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# Out of the Shadows: What Legal Research Instruction Reveals About Incorporating Skills throughout the Curriculum

Barbara Glesner Fines\*

After two years of dramatic decreases in applications,<sup>1</sup> widely-read critiques of legal educations calling for change,<sup>2</sup> and pressures from industry,<sup>3</sup> the American Bar Association has now recommended substantial changes in standards for regulation of law schools.<sup>4</sup> These recommendations include a focus on student-learning outcomes as a measurement of the quality of an academic program and a

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<sup>1</sup> Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 30, 2013, at A1 (reporting a 38% decline in law school applications between fall 2010 and fall 2012). The most recent statistics from the LSAC indicate that applications are continuing to decline. Fall 2013 applications were down 17.9% from 2012. Law School Admissions Council, *Three-Year ABA Volume Comparison* (August 8, 2013), [http://www.lsac.org/docs/default-source/data-\(lsac-resources\)-docs/three-year-volume-2013.pdf](http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/three-year-volume-2013.pdf)

2. These critiques range from the report from the Carnegie Foundation for the Advancement of Teaching, WILLIAM M. SULLIVAN, ET. AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 24 (2007) [hereinafter CARNEGIE REPORT]; the Best Practices project of the Clinical Legal Education Association, STUCKEY, ET. AL, BEST PRACTICES IN LEGAL EDUCATION: A VISION AND A ROAD MAP 78 (2007)[hereinafter BEST PRACTICES]; and BRIAN TAMANAHA, FAILING LAW SCHOOLS (2012).

3. James E. Moliterno, *The Future of Legal Education Reform*, 40 PEPPERDINE L. REV. 423, 435 (2013) (“An economic transfer is taking place. Law firms formerly trained beginning lawyers in their specific firm ways, mainly by billing their hours to corporate clients. That system no longer exists. Now, law firms are demanding that law schools undertake more practical preparation.”).

4. The American Bar Association has two taskforces designed to consider reforms to legal education. The Standards Review Committee of the ABA Section of Legal Education and Admission to the Bar determines law school accreditation standards. In 2008, the committee began a process for comprehensive review of accreditation standards. American Bar Association, *Standards Review Committee*, [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review.html](http://www.americanbar.org/groups/legal_education/committees/standards_review.html) (last visited August 31, 2013). The second entity is a special task force, The Task Force on the Future of Legal Education, created in the summer of 2012, charged with making recommendations to address issues concerning the economics of legal education and its delivery. The task force was formed because of “rapid and substantial changes in the legal profession, legal services, the national and global economy, and markets affecting legal education.” American Bar Association, *Task Force on the Future of Legal Education*, [http://www.americanbar.org/groups/professional\\_responsibility/taskforceonthefuturelegaleducation.html](http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html) (last visited August 31, 2013).

substantial increase in skills components in law school. Of course, these recommendations are not new. Demands that law schools prepare students for practice have competed with the positivist Langdellian model of legal education for nearly a century.<sup>5</sup> What may be new is the seriousness of attention that is being given to these recommendations.

These critiques do not seek to dispense with the case-dialogue method of instruction or the study of analysis of legal doctrine and theory. This is the method the Carnegie Foundation's study of professional education identified as law school's "signature pedagogy." However, the recommendations acknowledge that law schools need to develop what Carnegie describes as the shadow structure: "the absent pedagogy that is not, or is only weakly engaged."<sup>6</sup> The "shadow" pedagogy identified by the study was the clinical or practice experience of lawyering—the contextualizing of the classroom's legal analysis and doctrine.<sup>7</sup> This pedagogy does not displace Socratic Method but is complementary. Just as the teaching of legal skills is of little effect when taught without substance and analytical rigor, so too the teaching of analytical skills and knowledge is enhanced by placing analysis and doctrine in the context of real-world applications.<sup>8</sup>

In examining the challenges of bringing any skills instruction out of the shadows of the curriculum, reformers may find a telling example in the efforts to incorporate instruction of legal research into the curriculum. Legal research skills have long been recognized as foundational to legal practice. Yet attorneys and law firm librarians consistently evaluate law students and new lawyers as deficient in legal research skills. Why have law schools been unable to improve this assessment of their graduates' skills? A careful examination of this question can provide insights in thinking about the integration of other skills education into the curriculum.

The article first examines the politics of curricular reform. Before a law school will be able to increase or improve any skills instruction, the targeted skill must be important to enough to affect the curriculum. For example, sometimes law schools send inconsistent messages about the importance of legal research instruction. While external voices such as ABA accreditation standards and surveys of the practicing bar have long-recognized importance of the skills of legal research, evidence of the importance of the skill in the law school curriculum is mixed. If asked, most faculty members will agree that a given skill, such as legal research, is important. However, for that skill to be integrated into the curriculum in a way that will substantially affect graduate competencies, the skill must be important enough in the hierarchy of the faculty and curriculum to justify the costs of curricular change.

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5. Part of the Legal Realists' critique included the suggestions that Langdell's method of legal education and its positivist assumptions were divorced from the reality of law in practice. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PENN. L. REV. 907 (1933); K.N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935).

6. CARNEGIE REPORT, *supra* note 2, at 24.

7. *Id.* at 56-58. The authors also identify the context of ethical and moral reasoning alongside case dialogue reasoning as a second "shadow." *Id.* at 57-58.

8. DAVID PERKINS, *MAKING LEARNING WHOLE: HOW SEVEN PRINCIPLES OF TEACHING CAN TRANSFORM EDUCATION* 4 (2010) (Arguing that teaching decontextualized content is ineffective, the author comments, "The problem is that elements don't make much sense in the absence of the whole game.")

Part Two of the article discusses three attitudes that can hinder the development of skills instruction. The first of these is a general skepticism about skills instruction. For some faculty, whose own connection to practice is thin and distant, a shift to emphasizing practice skills can threaten their sense of competence. Others may argue that it is unrealistic to develop practice-ready attorneys in three years of law school, no matter how capable a faculty would be of providing this training. Examining this issue through the lens of legal research lends additional insights into this skepticism. Faculty scholars, for whom one would presume research to be a core skill set, may have developed that skill in such an incremental and organic process that they may be unable to “unpack” the expertise they have or even recognize the sheer complexity of their expertise. This can cause an undervaluing of the skill itself.

The second challenge is competition among faculty for ownership of portions of the curriculum. If responsibility for a specific set of skills is seen as “belonging” to a particular segment of the faculty, and if that segment of the faculty have lower status in the hierarchy of the school, raising the priority of education in those skills is fraught with political tensions. This political tension and ownership issue has particularly bedeviled legal research instruction. Librarians are experts in legal research but often have uncertain or even “outsider” status among law school faculty. Moreover, librarians have shared a shifting ownership of legal research instruction with legal writing faculty, whose curricular ownership continues to grow while librarians struggle to keep pace in status and resources.

Finally, for any part of the curriculum to be given a higher profile or integrated more fully into the program of education, something has got to go. For many doctrinal teachers there is no room for sacrificing the premier place of doctrinal content to make room for greater emphasis on skills. The article explores this as “the curse of coverage”: an implicit pressure of ever-growing bodies of law and the sometimes not-so-subtle implications that bar examination results will depend on the faculty’s ability to “cover” doctrine.

Part Three of the article posits that approaches to curricular reform that are grounded in collaboration and focused on assessment of student learning can raise the profile and importance of a particular skill. Thus, this article describes such an approach to integrating skills instruction into the curriculum through the analysis of outcomes and the development of assessment devices. The process begins with assessment, which educational research emphasizes as driver of much learning. Assessment begins with defined learning outcomes. Herein lies one of the challenges for skills instruction: to move beyond an “I know it when I see it” description of skill outcomes to articulate detailed, concrete, and measurable components of those skills and agree upon realistic proficiency levels for our graduates. The article describes efforts to develop assessment instruments and measures for legal research as an example of the process faculty might use in designing assessment programs for any skill in the curriculum. Finally, the article explores the ways in which assessment leads to curricular change and prioritization, as results of assessments drive improvements in both teaching and learning.

## I. SKILLS BEYOND LEGAL ANALYSIS: WHO CARES AND HOW MUCH?

At a national level, legal education’s learning priorities are reflected in national conversations about curriculum and law school accreditation standards. In

many law schools, in contrast, the process of curriculum prioritization depends as much on the individual preferences of faculty members as it does on any collective decision-making.<sup>9</sup> Before any law school can systematically incorporate more skills instruction into the curriculum, the faculty must decide collectively which skills are important. Faculty must rank the relative importance of one skill or another and determine the value of skills instruction in general compared with the other learning goals in the curriculum. This process is part of an overall process termed “curriculum mapping” in the assessment literature. “Curriculum mapping is at its essence a process—a process of collecting and analyzing data that identifies the core content and assessments used in curriculum for subject areas—with the purpose of improving communication and instruction throughout the curriculum.”<sup>10</sup>

To make these choices, law schools may look to external constituencies for information about the relative importance of learning goals. Those external constituents have placed a high priority on legal research skills.<sup>11</sup> Internally, law schools must recognize that any change in the curriculum or priority of learning goals for students is an allocation of scarce resources and be honest about those choices. The evidence of current law school curricula indicates that legal research instruction is not a high priority for many faculty members and, for those that do place a priority on the skill, competition for ownership of the instruction undermines development of improved learning.

#### *External Sources of Evidence of the Priority of Legal Skills in the Curriculum*

How might a law school choose the skills learning goals for graduates and the methods for delivering instruction toward those goals? Three external sources should influence this decision: the experience of lawyers, the standards of the legal profession, and the standards of accreditation of law schools.

One criterion for choosing the relative importance of a skill is its centrality to the practice of law. On this measure, legal research would appear to rank very highly. When one recognizes that research requires a complex analytical process, rather than merely a ministerial task, the connection between legal research and problem solving in all types of practice is apparent. Effective legal research requires a marrying of a thorough understanding of doctrinal categories and legal institutions<sup>12</sup> with the practical demands of uncertain and shifting facts and boundary-expanding claims and concerns of clients. Legal research, like so many

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9. Brooke J. Bowman, *Researching Across the Curriculum: The Road Must Continue Beyond the First Year*, 61 OKLA. L. REV. 503, 549 (2008) (noting that faculty “may believe that the content of their courses is just that – theirs.”)

10. Debra Moss Curtis & David M. Moss, *Curriculum Mapping: Bringing Evidence-Based Frameworks to Legal Education*, 34 NOVA L. REV. 473, 477 (2010).

11. See *infra* notes 18-23 and accompanying text.

12. The American Association of Law Libraries, Legal Research Competencies and Standards for Law Student Information Literacy define “fundamental research skills” that students should possess as: “understanding of the complexities of the legal system.” American Association of Law Libraries, *AALL Legal Research Competencies and Standards for Law Student Information Literacy* (July 2012), available at <http://www.aallnet.org/main-menu/Leadership-Governance/policies/PublicPolicies/policy-lawstu.html>.

professional skills, cannot be divorced from skills of problem identification<sup>13</sup> and issue framing.<sup>14</sup>

With the increasing complexity,<sup>15</sup> diversity,<sup>16</sup> and volume<sup>17</sup> of information an attorney can bring to the representation of a client, legal research skills are more important than ever. In their study commissioned by the Law School Admissions Service, Marjorie M. Shultz and Sheldon Zedeck<sup>18</sup> identified eight categories of characteristics correlated with lawyer effectiveness. One of these was “research and information gathering abilities,” which included researching the law, interviewing skills, and fact-finding skills.<sup>19</sup> Surveys of hiring partners indicate that most consider legal research competency essential for new attorneys.<sup>20</sup> This is especially so for younger attorneys.<sup>21</sup> The most recent survey of law firm associ-

13. Paul D. Callister, *Time to Blossom: An Inquiry into Bloom's Taxonomy as a Hierarchy and Means for Teaching Legal Research Skills*, 102 LAW LIBR. J. 191, 200 (2010) (“Recognizing that there is an information problem or deficit is essential to professional standards for information literacy”).

14. *Id.* at 207-08. The process of “working the problem” is “identical” to the “issue spotting” common to exams in most substantive law school courses. *Id.* The difference is that those problems require reliance upon what a student has already learned through course readings and lectures, whereas in a research course, such problems require active learning in the classroom and lifelong learning after graduation. *Id.*

15. While many areas of law were once the province of local (state) authority only, today, law governing even traditionally state-dominated fields of law such as family law or professional regulation have acquired federal and international standards. See Daniel R. Coquillette & Judith A. McMorro, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation*, 48 SAN DIEGO L. REV. 123 (2011); Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007-2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713 (2009).

16. The “Brandeis Brief” in *Muller v. Oregon*, 208 U.S. 412 (1908), incorporating social science or other non-legal authority, was a radical development in legal authority. Today, attorneys must be able to locate legal and non-legal authority for most representations. This blurring of what constitutes “authority” in representing a client has been hastened by changes in ownership of legal publishing companies: “What once was a bright-line border between legal information and “other” sources is fading as integrated information providers offer sources of all sorts through legal portals.” Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 311 (2000).

