a decision that taking a C is better than spending endless time on assignments.

Finally, as to the balance between research and writing plus analysis in each assignment, law students err in both directions: some spend too much time looking for cases, some spend too little. The error of those who spend too much is the illusion that a case can be located that solves the problem as though it were purely an informational one. This illusion feeds into the reluctance that most of us feel, as Reynolds declares in the epigraph that begins this essay, toward the hard work of thinking.

Spending too little time on looking for cases is a more sophisticated error. Especially after the introduction of WESTLAW and LEXIS, many students seem ready to do a few sweeps through the databases, and settle down with the body of cases they have collected to do their writing without a more systematic evaluation of what they have. This error may be prudent behavior in the student's use of time, whatever its inadequacy in producing a good brief or memo. The student may recognize that the amount of the grade attributable to the quality of research is out of proportion to the time that can be spent in that search. Devoting a minimal amount of time to case location may not affect the grade enough to justify the surrender of personal time.

For most students all of these questions are determined in light of their hopes for a high grade point average. Legal Research and Writing courses offered on a pass-fail basis ensure that student incentives will be limited. The same limitation applies if a separate grade is given for the research component.

Grading of legal research, whether done separately or as a component of a writing course, presents other problems. Quality of research is usually graded as part of the credit for a research memo or brief. However, in the nature of things, it is a small part of the grade, and it is difficult to distinguish among the majority of students, all of whom will locate most of the important materials. For this reason, many programs use an examination that tests

knowledge of facts about research sources.⁴² Nobody feels that answering questions about research sources is a direct test of research skills, but it's undeniably objective, and it serves as an incentive for study and review.

Concentration on grading also limits the efforts that might be made at reinforcement of research skills. Voluntary programs are not likely to elicit widespread participation. One potential exception is a voluntary review program offered close to the time when students will be employed as clerks. LEXIS and WESTLAW usually offer such programs. Law libraries sometimes do the same, concentrating on printed texts. By their nature, however, such programs will take place when final exams are in sight; in less-favorable climates, they will also coincide with the return of good weather. Neither are propitious circumstances. No matter how important legal research skills may be in a first job, there is a persistent impression that law students do not value them highly enough.

What Lawyers Think about Their Legal Research Training

It would be interesting to ask a large sample of lawyers how well their law school instruction prepared them to do legal research when they entered practice. I am not aware of any study that has asked precisely that question, but inferences can be drawn from a recent survey by the American Bar Foundation on the relation of law school education to professional competence. The questions in this 1991 survey dealt with the perceptions of lawyers regarding the role of law schools in the acquisition of a variety of skills and

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42. On such exams right answers correspond to diligent study, but not, perhaps, to research skill. Some sample objective or essay questions:
- I. The following are legal publications: 1. C.F.R.; 2. Restatement (Second) of Torts; 3. United States Reports; 4. Supreme Court Reporter; 5. General Digest. Which of these should always be regarded as primary sources?
 - A. All of the above.
 - B. 1 and 3.
 - C. 1, 2, 3, and 4.
 - x D. 1, 3, and 4.
 - E. 3 and 4.
 - II. Which of the following are works in which one would *not* expect to find references to West key numbers: 1. C.F.R.; 2. C.J.S.; 3. United States Code; 4. F.R.D.; 5. Am. Jur. 2d.
 - A. 3 and 5.
 - x B. 1, 3 and 5.
 - C. 1, 2 and 5.
 - D. 1 and 4.
 - E. 1 and 5.
 - III. List three functions of Shepard's Citators
 - IV. Explain the relationship between the Code of Federal Regulations and the Federal Register.

areas of knowledge. Library legal research and computer legal research were included as separate areas of expertise.⁴³

The respondents were asked whether each skill could be taught effectively in law school. Ninety-one percent of the Chicago lawyers agreed that library research could be taught effectively⁴⁴; 90 percent agreed as to computer legal research. Even "knowledge of substantive law" was judged less teachable (89 percent agreement); only "written communication" (91 percent) was as high. By comparison, 86 percent agreed that "legal analysis and legal reasoning" could be taught effectively in law school; 80 percent agreed as to "drafting legal documents"; 77 percent as to "oral communication"; 67 percent as to negotiation. New lawyers appear much more optimistic than librarians or teachers of research and writing as to how much law schools can do.

When the Chicago lawyers were asked whether they agreed that particular skills were "learned essentially through law school," 76 percent agreed that legal research skills were learned there; only 66 agreed as to "knowledge of substantive law"; 64 percent as to computer legal research; 63 percent as to professional ethics; 62 percent as to legal analysis and reasoning; 43 percent for knowledge of procedural law; and 32 percent for written communication.⁴⁵

What respondents did not tell is whether they judged that their law schools did a good job. However, they did say whether their law school gave "sufficient attention" to the subject. In this part of the survey, "knowledge of substantive law" ranked first, with 85 percent agreeing that sufficient attention was given. Library legal research ranked second (75 percent), followed closely by "ability in legal analysis and legal reasoning" (74 percent). Next came "sensitivity to professional ethical concerns" (68 percent) and computer legal research (62 percent).

Thus, there appears to be widespread agreement that law schools can teach

43. See Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993). The respondents included Chicago lawyers within five years of law school graduation, law partners responsible for hiring at Chicago firms, and lawyers within ten years of graduation practicing in Missouri communities under 20,000 in population or in the city of Springfield, Missouri (population 155,000). On questions regarding legal research skills, the answers were consistent enough that it is not necessary to distinguish among the groups.