17. The internet has increased the availability of legal authority to include more decisions of more courts, tribunals and agencies than ever before. F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 564 (2002).

18. Marjorie M. Shultz & Sheldon Zedeck, *Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering* 26 (2008),

<http://www.law.berkeley.edu/files/bclbe/LSACREPORTfinal-12.pdf>. In a survey of members of the Arizona bar, 94% of the respondents rated legal research (library and computers) as “essential” or “very important” to first year associated in a small, general practice firm. Professor Marjorie Shultz is a law professor at Boalt Hall School of Law, and Sheldon Zedeck is a Professor of Psychology, both of University California, Berkeley. Their initial study was funded by the Law School Admissions Council. See also, BEST PRACTICES, *supra* note 2, at 78.

19. Shultz & Zedeck, *supra* note 18.

20. 92% of the partners in small Chicago firms expected new associates to be able to conduct traditional legal research and 84% expected online research proficiency. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 490 (1993). See also Frances Kahn Zemans & Victor G. Rosenblum, *Preparation for the Practice of Law — The Views of the Practicing Bar*, 5 LAW & SOC. INQUIRY 1, 16 (1980) (ninety-one percent of respondents expected entry-level attorneys to be proficient in legal research).

21. Susan Nevelow Mart, et. al., *A Study of Attorneys' Legal Research Practices and Opinions of New Associates' Research Skills* 8, June 2013, <http://www.aallnet.org/sections/all/storage/committees/practicetf/final-report-07102013.pdf> (reporting a weak negative correlation between years in practice and time spent on legal research); Steve Lastres,

ates indicates that law firm associates indicated they spend about 15 hours a week, or nearly a third of their work time, conducting legal research. However, even among attorneys with substantial practice experience, research plays a critical role in their practice.<sup>22</sup> Most law firms expect new attorneys to have strong legal research skills but that few provide formal training.<sup>23</sup> About half of the attorneys surveyed thought that law schools needed to include more education in legal research.<sup>24</sup> In sum, research is a key component of practice, one for which few firms provide training and nearly half of new attorneys desire better law school preparation.

A second criterion for ranking the importance of a skill might be the consequences of poor development of that skill. Failure to conduct legal research competently harms clients and the profession. Research is a core professional responsibility in representing clients.<sup>25</sup> Courts are increasingly assuming that attorneys can access relevant and timely information because of the increased availability of authority through an ever-widening range of sources.<sup>26</sup> While the amount of research being conducted by librarians,<sup>27</sup> research attorneys, and outsourced technicians<sup>28</sup> may be increasing, attorneys are ultimately responsible for the quality of that research and may not delegate the ultimate responsibility for its accuracy and

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*Rebooting Legal Research in a Digital Age* 3, <http://www.llrx.com/files/rebootinglegalresearch.pdf>, (last visited August 13, 2013) (“new associates spend a significant amount of time doing legal research, about 31% of their time or 14.5 hours per week on average. For associates in practice less than two years, the percentage is even higher, with respondents reporting that 35% of their time at work per week is spent on legal research.”).

22. Susan Nevelow Mart, *supra* note 21, at 9 (Nearly half of the 600 attorneys surveyed indicated that they spend “up to 15%” of their time per week on research on average” 10.3% spend at least half of their time conducting legal research on average; approximately one-quarter spend “at least 15% but not more than 25%” of their time on research.”).

23. Steve Lastres, *supra* note 21, at 2 (“56% of the survey associates indicated that their employer expected them to have strong legal research skills.... only 29% of respondents said they received some formal training, and that percentage falls to a mere 12% for those in small firms.”)

24. *Id.* at 6.

25. MODEL CODE OF PROF'L RESPONSIBILITY Rule 1.1. While the prior Code of Professional Conduct did not address research specifically, its centrality to competent representation was implied by the requirement that attorneys “prepare” cases adequately and insure that courts are “fully informed on the applicable law”. MODEL RULES OF PROF'L CONDUCT, EC 6-4 & EC 7-23 (1980).

26. See generally, Lawrence Duncan MacLachlan, *Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607 (2000) (arguing that the increased availability of legal research makes failure to conduct research more clearly subject to discipline). See, e.g., Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (*en banc*) (*per curiam*)(Attorneys must “use reasonable efforts to examine the litigation history” of jurors selected but not empanelled by searching the court’s web-based docket system (Case.net)).

27. The American Lawyer 2012 Survey of Law Librarians indicated that law firm libraries generated an average of 426 hours annual billable hours by research librarians. 59% of private law firm librarians believe they are performing work formerly done by associate-level attorneys. THE AMERICAN LAWYER, LAW LIBRARIAN SURVEY 2012 (distributed at 2012 Conference of the American Association of Law Librarians) (on file with author).

28. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008)(providing that attorneys may use outsourcing so long as the attorney insures the competence and ethical conduct of the service providers).

completeness.<sup>29</sup> Nor may third-party payors, such as insurance companies, dictate who or how much research is necessary, as that is the attorney's responsibility.<sup>30</sup>

Much inadequate research likely goes undiscovered, as clients are unlikely to realize that their attorneys have based advice, negotiation or transactional planning on bad research. This is particularly so if the attorney's advice and representation is untested by an adversarial process or when the attorney's poor research leads them to overlook solutions, rights or defenses, so that clients are simply told "there's nothing I can do for you." However, when incompetent research does come to light, discipline,<sup>31</sup> or malpractice liability<sup>32</sup> often follow. For example, Rule 11 of the Federal Rules of Civil Procedure requires that pleadings be "warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."<sup>33</sup> A pleading based on inadequate research often would risk violating this standard. As the court responded in a case in which the attorneys argued that the nature of their practice sometimes required that they filed pleadings in advance of doing legal research:

An attorney who wants to strike off on a new path in the law must make an effort to determine the nature of the principles he is applying (or challenging); he may not impose the expense of doing this on his adversaries – who are likely to be just as busy and will not be amused by a claim that the rigors of daily practice excuse legal research.<sup>34</sup>

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29. See *Graham v. Dallas Independent School District*, No. 3:04-CV-2461-B, 2006 WL 2468715 (N.D. Texas Aug. 24, 2006) (attorney disciplined for turning over legal research to a non-lawyer research firm).

30. OH Adv. Op. 2000-3 (Ohio Bd. Com. Griev. Disp.), 2000 WL 1005223 (Attorneys must not yield professional control of their legal work to an insurer. Guidelines that restrict or require prior approval before performing computerized or other legal research are an interference with the professional judgment of an attorney. Legal research improves the competence of an attorney and increases the quality of legal services. Attorneys must be able to research legal issues when they deem necessary without interference by non-attorneys. Guidelines that dictate how work is to be allocated among defense team members by designating what tasks are to be performed by a paralegal, associate, or senior attorney are an interference with an attorney's professional judgment. Under the facts and circumstances of a particular case, an attorney may deem it necessary or more expedient to perform a research task or other task, rather than designate the task to a paralegal. This is not a decision for others to make).

31. Attorneys have been subject to discipline for inadequate legal research. See, e.g., *State ex rel. Counsel for Discipline v. Orr*, 759 N.W.2d 702 (Neb. 2009) (lawyers should not take on "cases in areas of law with which they have no experience, unless they are prepared to do the necessary research to become competent in such areas or associate with an attorney who is competent in such areas"); *Attorney Grievance Comm'n of Maryland v. James*, 385 Md. 637, 656-57, 870 A.2d 229, 240-41 (2005) ("even cursory research ... would have revealed that ... public policy would not allow tort damages based upon adultery."); *But see, Barrett v. Virginia State Bar ex rel. Second Dist. Comm.*, 272 Va. 260, 272, 634 S.E.2d 341, 347 (2006) ("discipline ... under Rule 1.1 is not justified based on research that results in the wrong legal conclusion because incorrect legal research alone, although attorney error, is not clear and convincing evidence of incompetence for purposes of that Rule).

32. See, e.g., *Helmbrecht v. St. Paul Ins. Co.*, 362 N.W.2d 118 (Wis. 1985) (failure in researching community character of retirement benefits in divorce); *Jerry's Enter. Inc. v. Larkin, Hoffman, Daly & Lindgren Ltd.*, 711 N.W.2d 811 (Minn. 2006) (failure to properly research and anticipate a change in the law that caused an expensive dispute in a real estate transaction).

33. FED. R. CIV. P. 11(b)(2). See generally, Marguerite T. Butler, *Rule 11-Sanctions and a Lawyer's Failure to Conduct Competent Legal Research*, 29 CAP. U. L. REV. 681 (2002) (reviewing cases).

34. *In re TCI, Ltd.*, 769 F.2d 441, 447 (7th Cir. 1985) (awarding fees against attorney for inadequate research).



Courts are unlikely to lightly excuse poor legal research as the consequences of this breach of duty not only burden adversaries and the courts but, most obviously, clients, whose legal rights may be jeopardized by poor research. For example, Professor Douglas Abrams notes in his review of the landmark<sup>35</sup> decision that the quality of the research supporting each side's brief was pivotal in determining the outcome.<sup>36</sup> He points out that *Lochner's* attorney "submitted a lengthy, carefully researched brief whose appendix supplemented legal doctrine with research from medical journals" while the New York Attorney General's brief provided "few citations to precedent, and barely any mention of medical authorities."<sup>37</sup>

The poor briefing in *Lochner* may not be an aberration. In an extensive review of several hundred summary judgment briefs in employment law cases in two jurisdictions where there were splits of authority regarding the availability of a key defense, Professor Scott Moss found that most plaintiff's briefs did not cite case law rebutting the defense arguments,<sup>38</sup> and that these poorly researched briefs lost at twice the rate of good briefs.<sup>39</sup> He notes that some of these losses may be attributable to poor case selection as well, which is yet another area in which poor research leads to poor decision-making.<sup>40</sup>

The legal system as a whole suffers along with poorly represented clients when attorneys fail to conduct adequate legal research. For example, Professor Moss observes in his study of the employment law cases that the prevalence of poorly researched and drafted briefs skews case law in favor of defendants, who more often have greater resources for research. Even if the outcome is against a plaintiff, an opinion in which case based on equally well-researched and written briefs presents a more balanced development of the law.<sup>41</sup> Likewise, Professor Abrams notes the "sound and fury" that followed the 2008 decision in *Kennedy v. Louisiana* when key research only came to light after the decision. The issue in that case turned on the degree of consensus on the appropriateness of the death penalty for nonfatal child rape.

As the Court surveyed the landscape of American law and disagreed about the consensus issue, no Justice mentioned that Congress had overwhelmingly authorized capital punishment for nonfatal child rape under military law in 2006, and that a 2007 presidential executive order had implemented the legislation by adding the authorization to the Manual for Courts-Martial. The *Kennedy* majority and the dissenters overlooked these authorities because no party or *amicus* had cited or discussed them in their briefs.<sup>42</sup>

35. *Lochner v. New York*, 198 U.S. 45 (1905).

36. Douglas E. Abrams, *Lochner v. New York (1905) and Kennedy v. Louisiana (2008): Judicial Reliance on Adversary Argument*, 39 *Hastings Const. L.Q.* 179, 181-82 (2011).

37. *Id.* at 181.

38. Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects* 22-23 (2013) available at [http://works.bepress.com/scott\\_moss/4/](http://works.bepress.com/scott_moss/4/).

39. *Id.* at 26-27. Professor Moss concludes that 72% of the plaintiffs' briefs were deficient, many failing to reflect any research whatsoever. *Id.* at 18.

40. *Id.* at 26-27.

41. *Id.* at 28 ("good plaintiffs' briefs generate more pro-plaintiff caselaw than bad briefs, even controlling for win rate.")

42. Abrams, *supra* note 36, at 181.

Professor Abrams notes the extraordinary challenge this oversight posed for the Court, in deciding a controversial issue without key research. The complexity and specialization of modern law, he argues, heightens the professional obligation of attorneys to find and bring that law to the attention of the court. The very system of common law development, then, relies upon each attorney's "meticulous legal research, free from assumptions and reliance on adversaries to point out potential shortcomings."<sup>43</sup>

Presuming that the role of a law school should be to prepare students to recognize and meet their basic professional responsibilities to clients, courts, and the development of the law, it would seem that legal research should be given high priority, communicating its central role to professional practice and equipping graduates with sufficient skills to meet those professional standards.

A third criterion for determining the importance of a skill to legal education might be the place of the particular skill in national conversations about legal education. Here, while legal research has always had been recognized as a core legal skill, the priority given to that skill has waxed and waned.

A 1979 ABA report entitled "Lawyer Competency: The Role of Law Schools" (the "Cramton Report") recommended that law schools engage students in a range of lawyering competencies.<sup>44</sup> Legal research was treated as a well-established part of the skills curriculum.<sup>45</sup> Likewise, legal research played a prominent role in the 1992 report of the ABA Task Force on Law Schools and the Profession: Narrowing the Gap (now known as the MacCrate Report). The MacCrate Report identified legal research as one of the key legal skills for which all law graduates should have competency.<sup>46</sup> The Report noted that "Prior to the advent of the clinical legal education movement in the 1960's, the role of law schools in the professional development of lawyers was confined, with few exceptions, to the teaching of analytical skills, substantive law, and the techniques of legal research."<sup>47</sup>

More recent national conversations within legal education reflect a minimal priority on legal research. The Carnegie Report gives legal research only scant mention, primarily in the context of descriptions of historical components of legal education.<sup>48</sup> Best Practices cites prior bar surveys indicating the importance of legal research, but devotes only one sentence to the particulars of teaching legal research: "For example, a law school may decide that legal research skills can be

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43. *Id.* at 190.

44. AM. BAR ASS'N, TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 1 (1979).

45. *Id.* at 3. "In addition to being able to analyze legal problems and do legal research, a competent lawyer must be able effectively to write, communicate orally, gather facts, interview, counsel, and negotiate." *Id.*

46. AM. BAR ASS'N, *Statement Of Fundamental Lawyering Skills And Professional Values*, in TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 31-37 (1992) [hereafter THE MACCRATE REPORT].

47. *Id.* at 233. Legal research instruction in law schools has existed for over 100 years. See Robin K. Mills, *Legal Research Instruction in Law Schools, The State of the Art or, Why Law School Graduates Do Not Know How to Find the Law*, 70 LAW LIBR. J. 343 (1977) (noting that articles about teaching legal research have been published as long ago as 1903) (citing Edward Q. Keasbey, *Instruction in Finding Cases*, 1 AM. L. SCH. REV. 69 (1903) and Charles C. Moore, *Law School Instruction in How to Find the Law*, 7 LAW NOTES 64 (1903)).

48. Paul D. Callister, *The Metacognitive Imperative* (draft chapter, on file with author).

introduced, practiced, and mastered by the end of the first year of law school, whereas problem-solving skills are introduced and practiced in the first year, practiced again in the second year, and not mastered until the third year.”<sup>49</sup> The suggestion suggests a common attitude toward legal research skills; that is, that legal research is a limited set of mechanical tasks rather than a set of complex analytical tasks.<sup>50</sup>

Perhaps the most powerful external voice influencing law school curricula is that of the American Bar Association speaking through its accreditation standards. Early standards of accreditation provided very little guidance on the content of the curriculum, requiring only “a sound educational policy.”<sup>51</sup> Research, however, was implicitly part of that policy as the standards did require adequate library facilities for student use.<sup>52</sup> Thus, while other skills have only recently been emphasized in law school accreditation standards, legal research has been an implicit part of the ABA Council of the Section of Legal Education standards since the early 20<sup>th</sup> century. However, unlike other skills, which have found their directives in standards for the program of legal education, research instruction has been emphasized more often in standards relating to the library than the classroom. This segregation is likely to influence how law schools value instruction of legal research.

In 1973 the standards governing accreditation were comprehensively revised, addressing curriculum for the first time.<sup>53</sup> The mission of law schools reflected in those standards was to prepare students for “admission to the bar” rather than the practice of law.<sup>54</sup> Nonetheless, Standard 302 was added, providing more direct curriculum mandates for the first time, and becoming the battle ground for curriculum reform. Required instruction included “subjects generally regarded as the core of the law school curriculum”<sup>55</sup> and “training in professional skills, such as counseling, the drafting of legal documents and materials, and trial and appellate advocacy.”<sup>56</sup> Finally, with Watergate and the role of lawyers under public scrutiny, the standards identified the one course that law schools were to require of all students: “instruction in the duties and responsibilities of the legal profession.”<sup>57</sup>

While Standard 302 did not explicitly identify research instruction as a critical skill, other parts of the 1973 standards implied the importance of research. Standard 303, for example, provided that law schools were required to offer op-

49. BEST PRACTICES, *supra* note 2, at 268.

50. Paul D. Callister, *Time to Blossom: An Inquiry into Bloom's Taxonomy as a Hierarchy and Means for Teaching Legal Research Skills*, 102 LAW LIBR. J. 191 (2010).

51. ALFRED Z. REED, REVIEW OF LEGAL EDUCATION IN THE UNITED STATES AND CANADA FOR THE YEAR 1928 48 (1929). Of course, before the 20<sup>th</sup> century, legal research instruction was unnecessary because “[l]awyers and law teachers of the early 1900s were not far removed from the time when a lawyer was expected to own and be familiar with all the materials needed for the practice of law.” Joyce Manna Janto & Lucinda D. Harrison-Cox, *Teaching Legal Research: Past and Present*, 84 LAW LIBR. J. 281, 281 (1992).

52. The 1928 Standards provided that a law school “shall provide an adequate library available for the use of the students.” REED, *supra* note 51, at 48.

53. AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE, Standard 301 (1973) [hereinafter 1973 ABA STANDARDS].

54. *Id.* at Standard 301.

55. *Id.* at Standard 302(a)(1).

56. *Id.* at Standard 302(a)(2).

57. *Id.* at Standard 302(a)(3).

portunities for “study in seminars or by directed research.”<sup>58</sup> Moreover, an entire section of the standards was devoted to the library and library resources<sup>59</sup> and recognized that the principal activities of the library staff were to provide “assistance to faculty and students, and may include teaching courses in the law school.”<sup>60</sup>

By 1979, the standards for the curriculum remained the same, but the importance of the library was emphasized with the admonition that “The law school library must be a responsive and active force within the educational life of the law school. Its effective support of the school’s teaching and research programs requires a direct, continuing and informed relationship with the faculty and administration of the law school.”<sup>61</sup> Through this placement in the library standards rather than the standards for the curriculum, research remained in the shadows of legal education. This continued even more in the 1983 amendments to the curriculum standards. This time the standards placed a higher priority on legal writing as a new subsection of Standard 302 now required law schools to “Offer to all students at least one rigorous writing experience.” At the same time, the requirement that law schools “offer instruction in professional skills” no longer listed examples of these skills.<sup>62</sup>

In the late 1990s, the standards for accreditation were substantially revised over a series of amendments between 1995 and 2000.<sup>63</sup> The amendments were responses to a number of factors, including an antitrust complaint filed by the U.S. Department of Justice against the American Bar Association, which required that the ABA revise standards relating to faculty compensation.<sup>64</sup> The effect of the 1992 MacCrate Report<sup>65</sup> can be seen in the series of amendments to the standards for accreditation that followed that report, each of which incrementally increased the pressure on law schools to provide greater skills instruction, with a subtle competition among those skills reflected in the detail, placement, and standards for various skills. Legal research was a steady presence among these incremental standards but did not see the types of increasingly explicit emphasis that were given to legal writing and clinical programs.

In the mid-1990s, the standards began to focus more expressly upon legal research. In 1995, the standards were amended to provide that the purpose of legal education was to prepare students “to participate effectively in the legal profession.”<sup>66</sup> The required curricular components remained the same, but new interpretations now emphasized that, to meet these standards, law schools must “adequate training in professional skills” through “clinics or otherwise.”<sup>67</sup> The standards

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58. 1973 ABA STANDARDS, *supra* note 53, Standard 303(a)(1).

59. *Id.* at Standard 601-605.

60. *Id.* at Standard 605.

61. AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE, Standard 604 (1979).

62. AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE, Standard 302(a)(i)&(ii) (1983).

63. The entire collection of ABA Standards for Legal Education from 1926 to date can be found at [http://www.americanbar.org/groups/legal\\_education/resources/standards/standards\\_archives.html](http://www.americanbar.org/groups/legal_education/resources/standards/standards_archives.html).

64. *United States v. American Bar Ass’n*, No. 95-1221 (CRR) (1995); Proposed Final Judgment, 60 Fed. Reg. 39,421.

65. MACCRATE REPORT, *supra* note 46.

66. AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE Standard 301 (1995).

67. *Id.*, Interpretation 2 of Standard 302(a)(iii).

continued to refrain from prioritizing skills beyond writing.<sup>68</sup> However, research skills once again found express attention. A new interpretation identified “fundamental core subjects, and “opportunities for training in writing, research, and professional skills” as central to compliance.<sup>69</sup> Under the pressure of the consent decree, the standards for libraries were changed from volume counts and other physical measures to focus on the adequacy of the library for the school’s mission. The library’s role in teaching legal research was addressed in interpretations to staff and service resources.<sup>70</sup>

The following year, legal research moved up from interpretations into the core curriculum mandated by the standards. Standard 302 now required that schools offer to all students instruction in “legal analysis and reasoning, legal research, problem solving, and oral and written communication.”<sup>71</sup> The requirements for a “rigorous writing experience”<sup>72</sup> and for “adequate opportunities for instruction in professional skills”<sup>73</sup> remained the same, but the clinical component of the standards was amended to require that law schools offer “live-client or other real-life practice experiences.”<sup>74</sup>

Legal research remained as a core part of the curriculum requirements thereafter. Further amendments expanded attention given to other skills. The 2006 standards upped the ante on live client experiences, by requiring “substantial opportunities” for these learning activities, but expanded the requirement of “substantial legal writing instruction” to include not only a “rigorous writing experience in the first year” but also an additional upper-level writing requirement.<sup>75</sup> While later amendments restructured how these requirements were listed, these would remain the Standards’ basic requirement skills instruction to the present time.

Perhaps the most dramatic changes in the standards are those pending at this time.<sup>76</sup> The ABA Standards committee has voted to recommend that the accreditation standards be amended to require law schools to “establish and publish learning outcomes to achieve the objectives of the academic program.”<sup>77</sup> The standards leave considerable flexibility to law schools to craft outcomes and assessment measures appropriate to their academic program.<sup>78</sup> However, the proposed standards do require competency in

68. *Id.*, Interpretation 3 of Standard 302(a)(iii).

69. *Id.*, Interpretation of Standard 302 and 303.

70. Interpretation 1 of Standard 604 indicated that one factor relevant to the necessary staff of a library included “formal teaching assignments of staff members” and Interpretation 1 of Standard 605 included among the appropriate services a library must provide “enhancing the research and bibliographic skills of students.” *Id.*, Interpretations of Standards 604 & 605.

71. AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE, Standard 302(a)(2) (1996).

72. *Id.*, Standard 302(a)(3).

73. *Id.*, Standard 302(a)(4).

74. *Id.*, Standard 302(d).

75. AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE, Standard 302(a)(2) (2004-05).

76. Council of the Section of Legal Education and Admissions to the Bar, Standards Review Committee, Proposed Revisions to Standards: Chapters 1, 3, and 4, and Standards 203(b) and 603(d) (July 24, 2013) available at

[http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/meeting\\_drafts.htm](http://www.americanbar.org/groups/legal_education/committees/standards_review/meeting_drafts.htm) (follow links to meeting materials). Proposed Standard 301(b)

77. Proposed Standard 301(b). *Id.* at 53.

78. Interpretation 302-2. *Id.* at 54.

three discrete outcomes. These outcomes are knowledge of the law, exercise of professional and ethical responsibilities, and a collection of core skills: “Legal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context.”<sup>79</sup> While legal research is given priority in the learning outcomes standards, the proposed standards on the curriculum, while expressly requiring writing experiences, professional responsibility courses, and experiential coursework, do not mandate research instruction for each student.<sup>80</sup> When all is said and done, while external constituents in practice emphasize the centrality of legal research to professionally responsible and effective representation of clients, legal research still remains in the shadows of other skills and knowledge in the hierarchy of curricular standards. Only with a commitment from law schools to give explicit attention to legal research will the outcomes of minimum competency in this skill be achieved.

### *B. Internal Evidence of Curricular Priorities*

With external constituents giving such substantial recognition of the central role of legal research skills in the practice of law, one would expect that instruction in this skill would be have a priority place in the law school curriculum and graduates would be entering practice with at least as much competence in this skill as they would have in other skills long-recognized as central parts of the curriculum. This does not appear to be the case, however.

Graduates take very poor legal research skills into practice. In a review of seven law firm surveys between 1986 and 2009 revealed that attorneys and private firm law librarians continued to indicate that student and graduate research skills are poor.<sup>81</sup> Clinical faculty in law schools report similar concerns.<sup>82</sup> Particular deficiencies often cited are the failure to plan research, the failure to use secondary materials, the tendency to rely on Google rather than print research, and ignorance of cost-effectiveness in research.<sup>83</sup>

Attorneys who supervise new lawyers report varying degrees of skill in legal research.<sup>84</sup> For those research skills traditionally emphasized in first-year research instruction, such as case law and statutory research, about 90% of new attorneys were rated as having adequate or better skills.<sup>85</sup> Likewise, the analytical training

79. Proposed Standard 302. *Id.* at 54.

80. Proposed Standard 303. *Id.* at 53.

81. Patrick Meyer, *Law Firm Legal Research Requirements for New Attorneys*, 101 LAW LIBR. J. 297, 302-308 (2009).

82. Carolyn R. Young & Barbara A. Blanco, *What Students Don't Know Will Hurt Them: A Frank View from the Field on How to Better Prepare Our Clinic and Externship Students*, 14 CLINICAL L. REV. 105, 116-17 (2007) (citing survey revealing inadequacy of legal research skills of students in clinics and externships).