44. I have used the Chicago lawyers' responses for precise percentages. The rural lawyers were more likely to say that a skill was essentially learned in law school, but their rankings were generally consistent with the city practitioners.

45. Garth and Martin tabulate the opinion of their lawyer respondents as to whether a subject "can be taught effectively in law school" as well as whether their own skills were essentially learned there. The fall-off from those who believed *written communication* could be taught in law school (91%) to those who felt they had actually learned it in law school (32%) is particularly dramatic. Legal research, on the other hand, drops off only from 91% (can be taught) to 74% (I learned it there). Garth & Martin, *supra* note 43, at 479. Perhaps this indicates that lawyers know they learned a lot about writing after law school, but aren't so sure they learned much about research after graduation. If so, the lawyers' opinions may contradict my assertion that real learning of legal research skills happens with the intense experience of practice. Perhaps, however, it reflects that many of the respondents have not done much research.

legal research effectively, that they devote sufficient time to it, and that most lawyers learn what they know about legal research in law school. These appear to be optimistic conclusions, but they may reflect a view, garnered from experience, of the limits of what can reasonably be expected from a law school course seeking to teach skills that really only develop with practice.⁴⁶

The survey also provides a disturbing insight from the experience of practicing lawyers by asking respondents to evaluate the importance of the skill areas. The results show that lawyers rank legal research, library or computer, at the bottom of the skills listed in the survey.

All groups were asked to rank a list of skills on a scale of importance in which 1 stood for "extremely important," 2 for "important," and 5 for "not at all important." Oral communication received a 1.20 score; written communication, 1.23; knowledge of substantive law, 1.79; library research, 2.37; and computer legal research, 2.92.⁴⁷ The skills ranked more important than legal research were oral communication, written communication, instilling others' confidence in you, legal analysis and reasoning, and drafting legal documents. Among the Chicago lawyers, more than half the respondents rated these skills "extremely important." Other categories rated "extremely important" by more than a third of the Chicago respondents were ability to diagnose legal problems and plan solutions, knowledge of substantive law, organization and management of legal work, negotiation, fact gathering, sensitivity to ethical concerns, knowledge of procedural law, counseling, understanding and conducting litigation, and ability to obtain and keep clients.

Legal research was rated "extremely important" by 17 percent of the respondents; computer legal research was rated "extremely important" by 8 percent. When the percentages ranking research skills as either important or extremely important are combined, legal research is much closer to the other skills, but remains in the same relative position.

Significant information bearing on the question of importance of legal research came from the responses of hiring partners to the recent study. Legal research abilities did not appear among the factors listed as important for hiring decisions or promotion to partnership.⁴⁸

46. A strange result comes from a question as to whether too much law school time was devoted to each category. The leading contenders for too much time honors were: substantive law (13% judged the time excessive); Computer legal research (7%); and library legal research (6%). *Id.*

47. Garth & Martin, *supra* note 43, at 477. Among Missouri and small firm Chicago lawyers computer legal research scored 3.57. Recent adjustments in the price structure for LEXIS and WESTLAW designed to make the systems more attractive to small firms and solo practitioners may change this very low rating in the future.

48. A further indication that librarians are more distressed by the research skills of new lawyers than employers are comes from the extended title of another librarian's contribution to the debate: Michael J. Slinger, *Placing the Horse Before the Cart: The Need to Convince Law Firm Partners and Law Professors of the Inadequacy of Legal Research Training at Law Schools as a First Step in Developing a Successful Training Solution*, in *EXPERT VIEWS*, *supra* note 8, at 91.

A comparable study was done in 1975-76.⁴⁹ Chicago lawyers were asked the importance of a similar list of skills. In that survey legal research was rated as extremely important by 45 percent, and ranked seventh of twenty-one categories. Interestingly, the percentage of those who felt they learned legal research essentially in law school was virtually identical (75 percent) with the more recent study. The percentage of those who felt legal research could be effectively taught in law school was even higher in the earlier study (98 percent).

Conclusion

The overall conclusion to be drawn from these considerations is that hopes should be modest for achieving effective legal research skills by the end of law school. Those graduates who are required to do large amounts of legal research soon after law school will gain their expertise through action. If they have the opportunity to be assisted by skilled law librarians, they will learn more quickly. It may be hoped that prior research training in law school will shorten the time necessary to develop practical skills once on the job.

Most first-year programs now offer law students the opportunity to learn legal research by assignments that mimic the real world (office memoranda and briefs). Because such assignments require a greater proportion of thinking time relative to the time spent using research tools, there are severe limitations on the amount of practice and reinforcement of research skills that can be provided in such programs. Frequently criticized "treasure hunt" exercises are practical and effective for some purposes.

For law students, the initial instruction must be followed by regular reinforcement. If a first-year legal writing program is not supplemented by additional requirements beyond the completion of a scholarly seminar paper, skill in the use of most legal research tools will fade quickly for those who are not employed as research clerks. The use of short, ungraded "treasure hunt" exercises in upper-division courses is probably the most practical way to overcome these problems.

Upper-division electives in Advanced Legal Research will appeal only to a limited number of students, self-selected by their interest in research. Such courses cannot do much to improve the general state of research skills. Many students will not place a high value on legal research training and will avoid reinforcing exercises if possible. However, the end of spring semester, when many students are looking toward employment involving research as law clerks, has some special advantages for review programs.

49. See FRANCES ZAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981). The essential data from this study is summarized by Garth & Martin, *supra* note 43, at 494-96.