83. Meyer, *supra* note 81.

84. Susan Nevelow Mart, *supra* note 21, at 77-94.

85. *Id.* at 81-82 (64.3% of new attorneys were rated as able to conduct case law research “moderately well” or “very well” and the skills of another 28.5% were rated as adequate. Skills in research stat-

law students receive was reflected in ratings of new lawyer's abilities to demonstrate critical thinking in evaluating the relevance of the products of their research, with about 38% of new attorneys having good or very good evaluative skills and 42% having adequate evaluative skills.<sup>86</sup> However, many new lawyers lacked other skills. Over a quarter of new lawyers were rated as having poor or unacceptable skills in using secondary sources effectively,<sup>87</sup> researching court documents,<sup>88</sup> locating non-legal information,<sup>89</sup> or researching administrative decisions.<sup>90</sup> The same percentages of attorneys were deficient in such fundamental research skills as performing cost-effective research<sup>91</sup> or knowing when to stop.<sup>92</sup>

Perhaps the clearest evidence of the place of legal research, or any skill instruction, is to be found in the courses a law school requires and offers and in the resources it allocates to the faculty members teaching those courses. On this basis, the situation reported in the Carnegie report in which doctrine and analysis are at the core and other skills are in the shadows continues to be the norm.

Required coursework in all law schools is largely doctrinal. Of the roughly 90 hours necessary for graduation in most law schools, almost half of those hours are in required courses.<sup>93</sup> While credit hour allocations have shifted slightly, the first-year curriculum at most law schools has remained unchanged since at least 1975.<sup>94</sup> Of the roughly 30 hours required in the first year of most law schools, between 24 and 26 hours are devoted to doctrine-focused courses such as Torts or Contracts.<sup>95</sup> Of all required courses in the curriculum, few emphasize skills.<sup>96</sup>

That is not to say that it would be impossible to integrate skills into a traditional doctrinal course. How do we know whether the learning outcomes for doctrinal courses include skills outcomes? Curriculum surveys rarely drill down far

utes were similar, with 55.6% rated as being able to conduct this research moderately or very well and 32.4% adequately.).

86. *Id.* at 79.

87. *Id.* at 78 (26.2% had skill ratings of poor or unacceptable; 44.2% adequate).

88. *Id.* at 92 (33% had skill ratings of poor or unacceptable; 38% adequate).

89. *Id.* at 94 (43.3 had skill ratings of poor or unacceptable; 34.4% adequate).

90. *Id.* at 84. (44% had skill ratings of poor or unacceptable; 31.7% adequate).

91. *Id.* at 88 (37.7% had skill ratings of poor or unacceptable; 34.3% adequate).

92. *Id.* at 93 (42.3% had skill ratings of poor or unacceptable; 35% adequate).

93. AM. BAR ASS'N, A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010 (Catherine L. Carpenter, ed.) (2012) [hereinafter ABA SURVEY]. The ABA Survey of curriculum reports that in 2010, the average units for required for graduation was 89 units and the median was 88 units. *Id.* The largest number of reporting schools reported 90 credit hours. *Id.* at 28-29. Of these, the first year of law school typically takes 30-32 credit hours, all of which are required in the majority of law schools. *Id.* at 48. The American Bar Association requires three additional courses beyond the first year: Professional Responsibility, an upper-division writing experience, and a course providing "other professional skills." *Id.* at 31. At an average of 2 credit hours each, this makes an addition 6 required credit hours. *Id.* Finally 76% of law schools have additional required courses beyond the first year, the most common being Constitutional Law (if not offered in the 1L year), Evidence, Advanced Legal Writing, and Business Organizations. *Id.* at 67.

94. The "typical" 1L curriculum in 2010 includes Contracts, Torts, Property, Criminal Law, Civil Procedure, Constitutional Law, Legal Research and Writing and one other course. *Id.* at 55. "The course requirements for the first-year lineup continued to be comprised of the same courses first reported ... in 1975." *Id.* at 50.

95. *Id.*

96. In the first-year curriculum, only Legal Research and Writing focuses on skills. *Id.* at 67, Figure 53. Of the most commonly required courses in the upper-level curriculum, few schools require skills courses. *Id.* About 28% of schools require an upper-division writing course (46/160) and 20% require a trial practice course (32/160). *Id.* Only 11 out of 160 schools require a clinical experience. *Id.*

enough to identify discrete learning goals<sup>97</sup> but anecdotal evidence and the evidence to be drawn from reviews of course textbooks point to two primary learning goals in the required doctrine-focused curriculum: knowledge of content and the acquisition of analytical skills. Some faculty might introduce this knowledge and analytical development in the context of practice skills such as interviewing, drafting, or negotiation. However, the evidence of the casebooks in first-year courses points to the conclusion that these other practice skills are rarely the predominant learning goal in these courses. For example, a review of casebooks in two required doctrinal courses indicates that few casebooks even address the subject of research and those that do, provide only commentary on sources of law with little indication of how those sources might be located.<sup>98</sup>

While skills-focused courses in the first year such as legal research and writing have expanded in credit hours over time,<sup>99</sup> so too have the range of skills expected to be introduced in those hours.<sup>100</sup> Of the first-year legal writing requirement, whether in a combined or separate course, legal research comprises about small percentage of time.<sup>101</sup> Thus, in the first-year curriculum, knowledge of doctrine and basic analytical skills of case analysis and rule application remain the predominant learning goals.

In the upper-level required curriculum, one might expect to see a shift toward a greater variety of learning goals. Here, the evidence from the ABA curriculum survey indicates that, while most law schools offer a variety of skills courses, the majority of curricular hours offered still continue to be in doctrinal-focused courses.<sup>102</sup> Upper-level required courses are largely doctrinal, such as evidence or constitutional law.

Accreditation standards have influenced schools to improve their skills offerings. Standard directs all law schools to require an upper-level writing require-

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97. The only evidence of integration of skills into doctrinal courses from the ABA curriculum survey is found in the observation that a number of schools indicated that their students can fulfill the school's "other professional skills" requirement by taking an "advanced doctrinal elective that had sufficient amount of skills instruction to meet ABA Standard 302(a)(4)." *Id.* at 42. The number of schools for which this is true could not be ascertained from the report however.

98. For example, in Property, out of nine popular textbooks, five had an average of seven pages that mentioned research sources. Of seventeen Professional Responsibility texts comprised of over 13,000 pages, only 122 total pages addressed sources of law and only two pages addressed research tools. I do not include my own text in this survey, as it attempts to respond to the calls for integration I make in this article by incorporating research assignments and instruction in most chapters, though even in this text that integration amounts to only 33 of the text's 633 pages. BARBARA GLESNER FINES, PROFESSIONAL RESPONSIBILITY (2013) (research on file with author).

99. ABA SURVEY, *supra* note 93, at 46.

100. Of the 160 respondents to this question, the vast majority (140 schools or 88%) reported professional skills components beyond research and written work in the first-year legal research and writing course. *Id.* at 50. Figure 46. The most often selected response was Appellate Advocacy (91%), but Interviewing, Counseling, and Negotiation were each selected by at least 25% of the respondents. *Id.*

101. Two schools (2%) reported that less than ten percent of the course was devoted to legal research. *Id.* at 61, Figure 47. Forty-seven schools (36%) indicated that 10 to 20 percent of the course was devoted to legal research. *Id.* Fifty-five schools (42%) answered that between 20 and 30 percent of the course was devoted to legal research, and 27 schools (21%) responded that more than 30 percent of their legal research and writing course was devoted to legal research. *Id.*

102. Over half the law schools offer ten or more courses to satisfy the professional skills requirement. *Id.* at 75, Figure 61. Out of an average of 132 different upper-division course titles, this is a small percentage.



ment.<sup>103</sup> Likewise, the ABA has recently required that all law schools have an “other professional skills” requirement in the upper-level curriculum<sup>104</sup>, to which most law schools devote 2-3 credit hours of a menu of skills courses.<sup>105</sup> Beyond that, only about 3% of law schools require an additional skills course, such as clinic.<sup>106</sup> Thus, of the required upper-level curriculum, only 4 to 6 credit hours are in broadly defined skills courses. Upper-level skills courses have grown, but not to the point of competing with the largely doctrinal focused curriculum.<sup>107</sup> Clinical and externship opportunities are limited.<sup>108</sup>

Clearly the picture is changing in many law schools, especially as to upper-level writing courses. However, the addition of skills course options to a largely doctrinal focused curriculum is not the same thing as integrating skills throughout the curriculum. The growth of the number of course titles offered by law schools in recent years<sup>109</sup> indicates that these additions may simply be that: additions to an already crowded curriculum.

When one focuses specifically on legal research skills in this landscape, it is easy to conclude that “[t]he curriculum often does not recognize legal research as a necessary, intellectual skill.”<sup>110</sup> While every law school does require students to have legal research instruction, at the overwhelming majority of law schools, research is taught as part of the legal writing program, with the number of schools reporting integrated programs growing each year between 2000 and the present.<sup>111</sup>

103. AM. BAR ASS'N, STANDARDS & RULES OF PROCEDURE, Standard 302(a)(2) (2004-05).

104. AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE, Standard 302(a)(4) (2012).

105. Of the 162 respondents to Question 10, 41 law schools (25%) reported that students must take a certain course or courses to fulfill the “other professional skills” instruction requirement, but the majority of respondents (121 law schools - 75%) permitted students to choose from a designated list of courses. ABA SURVEY, *supra* note 93, at 59, Figure 61. The course most frequently required by the 41 respondents to meet ABA Standard 302(a)(4) was Upper Division Legal Writing (26 law schools - 63%). *Id.* “The most popular professional skills courses offered in 2010 were Trial Advocacy-basic (98%), Alternative Dispute Resolution (89%), and Appellate Advocacy (88%) followed by Mediation (85%) and Transactional Skills (78%).” *Id.* Only 49 of 124 responding schools indicated that students may choose an advanced research skills course to fulfill the upper-level skills requirement. *Id.* at 38.

106. *Id.* at 33.

107. Of the 32 courses the ABA identified as added to the curriculum of law schools in recent years, seven are facially skills courses. *Id.* at 74, Figure 60. However, three of the six courses added by the most law schools were skills courses (Alternative Dispute Resolution, Drafting, and Trial/Appellate Advocacy). *Id.*

108. “Schools with in-house clinics offered an average and median of three clinics. Schools with off-site clinical opportunities offered an average of three with a median of two experiences. The largest number of in-house opportunities was 11, and the smallest was one. The largest number of off-site opportunities was 14, which was a bit of an outlier, as most schools at the higher end of the scale offered eight or nine opportunities. Again, the lowest number of off-site opportunities was one. Of the 162 respondents to this Section, 156 law schools (96%) offered at least one externship opportunity in 2010 in one of the eight areas.” *Id.* at 76-77, Figure 63.

109. The average number of upper-division course titles law schools offer is 132; the median 119, with many schools offering over 150 course titles. *Id.* at 64 (noting “an increase in titles and a widening among law schools in terms of the number of upper division course titles”).

110. Boulder Research Education and Boulder Statement on Legal Research Education: Signature Pedagogy Statement, *available at* [http://www.utexas.edu/law/faculty/pubs/bb26663\\_pub.pdf](http://www.utexas.edu/law/faculty/pubs/bb26663_pub.pdf) (last visited Apr. 6, 2011).

111. The Association of Legal Writing Directors/Legal Writing Institute annual survey reports are the best source of data on these courses, though the majority of the survey questions relate to the status of legal writing faculty (salary, title, tenure, etc.) and only two questions address research instruction expressly. ASS'N OF LEGAL WRITING DIRECTORS, Surveys, <http://www.alwd.org/surveys/> (last visited

Research instruction is only a small part of the broad range of learning goals targeted by these first-year courses. In any given first year writing course that incorporates legal research, students will likely also be taught basics of the structure of the legal authority; pre-writing analytical processes; organization, grammar, usage, and style in writing; appropriate format and tone for a variety of legal documents; citation format; professionalism; and a variety of oral communication skills.<sup>112</sup> Bibliographic instruction in sources of legal research may be separated out for special “workshops” outside the regular structure of the coursework. Most courses will include research exercises separate from writing exercises as well as “open research” writing assignments. Needless to say, with all the learning goals jostling for priority in these courses, students cannot be expected to have acquired much competency in legal research in the first year.

Beyond the first year, there are several ways to integrate legal research instruction into the upper-level curriculum. The most obvious way to develop legal research skills (or any skill) is to develop specialized courses. Advanced legal research courses in the curriculum have grown over time: from 4 reported courses in 1973 to 17 in 1985<sup>113</sup> to 2011, when 67 schools reported an advanced legal research course that counted toward a required upper-level writing requirement<sup>114</sup> and 137 schools that reported courses taught by librarians.<sup>115</sup> Only ten law schools require an upper-level course specifically focused on legal research skills.<sup>116</sup>

These specialized upper-level skills courses are one way to increase skills instruction,<sup>117</sup> but they suffer from limited availability and, to the extent they are not directed toward particular types of practice,<sup>118</sup> can suffer from a lack of context. An important alternative for significantly improving research instruction is in

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Aug. 23, 2013) [hereinafter ALWD/LWI Survey]. In 2000, 103 of 137 (75%) respondents reported an integrated program. By 2012, the number had increased to 159 out of 183 respondents (83%). *Id.*

112. *Id.*

113. S. Blair Kauffman, *Advanced Legal Research Courses: A New Trend in American Legal Education*, 6 LEG. REF. SERV. Q. 123, 123 & n.1 (Fall/Winter 1986).

114. ALWD/LWI 2011 Survey, *supra* note 111, Question 33. The ABA curriculum survey identified 33 schools as having added advanced legal research to their curriculum since 2002. ABA SURVEY, *supra* note 58, at 74, Figure 60. In terms of these courses fulfilling the upper-level writing requirement, the ALWD survey reports greater use of the advanced research course than the ABA Survey, which does not list advanced research courses in those courses commonly permitted to fulfill the upper-division legal writing requirement. *Id.* at 39, Figure 20.

115. ALWD/LWI 2011 Survey, *supra* note 111, Question 35. Schools also offer advanced legal research taught by faculty other than librarians. *Id.* For example, the 2011 survey results indicate that 13 courses are taught by legal research and writing full-time faculty and 21 taught by other full-time faculty. *Id.* However, because respondents can select more than one category, these could be additional courses in the same schools as the 137 schools indicating that advanced legal research was taught by librarians.

116. *Id.* Another 56 schools do not require advanced research but permit students to fulfill some upper-level writing requirement through that course.

117. Among law librarians, a long-standing debate focuses on whether legal research should be taught in the first year or upper-level. For the classic argument in favor of teaching research in the upper-level curriculum. See Robert C. Berring & Kathleen Vanden Heuvel, *Legal Research: Should Students Learn It or Wing It?*, 81 LAW LIBR. J. 431 (1989).

118. A survey of advanced legal research courses indicated that approximately one-quarter of these courses are subject specific, with taxation being the most popular topic. Ann Hemmens, *Advanced Legal Research Courses: A Survey of ABA-Accredited Law Schools*, 94 LAW LIBR. J. 209, 233 (2002).

upper-level seminars and other intensive writing courses and activities.<sup>119</sup> In part because a second substantial writing experience is required by accreditation standards, nearly all law schools have a required upper-level writing requirement.<sup>120</sup> The two most common methods used to fulfill this requirement are scholarly papers (journals, seminar papers, etc.) and advanced advocacy (including moot court competitions).<sup>121</sup> We do not know how much direct research instruction occurs in these classes. Without this instruction, student research in these settings may be conducted on a trial-and-error basis, with errors overlooked as often as identified. It is in this setting that the most fertile ground for integration and collaboration exists.

## II. CHALLENGES TO INCREASING SKILLS INSTRUCTION

Given the centrality of research skills to entry-level practice and law school accreditation and the generally poor assessment of graduate's current skill levels, why haven't law schools taken steps to improve instruction in this foundation skill? The answers could be many, including a conclusion that the skill is not truly as important as the external audience would suggest. Another candidate for explanation is the over-identification of certain faculty members with certain skills and the resulting competition for resources. At many law schools, the faculty members with the lion's share of power prioritize coverage of doctrine and critical analysis skills and those faculty members who would be most interested and able to broaden the skills outcomes in the curriculum have the least power.<sup>122</sup> Finally, increasing the importance of any skills instruction must come at the cost of other learning goals. The most common objection to increasing skills instruction is the cost of "coverage" – a learning goal that is cited but rarely critically analyzed. Until faculty members are able to recognize their collective interest in broadening legal education outcomes and the redistribution of student attention that requires, true integration of skills instruction across the curriculum will be slow going indeed.

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119. See Brooke J. Bowman, *Researching Across the Curriculum: The Road Must Continue Beyond the First Year*, 61 OKLA. L. REV. 503 (2008).

120. ALWD/LWI 2011 Survey, *supra* note 111, at Question 33 (176 schools responded that such a requirement exists; 12 responded that it did not).

121. ABA SURVEY, *supra* note 58. "Respondents reported that they allowed students to meet the upper division writing requirement a multitude of ways, although the seminar format was the clear favorite. Of the 153 respondents to this question, 137 law schools (90%) permitted students to satisfy the upper division writing requirement in a seminar format. Additionally, 110 respondents (72%) used the Independent Study, 90 law schools (59%) allowed students to satisfy the writing requirement through their participation in a journal, and 26 law schools (17%) permitted participation in moot court. ... While most respondents allowed more than one option to fulfill the upper division writing requirement, 11 of the 153 respondents (7%) permitted only the seminar format, and ten law schools (7%) allowed only an upper division legal writing course to fulfill this requirement" *Compare* ABA SURVEY, *supra* note 58, at 34-35, with ALWD/LWI 2011 Survey, *supra* note 111, at Question 33 (indicating that 173 schools provide for scholarly papers to satisfy the requirement. Of these, nearly half (80) require this form of advanced writing. 100 schools provide for advanced advocacy writing (one would presume appellate briefs) to fulfill the requirement, though in only 8 schools is this the required form.)

122. See *infra* text accompanying notes 136-41.

*A. Skepticism about Skills Instruction*

The level of commitment a law school makes to skills instruction is reflected in the degree to which it makes that skill central to the students' education. While a faculty may be willing to support adding a specialized seminar as an elective, so long as the costs of teaching that seminar are not prohibitive, few skills can garner the kind of collective commitment that would support new faculty positions or integration of skills across the curriculum. Certainly this has been true for legal research.

Even though legal research may appear to be integrated throughout the curriculum in many law schools, in the form of seminar paper requirements, it is likely that little direct instruction of research actually occurs in those settings. Doctrinal faculty teaching seminars that include research paper requirements may not have legal research skills on their radar as objectives of the course. There are at least two reasons that could be true. From one perspective, faculty may have acquired such facility at research that they underestimate the learning task required to have achieved that facility. Faculty who are experts in a field may not realize the gulf between their own ability to work in that field and that of the students. Faculty may be "unconsciously competent"<sup>123</sup> in legal research, so that it may be difficult for them to articulate the processes and conventions by which they approach a research problem in a way that can be taught to novices.<sup>124</sup> Conversely, faculty members, like senior attorneys in practice,<sup>125</sup> may be more likely to delegate much of their research work, either to research assistants or research librarians.<sup>126</sup>

Other limitations may exist because of the constraints of the teaching format. For example, students preparing briefs for national appellate advocacy competitions must devote considerable time to researching; however, rules of those competitions often limit the ability of faculty to provide feedback or coaching in this process.<sup>127</sup> Clinical faculty members likely teach research as they do many other aspects of client representation: on a need-to-know basis in which they demon-

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123. NEAL A. WHITMAN, PEER TEACHING: TO TEACH IS TO LEARN TWICE 9 (ASHE-ERIC Higher Education Report No. 4 1988) (citing THOMAS L. SCHWENK AND NEAL WHITMAN, RESIDENTS AS TEACHERS (1984)).

124. John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEG. EDUC. 275, 283-5 (1989) (describing the difficulties of experts teaching novices, the author notes that experts may be unable to articulate unwritten conventions of their area of expertise because they are consciously unaware of the conventions -- recent learners are more likely to be consciously aware of their acquisition of these conventions.)

125. Matthew C. Cordon, *Task Mastery in Legal Research Instruction*, 103:3 L. LIBR. J. 395, 399 (2011) (discussing habit of senior attorneys to delegate research tasks).

126. Barbara Bintliff, *Legal Research: MacCrate's "Fundamental Lawyering Skill" Missing in Action*, 28 LEG. REF. SERV. Q. 1, 3 (2009).

127. See, e.g., New York City Bar Association, *Sixty-Third Annual National Moot Court Competition Rules, Comments, and Forms 14* (2012-13) ("No team may receive help preparing its brief. Teams may, however, use widely available research tools, receive general clerical assistance (e.g., copying, printing, mailing, etc.) and discuss the Rules with faculty and other students.")

strate a process in a particular context, without generalizing the skills beyond that context.<sup>128</sup>

### *B. Faculty Competition and Curricular “Ownership”*

Even if faculty members are enthusiastic about incorporating research instruction into their courses, enhancing any skills instruction in legal education requires more: more student time and attention, more quality in instructional material; and more instructor energy and expertise. In an era when law schools tuition rates are exceeding the availability of low-cost loans and graduates are bearing student loan burdens in a depressed market, the “more” cannot conscionably come from the students. Professor Paul Campos summarizes the situation succinctly:

Approximately half of the 45,000 people who will graduate this year from ABA-accredited law schools will never find jobs as lawyers. Most of those who do find jobs will be making between \$30,000 and \$60,000 per year.... People currently in law school are going to graduate with an average of \$150,000 of educational debt. This debt will have an average interest rate of 7.5 percent, meaning the typical graduate will be accruing nearly \$1,000 per month in interest upon graduation. Unlike almost every other form of debt, these loans cannot be discharged in bankruptcy. In short, one out of every two law graduates will not have a legal career, and most of the rest will never make enough money to pay back their educational loans.<sup>129</sup>

The most logical place to find this “more” is by finding other places to have “less.”

Law schools are by no means unique in this respect. Colleges and universities around the country are struggling with this allocation dilemma. As programs and missions expand, while resources diminish, constant underfunding is “the new normal” in education.<sup>130</sup> “There is growing incongruence between the academic programs offered and the resources required to mount them with quality, and most institutions are thus over-programmed for their available resources.... The most likely source for needed resources is reallocation of existing resources....”<sup>131</sup> The most common response to this call for resource reallocations, however, has been across-the-board cuts rather than prioritization.<sup>132</sup> Surfacing the inherent competi-

128. *But see* Vicenç Feliú & Helen Frazer, *Embedded Librarians: Teaching Legal Research as a Lawyering Skill* (2010), available at [http://works.bepress.com/vicenc\\_feliu/2](http://works.bepress.com/vicenc_feliu/2) (describing integration of research librarians into clinic at one law school).

129. Paul Campos, *Debt: Not Just for Undergrads*, SALON (May 14, 2012), [http://www.salon.com/2012/05/15/debt\\_not\\_just\\_for\\_undergrads/](http://www.salon.com/2012/05/15/debt_not_just_for_undergrads/).

130. “State allocations do not keep pace with expenses, federal research dollars are unreliable, the stock market is unstable, foundation support is waning, and the tuition-paying public will no longer stand for tuition increases to make up budgetary shortfalls.” PETER D. ECKEL, CHANGING COURSE: MAKING HARD DECISIONS TO ELIMINATE ACADEMIC PROGRAMS 2 (2003).

131. ROBERT C. DICKESON, PRIORITIZING ACADEMIC PROGRAMS AND SERVICES: REALLOCATING RESOURCES TO ACHIEVE STRATEGIC BALANCE 15 (2010).

132. *Id.*

tion among faculty and programs for scarce resources is a political football few are courageous enough to tackle.<sup>133</sup>

Within law schools, reallocation often surfaces tensions between the teaching and research missions of the law school. Law schools need to make clear to themselves the relative value of faculty expertise and the dissemination of that expertise through nationally visible scholarly writing and speaking. Critics of the role of modern legal scholarship have argued that scholarship is unconnected to practice and, yet, has become “the engine that drives the teaching train in law school.”<sup>134</sup> That is to say that teaching and the tuition revenue it generates is seen as the means to the end of producing scholarship rather than scholarship supporting teaching and the preparation of students for practice.<sup>135</sup> Such an attitude is unlikely to carry the day in any but the most elite law schools in the future. Rather, the scholarly enterprise must be designed to improve and advance the law and serve the ends of justice, as well as to improve the overall educational value available to students. Good scholars are often good teachers as expertise is a core element of good teaching, and scholarship (in the narrow sense of publications) is one route to expertise. However, that the two activities are not mutually exclusive does not mean that they do not compete for time and resources. If it were otherwise, there would be no need for light loads and leaves to facilitate scholarship or alternative scholarship requirements of faculty with intensive teaching responsibilities.

Even if we confine our analysis to allocation choices of curricular structure, these choices are rife with political and emotional tensions. Curricular choices cut deeply to issue of faculty identity, as the departmentalization of the curriculum and differential statuses among the faculty teaching in those “departments” have created a situation in which some faculty feel ownership of the skills curriculum.

Those faculty who most identify with skills instruction are also those faculty who have struggled with lower status, lower salaries, lesser job security, and limited franchise in faculty governance.<sup>136</sup> Long-felt and angry divisions between tenure-track (“doctrinal” “casebook”) faculty and other full-time faculty (“professional skills” “clinical” “legal writing” “librarian”) faculty thus become part of the conversation about curriculum.<sup>137</sup>

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133. For a notable example of a candid discussion of costs and priorities, see Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 309, 328 (2012).

134. William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 206-07 (1996).

135. *Id.*

136. *Id.* This hierarchy is largely a historical result of the pressures to move legal education into the academy and leave skills training of graduates to the law firms. *Id.* “To compete with the apprenticeship programs and proprietary law schools, university law schools had to develop a distinct mission and convince students that the expense of a university education was justified.” *Id.* The pattern has been maintained by hiring patterns in tenure-track positions: prizing faculty with limited or no practice experience, whose focus is scholarship rather than teaching, and whose scholarship itself is more theoretical and less connected to either doctrine or practice. *Id.* at 211-15.

137. Professors Stanchi and Levine suggest that, “The appearance of a cadre of low-pay, low-status positions in skills courses flowed from two major events in the history of American law schools: the sharp rise in general law school enrollment in the 1970s and early 1980s and the influx of women into law schools in the mid-1970s.” Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 1, 7 (2001).

Examining the conversations over legal research instruction highlights these tensions. Discussions regarding the students' legal research skills often transmute into a conversation about the status of those who teach those skills.<sup>138</sup> The relationship between tenure or tenure-equivalent status and other indicia of status in the academy can be seen quite clearly in ABA accreditation guidelines regarding student-faculty ratios. In the category of "other teaching resources" clinicians and legal writing instructors with tenure equivalent status are counted as 0.7 of a full-time faculty member and librarians with teaching responsibilities are counted the same as adjunct faculty, at 0.2 of a full-time faculty member.<sup>139</sup>

However, the very pressures that moved the ABA to improve the status of non-tenure-track faculty and librarians also reinforced the notion of "ownership" of the skills curriculum by these faculty members. As any divorce attorney or mediator can tell you, if you ask about the difference it makes in a custody dispute if the law refers to "parenting time" rather than "custody and visitation," language counts. In the past decade, we have seen a new vocabulary of teaching develop. In 1995 amendments to the Standards, the status of faculty and librarians was addressed by the standards, with "professional skills faculty" being required to be given "a form of security of position reasonably similar to tenure."<sup>140</sup> Similarly, these revisions required that the law library director (but not other law librarians) have a faculty appointment (though tenure was optional).<sup>141</sup> In 1996, a specific provision for "legal writing faculty" was added to this section.<sup>142</sup>

While these improvements in status for the faculty who carry the brunt of the load of skills instruction in the law schools are just and appropriate, the collateral consequence was to embed the classification of "professional skills faculty" in the structure of legal education. "The "us vs. them" dialogic has become reified to the point that skills faculties actually do see themselves as different: different in pedagogy, different in teaching loads, different in focus (teaching vs. scholarship), and so on. This, in turn, has the strange effect of seeming to legitimize the claims of some casebook faculty members that skills "instructors" are different."<sup>143</sup> The focus on change then becomes a debate about change in status rather than shared conversation about change in curricula or teaching or assessment. Dean Alford's prescription for improving legal research instruction in law schools, for example, focuses on changing the status of law librarians: emphasizing scholarship, organizing, and "advocating for status changes in a deliberate manner."<sup>144</sup> Conversa-

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138. See Carol A. Parker, *How Law Schools Benefit When Librarians Publish, Teach and Hold Faculty Status*, 30 LEG. REF. SERV. Q. 237 (2011); Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS'N. LEGAL WRITING DIRECTORS 12 (2002).

139. AMERICAN BAR ASSOCIATION, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Interpretation 402-1 (2011-12) (hereafter ABA ACCREDITATION STANDARDS).

140. *Id.* Standard 405(c) (1995).

141. *Id.* Standard 603(d) and Interpretation 1 of Standard 603(d). In 1999, the status of law library directors was addressed by a new requirement of security of position. "Except in extraordinary circumstances, a law library director shall hold a law faculty appointment, with security of faculty position." *Id.* Standard 603(d) (2000).

142. *Id.* Standard 405(d) (1997).

143. David T. Ritchie, *Who Is On the Outside Looking In, and What Do They See?: Metaphors of Exclusion in Legal Education*, 58 MERCER L. REV. 991, 1013 (2007).

144. Duncan Alford, *The Development of the Skills Curriculum in Law Schools: Lesson for Directors of Academic Law Libraries*, 28 LEG. REF. SERV. Q. 301, 313 (2009). Dean Alford is Associate Dean

tions about pedagogy and assessment become exercises in preaching to the choir, as the so-called “professional skills faculty” publish in specialty journals for their fellows<sup>145</sup> and present at conferences with similarly situated faculty. Cross-talk and collaborations are less common.

I do not here suggest that the struggles for equity and security by faculty members are not real and important issues. Nor do I suggest that discussions of these issues should cease.<sup>146</sup> However, I do suggest that we take care in those discussions that we do not lose sight of our common interest in excellent education for our students. When faculty speak of the curriculum and students as belonging to “us or them” and then either work for exclusive control or abdicate responsibility for our collective commitment to student preparation for practice, the language of division diminishes our students’ learning. This internal dynamic of ownership and competition inhibits collaborations that could lead to improved programs and efficiencies. Faculty member have limited incentives to contribute to an institution within which they have little security of position.<sup>147</sup> Unequal status can result in inequitable distributions of responsibility and reward in collaborations.<sup>148</sup> The competition is not merely between “doctrinal” and “skills” faculty but can be among those who identify most closely with skills – externships and clinics; legal writing programs and libraries; transactional drafting and litigation advocacy – all juggling for priority in attention for “their” skills and programs.

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for the Law Library and Associate Professor of Law, at the University of South Carolina School of Law.

145. Specialized journals exist for faculty teaching legal writing (*LEGAL COMMUNICATION & RHETORIC: J. ALWD*); clinical faculty (*CLINICAL L. REV.*) and librarians (*LAW LIBR. J.*). Articles in these journals are predominantly by these faculty members and many of these faculty members publish most frequently in these specialized journals for their fields rather than in general law reviews.

146. Indeed, I have been reminded on more than one occasion by my legal writing colleagues that suggesting that we should shift the conversation from our division to our shared interests is “easy for me to say” when I am on the upside of the hierarchy.

147. For example, authors reviewing one survey of collaborations between clinical and legal writing faculty observed “every institution with a some form of present or planned collaboration offers at least some kind of long-term contract as job security to its legal writing faculty, if not parallel or equal tenure track.” Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 *CLINICAL L. REV.* 285, 296 (2010).

148. DICKESON, *supra* note 131, at 18-19. See e.g., Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 *B.Y.U. L. REV.* 99 (2009):

On faculties where the legal writing faculty member collaborates with a doctrinal faculty member to produce writing problems in a particular substantive area (for example, the legal writing faculty member joins with the Torts professor to create problems for the Torts class), the legal writing faculty member may have a subservient position to the doctrinal faculty member, much like the position of wife to husband in the traditional family, or secretary to boss. Although the pedagogical benefits to students would theoretically increase because of the co-teaching, many legal writing directors have avoided this relationship because it is fraught with status issues. In most circumstances, unless both the legal writing faculty member and the doctrinal faculty member are on equal status, the relationship will inevitably reproduce the gendered relationship of superior and inferior.

*Id.* at 155, n. 173.

In the context of student learning, I have emphasized the detrimental effects of a competitive culture among students: creating powerful extrinsic motivators that undermine intrinsic motivation, skew and narrow learning, communicate a preference for hierarchy and control by the “winners,” and undermine professional values of cooperation and service. Barbara Glesner Fines, *Competition and the Curve*, 65 *UMKC L. REV.* 879, 896 (1997). There is good reason to observe that these same dynamics of heightened competition among faculty would have the same detrimental impact on our curricular development.



The history of legal research instruction provides a good example of how this internal competition can become the focus of attention when discussing instruction in a skill. Legal research has long been a part of the law school curriculum but the “ownership” and pedagogy has shifted over time. In his article on the development of the skills curriculum in law schools, Dean Duncan Alford describes the history of legal writing, clinical and legal research instruction.<sup>149</sup> He notes that both legal writing<sup>150</sup> and clinical programs<sup>151</sup> have grown dramatically in the past twenty years.

As legal writing instruction grew in volume and significance in the curriculum, legal research was increasingly integrated into those programs, and deemphasized.<sup>152</sup> As legal research has been assimilated into legal writing programs, the tensions between legal writing faculty and librarians over the proper structure of legal research instruction in the first year have become increasingly visible. Some librarians have argued that legal research must “step out of the shadow of legal writing and acquire its own importance, both in the curriculum and the students’ minds.”<sup>153</sup> As Professor Barbara Bintliff, former president of the American Association of Law Libraries, concludes in surveying the field:

Instruction in every other “fundamental lawyering skill” identified in the MacCrate Report has been, in the main, implemented in a distinct program with specialized faculty. Legal research instruction, however, generally has been incorporated into the legal writing program—not taught by the librarians, the research experts in the law school.<sup>154</sup>

These long-standing debates over responsibility for legal research instruction continue today. As one introduction to law school text notes, “Depending on the school, the person teaching you legal research may be a member of the legal writing faculty, a law librarian, a student teaching assistant, a Westlaw or Lexis-Nexis representative, or some combination of these folks.”<sup>155</sup> It is not as though there is no room for shared conversations about legal research instruction. Those conversations could most fruitfully occur in discussions of the upper-level curriculum. The first year of law school, with its signature pedagogy of case dialogue, works reasonably well in forming students in the “cognitive apprenticeship.”<sup>156</sup> Upper-level students, however, do not necessarily benefit from two more repetitions of the same pedagogy with the same objectives.<sup>157</sup>

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149. Alford, *supra* note 144.

150. *Id.* at 307-09.

151. *Id.* at 309-11.

152. *Id.* at 309. See also Donald J. Dunn, *Why Legal Research Skills Declined, Or When Two Rights Make A Wrong*, 85 LAW LIBR. J. 49, 55-56 (1993) (describing the reduction of legal research instruction to make way for increased legal writing instruction during the 1970s).

153. Ian Gallacher, *Forty-Two: The Hitchhiker’s Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151, 170 (2006).

154. Bintliff, *supra* note 126, at 5.

155. ANDREW MCCLURG, *1L OF A RIDE: A WELL-TRAVELED PROFESSOR’S ROADMAP TO SUCCESS IN THE FIRST YEAR OF LAW SCHOOL* 276 (2008).

156. Connie Lenz, *The Library’s Role in ‘Educating Lawyers’: Considering the Carnegie Report*, [http://www.aallnet.org/sis/allsis/newsletter/28\\_1/Carnegie.htm](http://www.aallnet.org/sis/allsis/newsletter/28_1/Carnegie.htm) (last visited Mar. 7, 2013).

157. *Id.*

While we can continue to discuss the scope and utility of legal research instruction in the first year, despite suggestions to the contrary,<sup>158</sup> it is unlikely that one year of instruction is sufficient. This is especially so given the nature of legal research (or most skills for that matter). Legal research is a skill that requires context: not just the context of facts but the context of the law as well. Like any skill, regular practice is essential for mastery. The first year of law school cannot provide that entire context and practice must not cease at the end of that year. Moreover, in most law schools, the doctrinal content of the first year of law school is heavily focused on the common law. Administrative law, transactional practice, global practice – these and other doctrinal areas are more predominant in the upper-level curriculum. For these reasons, the most fertile ground for making dramatic improvements in student learning of research is in the upper-level curriculum.

### *C. The Curse of Coverage*

A common response to calls to integrate skills instruction into doctrine-specific courses is an objection that there is no room in the course. In the competition for teaching resources, skills are often balanced against knowledge learning goals and the need for “coverage.” “Too often, classes aspiring to skill development morph into classes about the substantive legal framework of a particular subject, with professors expressing concern about whether they have covered enough of the substantive framework during the course of the semester”<sup>159</sup> The problem is not confined to legal education. “The curse of coverage” has bedeviled curriculum development throughout academia. This, despite the research on learning that establishes that teaching more content does not result in more learning. In their classic text on assessment, Professors Grant P. Wiggins & Jay McTighe, comment:

If learning is to endure in a flexible, adaptable way for future use, coverage cannot work. It leaves us with only easily confused or easily forgotten facts, definitions, and formulas to plug into rigid questions that look just like the ones covered. Furthermore, we have thereby made it far more difficult for students to learn the “same” things in more sophisticated and fluent ways later. They will be completely puzzled by and often resistant to the need to rethink earlier knowledge. In short, as Lee Shulman, president of the Carnegie Center for the Advancement of Teaching, put it so well, conventional teaching abets the three “pathologies of mislearning: we forget, we don't understand that we misunderstand, and we are unable to use what we learned. I have dubbed these conditions amnesia, fantasia, and inertia”.<sup>160</sup>

158. BEST PRACTICES, *supra* note 2, at 48.

159. Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C.J.L. & SOC. JUST. 279, 287 (2012), available at <http://lawdigitalcommons.bc.edu/jlsj/vol32/iss2/4>.

160. GRANT P. WIGGINS & JAY MCTIGHE, UNDERSTANDING BY DESIGN 46 (2d ed. 2005)(quoting Lee S. Shulman, *Taking Learning Seriously*, 31:4 CHANGE 10, 11 (July/August 1999), available at <http://www.carnegiefoundation.org/elibrary/taking-learning-seriously#article>.)

The ever-present drive for “coverage” implicit in the growing size of course books and the press of the “mile wide and inch thick” bar examination lends advantage to the “breadth” side of the equation in the battle between depth and breadth. The assessment question in this debate resolves itself in deciding levels of proficiency. Can you not conceive of a particular case, statute, doctrine or theory that could occupy your students’ entire learning for fourteen weeks if you set the level of expected proficiency high enough? Is there a course in the curriculum for which all the doctrine, rules, policies and context could be covered – even in cursory fashion – in fourteen weeks? For deep and transferable learning, we must aim for higher levels of proficiency, which requires thoughtful choices about the scope of doctrine (and skills) for which we desire that proficiency.

### III. HOW ASSESSMENT OF PRINCIPLES CAN MEET THE CHALLENGES OF IMPROVED SKILLS INSTRUCTION

If faculty are serious about placing the same priority on their graduates’ legal research skills as does the profession generally, there must be a greater commitment to that learning beyond that provided in the first-year legal writing program. One of the drivers for that greater commitment is assessment. A carefully structured program of assessment: the identification of discrete legal research skills outcomes, with defined levels of proficiency, and tools for assessing those proficiencies, can provide both incentive and structure necessary to effecting integrate legal research in a more comprehensive, efficient, and effective manner.

#### A. *The Role of Assessment in Curriculum Reform*

Part of the reason skills pedagogy remains in the shadows of legal education is that assessment of those skills is underdeveloped compared to the pervasive and ongoing assessment of doctrinal knowledge and critical analysis that occurs in the Socratic classroom and the final examination. Assessment is a powerful key to improving student learning. By beginning with designing methods to determine what skills students have and at what levels of proficiency, skills instruction will be deepened and made more visible in the curriculum. While it may seem backwards to begin with outcomes assessment, it is nonetheless a powerful point at which to begin. Educational researchers have demonstrated that students learn more and better when learning goals are clear,<sup>161</sup> when they are given opportunities to practice what they are learning,<sup>162</sup> and when they receive feedback on their learning.<sup>163</sup> These are the essential elements of outcomes assessment-driven education. Outcomes assessment has been an important part of university accredita-

161. Olcianer Christian Dark, *Statement of Good Practices in Legal Education: Principle 6: Good Practice Communicates High Expectations*, 49 J. LEG. EDUC. 441, 441 (1999); Barbara Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 GONZ. L. REV. 89 114 (2002).

162. Gerald F. Hess, *Statement of Good Practices in Legal Education: Principle 3: Good Practice Encourages Active Learning*, 49 J. LEG. EDUC. 401 (1999); see also R. Lawrence Dessem, *Statement of Good Practices in Legal Education: Principle 4: Good Practice Emphasizes Time on Task*, 49 J. LEG. EDUC. 430 (1999).

163. Terri LeClercq, *Statement of Good Practices in Legal Education: Principle 4: Good Practice Gives Prompt Feedback Learning*, 49 J. LEG. ED. 418 (1999).

tion systems since the 1980s when a series of studies of higher education raised issues of accountability.<sup>164</sup> Development of assessment for learning in professional schools did not respond as quickly as undergraduate programs, primarily because licensing exams, such as the bar examination, were seen as acceptable summative assessments of graduates.<sup>165</sup>

While recent attention has been given to proposed ABA standards focusing on outcomes assessment, the Standards have provided for this assessment for some time, albeit at a very high level of generality. In 1996, Standard 302 required “an educational program designed to provide its graduates with basic competence.”<sup>166</sup> Without measures for defining competence, the standard did little to further learning-centered measures and three years later this bold step forward took one step back, when the outcome-focused “competence” requirement of Standard 302 was removed and replaced with an input measure: “substantial instruction.”<sup>167</sup>

Two amendments were significant in the standards as they relate to developments in assessment. In 2004 the ABA adopted some of the most significant amendments to the ABA standards for skills instruction, especially of significance for the legal research skill. For the first time, the Standard 301 Interpretations referred to assessment of students learning apart from the bar examination.<sup>168</sup> In 2006, an interpretation of Standard 302 gave very explicit definition to what would be considered “rigorous” writing instruction: including multiple assignments, multiple drafts, conferencing, and assessment methods.<sup>169</sup> This micromanaging of legal writing instruction contrasts with the following interpretation that law schools were encouraged to “be creative” in instruction of other professional skills.<sup>170</sup> In the 2008-09 Standards amendments, an extensive interpretation<sup>171</sup> of Standard 301 for the first time gave detailed guidance for demonstrating compliance with that part of the Standard requiring that law schools maintain “an educational program that prepares its student for admission to the bar.”<sup>172</sup>

The most current amendments being considered for standards for approval of law schools would bring law schools into assessment conversation, by requiring law schools to identify learning outcomes, design assessments of those outcomes, and use that data to improve learning.<sup>173</sup> Rather than having student learning measured by faculty inputs—the carefully chosen course materials, the meticulously planned learning activity, the brilliantly delivered lecture—outcomes assessment asks whether all this teaching is actually resulting in learning. The assessment process can be the platform from which effective integration of skills into the curriculum will occur.

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164. GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 22-25 (2000).

165. *Id.*

166. AM. BAR ASS'N, STANDARDS & RULES OF PROCEDURE, Standard 302(a)(2) (1996).

167. *Id.* Standard 302(a) (1999).

168. *Id.* Interpretation 301-3 (2004-05).

169. *Id.* Interpretation 302-1 (2006-07).

170. *Id.* Interpretation 302-2 (2006-07).

171. *Id.* Interpretation 301-6 (2008-09). An appendix to the standards provided additional commentary on the interpretation.

172. AM. BAR ASS'N, STANDARDS & RULES OF PROCEDURE, Standard 301(a) (2008-09).

173. Standards Review Committee, *supra* note 76.

### B. Describing Learning Outcomes and Proficiency Levels

The first step in any assessment process is setting outcome goals. Few legal practice skills are simple, discrete skills, but are more often a complex amalgam. Legal research is no exception. Legal research is, at its core, an analytical and iterative process. The researcher must know where to start: identify the type of problem to be solved, develop a vocabulary for that problem, consider the possible legal institutions that may have spoken to that problem, and imagine analogous areas of law that might bring solutions to the problem presented.<sup>174</sup> Likewise, the research skill includes knowing when to stop, evaluating research results and projecting the likelihood that additional research will produce more or different answers. Along the way, the researcher must observe and evaluate his or her own process: weighing the time and costs against the likely benefits and critically examining choices of methods and tools. Thus, understanding how to access and update the law is only a small part of the overall research skill set. Rather, expert legal research involves the same kind of issue identification and analysis as is the standard fare of a law school exam bluebook. However, legal research introduces the context of uncertain facts, the anchoring of jurisdictions, and the possibilities of creativity: “Legal research puts a high premium on finding materials outside of the standard conceptualization of an issue, for the novel and analogous rather than for the accepted treatment of an issue.”<sup>175</sup>

Yet these skills of analysis, planning, evaluation, and imagination are not the focus of much first-year legal research instruction, which can be treated by students as no more than treasure hunts. The conflation of research instruction with bibliographic instruction has hindered the development of research pedagogy even within the community of experts.<sup>176</sup> To truly improve legal research instruction, the pedagogy must be developed to recognize the analytic and creative aspects of the research process as research, rather than thinking of research instruction as nothing more than mastering a set of finding tools.

Along with describing what we want students to learn, we must decide how well we want them to learn it. Any learning outcome could be described at a variety of proficiency levels. The challenge for legal educators is deciding the levels of competency we are targeting. Consider a common initial research-learning task in law school: Distinguishing between primary and secondary authority. At the most basic level, we want students to be able to define primary and secondary legal authority and recognize the most common categories of each of these. As soon as a student declares “but it’s a US Supreme Court case, of course it’s primary authority,” we recognize that students also need to be able to recognize the interactions of jurisdictional power and primary authority. At an even more sophisticated level, we may want them to be able to recognize the gradations of

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174. See generally Paul D. Callister, *Time to Blossom: An Inquiry into Bloom’s Taxonomy as a Hierarchy and Means for Teaching Legal Research Skills*, 102 LAW LIBR. J. 191 (2010); Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BALT. L. REV. 173 (2010).

175. Scott F. Burson, *A Reconstruction of Thamus: Comments on the Evaluation of Legal Information Retrieval Systems*, 79 LAW LIBR. J. 133, 143 n.25 (1987)

176. Paul Douglas Callister, *Beyond Training: Law Librarianship’s Quest for the Pedagogy of Legal Research Education*, 95 LAW LIBR. J. 7 (2003) (discussing process versus bibliographic pedagogy).

authority within primary and secondary – differentiating, for example, between a law review article on international law by a recognized scholar, a law review article on domestic law by a recognized scholar, and a law review article by a student author. Were we to aim for mastery of this basic concept, we might ask students to consider why some authorities are considered binding and others not and the circumstances in which otherwise binding precedent is subject to change. And so on.

As a practical matter, many of us choose a proficiency goal for student learning that allows us to land somewhere in between becoming experts on the minutiae and becoming acquainted with the field. We may choose to dig deep on one topic in the course but provide a cursory survey of others. If we choose an overall big idea that can tie all these subjects together with a theme, we find these choices of depth and breadth become less troublesome. Grant Wiggins and Jay McTighe, in their work on *Understanding by Design*, emphasize beginning that search for learning goals by looking for the “Big Idea.”<sup>177</sup> They suggest the following questions for identifying an idea around which it is worth building a course or curriculum:

Does it have many layers and nuances, not obvious to the naïve or inexperienced person?

Can it yield great depth and breadth of insight into the subject? Can it be used throughout [a legal career]?

Do you have to dig deep to really understand its subtle meanings and implications even if anyone can have a surface grasp of it?

Is it (therefore) prone to misunderstanding as well as disagreement?

Are you likely to change your mind about its meaning and importance over a lifetime?

Does it reflect the core ideas in a field or in life, as judged by experts?<sup>178</sup>

The value of this notion of a “big idea” is not limited to doctrinal or theory – skills have thematic structures as well. Some of the most important work in the pedagogy of legal research recently has focused on identifying these big ideas. In July 2012, the American Association of Law Librarians adopted *Legal Research Competencies and Standards for Law Student Information Literacy*.<sup>179</sup> Information literacy takes learning beyond mere knowledge standards to broader understandings of the structure of information. In legal research, these big ideas can

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177. WIGGINS & MCTIGHE, *supra* note 160, at 67.

178. *Id.*

179. AM. ASS'N OF LAW LIBRARIANS LEGAL RESEARCH COMPETENCIES & STANDARDS FOR LAW STUDENT INFO. LITERACY (2012) available at <http://www.aallnet.org/main-menu/Leadership-Governance/policies/PublicPolicies/policy-lawstu.html>.

provide themes that can tie together diverse doctrines and even courses across the curriculum.

Planned carefully, learning can re-emphasize and develop a thematic understanding while surveying a diverse and broad range of topics. To revisit the example of authority, for example, one might decide that a core theme for students to master is the difference between power and authority in law. Teaching from the beginning from this theme can give the concept of primary and secondary authority context and meaning far beyond knowing which court governs which type of law, but can allow students to develop a framework into which they can place those rules and understandings. That framework would lead to more sophisticated research processes and better evaluation of the products of that research.

### *C. Designing Assessment Tools*

Having determined the legal research outcomes and proficiencies we are aiming for in legal education, the assessment process requires that we then decide how we will know if students have achieved these outcomes. In the first-year legal research program at most schools, research is commonly assessed through paper examinations testing student understanding of research tools and through open-research memoranda or briefs in which students conduct research to support their analysis of a hypothetical problem.<sup>180</sup> Standards for mastery of the research outcomes are based primarily on the student's ability to identify proper finding tools or locate relevant research results. Research logs may provide a basis for assessing the student's efficiency and effectiveness in the research process.

Beyond the first year, however, assessment of research skills is underdeveloped. While the most common opportunity students have to further develop research skills is in their upper-level research or seminar papers, there is little evidence to suggest that professors supervising these papers are providing either guidance or assessment on the research aspects of these papers. This past spring, two of my colleagues, Paul Callister and Michael Robak, director and assistant director of the Leon E. Bloch Law Library, and I undertook a research project to investigate assessment of research skills in these upper-level research and writing experiences. We began with the current assessments and standards being used by attorneys and faculty. In the spring 2012 semester, we conducted several preliminary surveys to determine how research was being assessed by faculty and attorneys. First, we hosted three focus groups (attorneys from a wide range of practice settings and private law librarians). With each group we asked how individuals thought about and assessed new attorneys' research skills. Our findings reaffirmed the importance of research skills and the concerns expressed about new graduate's abilities.

At the same time, we surveyed the faculty to determine how they reviewed their students' research in the research papers they supervised. An email was sent to all full-time faculty members who supervise students in completing their research papers. We asked a simple question: "How do you know whether the quality of the research in your students' papers?" What we learned was that faculty varied widely in the processes and standards for assessing student research.

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180. See ALWD/LWI 2011 Survey, *supra* note 111 (2011).

Faculty responses as to the assessment processes provided a variety of assessment methods: Some professors supervised the initial development of the paper very closely—requiring a research plan, bibliography or an annotated outline. Many professors indicated that they guided student research through meetings during the student’s research phase. For example, one professor responded: “Sometimes we focus on the idea and say, “what would be the best possible support for this idea of yours” and then we go try to find what we’ve pictured, whether it be a study or a case or a statute.” If the paper is developed in a seminar, some professors ask research librarians to present to the class an overview of sources and methods for that subject area.

The standards used to assess research were heavily weighted toward assessing the student’s final product. Professors evaluated the students’ research results and inferred the quality of the research process by the products. Several professors commented that they could make this determination because of their own familiarity with the existing literature and case law. Others indicated that, if they did not have that expertise on the topic, they would conduct parallel research or at least spot-checks of authorities cited. As one respondent commented, “I can generally identify any significant gaps or assertions that seem to be unlikely to be supported by the authorities cited. I look for obvious warning signs such as over-reliance on a few sources, over-reliance on authorities that seem likely to have been derived from a single source, lack of recent sources (where appropriate), etc.”<sup>181</sup> Others relied on rules of thumb such as student reliance on secondary sources for propositions that should come or originally came from primary sources or the quality and diversity of sources.

From these comments, our team constructed a rubric for assessing the research papers. Rubrics can be an important tool for assessment of complex skills such as legal research.<sup>182</sup> A survey of the literature revealed no rubrics for research, though many legal writing rubrics did include a category of “citations”—most often using proper citation form as the criteria for assessment. We asked the faculty to review and approve the rubric as an expression of their criteria for effective research. We identified eight criteria for assessing the product of the research: Use of Authority (generally), Citation format, Use of primary authority, Relevance of authority, Diversity of sources, Balance in viewpoints represented by research, Key authorities in the field, and Currency of research. We also identified two process criteria: efficiency and effectiveness of the research process. For each of these, we developed a description of three levels of proficiency. The resulting rubric is replicated in the appendix.

We asked all professors to rate their students’ research and writing papers using this rubric. If students were conducting substandard research, faculty might be reluctant to admit that and be compared unfavorably to their peers. Thus we asked that the assessment be confidential, both as to the faculty member conducting the assessment and the paper being assessed. The only data we collected on the rubrics about the paper was the level of the students writing the paper (2L or 3L) and the date the paper was submitted for credit.

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181. Devised from Author’s email and faculty meeting notes (on file with author).

182. *Id.* See generally Sophie M. Sparrow, *Describing the Ball: Improving Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1 (2004).



Thirty-three R&Ws were evaluated during the Spring 2012 semester using the faculty-approved research assessment rubric. Six papers were by second-year students and the remainder by third-year students. The average score on each of the criteria was above acceptable, with scores ranging from 2.2187 for the “balance in sources” criterion to 2.65625 for the criteria of relevancy and currency. However, nine papers had a score of 1 on at least one criterion. Overall the range of total scores on research product quality was 14 to a perfect score of 24. Taking 70% of the total number of points possible on these criteria as a cut off for competent research product, there were ten papers with deficient scores, comprising a little less than 1/3 of the sample.<sup>183</sup>

On the assessment of research process, for nine of the 33 papers, the reviewing faculty member indicated that they were unable to assess the research methodology used by the student. This was consistent with our survey of faculty members regarding how they assess research, which indicated that, while most faculty do assess writing methodology by requiring thesis statements, outlines, drafts, and re-drafts, a smaller number of faculty assess student research method. However, the very presence of the rubric standards may have caused some faculty to now raise the topic of research methods with students earlier in the process and separate from the discussion of thesis or outlines.

To complete this assessment project, we will be conducting further analysis of the papers submitted by all students in an academic year. Trained research assistants are performing detailed citation analysis of these papers, which will provide further data about student research capabilities. For example, some preliminary observations from those studies indicate that, in writing these academic papers, students rely heavily on law journal articles and web-published reports.

This process of designing assessments and gathering data can be undertaken for any skills learning outcome. Many faculty members presume that assessment requires devising tests or undertaking graded activities. However, neither tests nor grades are necessary for gathering data about student learning. Rather, as we have in our research assessment study, important data can be gathered from the activities professors already require of students. Nor must every student’s performance be assessed: sampling of student work can provide sufficient data to make conclusions about overall understanding. Indeed, many professors use the classic Socratic dialogue as a form of assessment of a sample of students in order to determine overall student understanding of assignments. Likewise, a professor’s observations of student clinical practice or reflections, or of student performance in skills simulations can be the source for assessment.

The key to turning everyday assignments and activities into assessments is to go beyond general impressions and deliberately choose to gather concrete data. One need not gather every data point possible from any given assignment, performance, or examination. Often it is helpful to begin with two or three items to

183. The entire distribution is included here:

Score	14	15	16	18	19	20	21	22	23	24
Number of Papers	2	4	4	1	3	3	6	2	2	5

Email, *supra* note 181.

analyze. Thus, in our student research and writing papers, we chose to examine only research skills, though obviously these papers could provide ample evidence of a variety of other skills and knowledge.

Analyzing assessment data requires determining the confidence we have that the student's performance on the examination, simulation, or practice actually demonstrates their skill on the targeted outcome. Where data indicates that a significant percentage of student performance was deficient, begin by reexamining the assessment activity, its placement in the semester, the time allocated, and any other possible factors that could explain poor performance apart from student learning. Look for patterns in the student errors or misconceptions that can help diagnose the learning conditions that led to the student poor performance. To improve student learning on areas that have presented difficulties for students, faculty members should consider not only improving teaching materials or methods related to that area, but also incorporating more formative assessments during the term to identify earlier and more clearly learning deficiencies.

#### *D. Bringing Skills out of the Shadows: Using Assessment to Provide Deep Learning, Overcome Faculty Skepticism, and Promote Collaboration*

After determining the proficiencies in research skills that we expect students to develop and having designed an assessment activity and gathered and analyzed data about student performance, the final task in the assessment process is to consider methods of improving student proficiencies. Taking this last step to communicate the results of an assessment to both faculty and students can overcome many of the barriers to improving and integrating skills instruction throughout the curriculum.

The purpose of assessment is to improve learning and that improvement occurs in several ways. Simply clarifying the criteria for skills performance can improve learning if students are provided that criteria, as they can then better understand the objectives of any given learning activity. Likewise, assessment can provide the occasion for deliberate consideration of agreed-upon learning outcomes. It is difficult for a faculty to say that they care about skills instruction if they are faced with cumulative, convergent evidence that students are not acquiring these skills. Faculty who deliberately analyze the results of student assessment activities for purposes of improving student learning will more easily identify barriers to learning and focus their teaching efforts on the difficulties students are experiencing. If faculty are skeptical about the wisdom or ability of a law school to teach practice skills, assessment data can prove otherwise. Evidence that students are gaining proficiencies in skills reinforces efforts to continue instructional efforts to maintain that proficiency.

Assessment can provide tools that facilitate collaboration in skills instruction. One possible method for improving any given skill would be to incorporate skills activities and assessments into the curriculum broadly – including in doctrinal-focused courses. Just as the rubric for assessing research encouraged our faculty to give greater attention to this aspect of the upper-level writing process, so too clear criteria for any skill can help faculty feel comfortable incorporating those skills activities into their courses.

Incorporating skills instruction in doctrine-focused classes need not detract from the learning outcomes of those classes. Often skills instruction can help to

focus student attention and place other learning goals in context in a way that improves learning of the skills and any other learning objectives. For example, including even limited amounts of legal research into doctrine-specific courses could not only provide the iterative practice necessary for any skills learning but also could enhance student acquisition of other legal analysis skills that are the target of many upper-level courses.

Legal research can bring significant context to difficult concepts. For one example, even though case-law research is an integral aspect of legal research in the first year of law school, students often do not truly understand how to use the cases they have found. Attorneys and law librarians complain of students “mining” case law – looking for a key paragraph or phrase – without placing that language in context of the case from which it is taken or the context of that legal doctrine. One reason for this could be that we fail to differentiate rule-application from case-application when teaching legal analysis in doctrinal courses. The drive for coverage has had more costs than simply limited skills integration. At the same time that we have seen casebooks bloating, any given doctrine is likely to have only one (heavily edited) case to illustrate it, with perhaps some notes to identify differences in approach. Guiding students through a series of cases to show the common-law development of a particular doctrine is becoming an increasingly rare luxury as doctrines multiply to meet the changing needs of society. Legal research problems can provide a counter-weight to this single-lens approach to doctrine. Students asked to research and read a series of cases from their own jurisdiction to contrast with a casebook illustrative case would be given a broader perspective on the growth of doctrine, in the practical context of cases from their own neighborhood.

As another example, legal research can help to provide context and clarity, counteracting significant misconceptions about the indeterminacy of law. Students in procedure and evidence courses often become frustrated by the uncertainty of some doctrines. They expect clarity and predictability from “rules” courses that is simply not present when judicial application of those rules is insulated from appeal by final judgment rules and imbued with discretion by highly deferential standards of review. Traditional first-year legal research instruction, in which problems are pre-researched and designed so that all students will find the “right” answer, can further this misconception. In order to incorporate authentic problems into legal research instruction, faculty must be willing to devise problems that are open-ended<sup>184</sup> or for which there is no direct authority. Incorporating research exercises in doctrinal-specific courses, asking students to discover how a particular doctrine has been interpreted, only to discover that it has not been addressed by the courts in any systematic way, can open the door to important understandings about the role of discretion and the role of lawyering in development of law.

A final example of how research can inform understanding of a subject field comes from my experience in teaching professional responsibility. I have found that when a field is full of highly discretionary standards,<sup>185</sup> students may find it

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184. Kristin B. Gerdy, *Teacher, Coach, Cheerleader, and Judge: Promoting Learning Through Learner-Centered Assessment*, 94 LAW LIBR. J. 59, 68 (2002).

185. Family law and equity are two in particular I have found to present this issue.

difficult to think of the doctrine in that field as law at all. Students in my professional responsibility class come to my course with two primary learning goals:<sup>186</sup> they want to learn enough to pass the Multi-state Professional Responsibility Exam (MPRE) and they want to learn enough to avoid trouble. Yet they often also come to the course with a notion that a course in legal ethics is one that is basically without content – a bunch of sermonizing about a professional ideal from ages past – or that its content boils down to “everything I need to know about legal ethics I learned in kindergarten.” One of the main objectives of my professional responsibility course, then, consists of “undoing” some of what the students bring to the course.<sup>187</sup> I want the students to appreciate that there is indeed law – that the legal profession is a regulated industry with complex law from many competing sources that governs their conduct, so that they will always research ethics questions (even if it is just to look up the rule) rather than simply knock on their colleague’s door and ask “Joe, whaddya think?”

The MPRE is a powerful assessment that drives the students’ learning; however it sends a message that the law regulating lawyers is a unitary system (that is, discipline, even though most attorney regulation today comes in the form of liability rules, procedural regulations, and private enforcement mechanisms); consists of uniform laws (when in fact there are significant local variations) and is predictable enough to be subject to multiple choice testing (even though most of the truly difficult questions in legal ethics require judgment and discretion). To the extent the most powerful assessment the students face<sup>188</sup> cannot possibly test the breadth and variety of law and so conveys an overly simplistic picture of regulation of the profession, I have to swim upstream.

Incorporating legal research instruction into the course helps counteract the misconception that professional regulation is a product of a unitary, uniform, predictable system. Accordingly, I ask students to locate local versions of model rules, find ethics opinions and other unique resources in the field, and develop research strategies for finding analogous fields of law to develop interpretations for developing doctrines.

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186. I know this is true because I always conduct a survey of each class before the semester begins in which I ask the students to identify their learning goals for the course. The majority of responses fall into one of these two categories. My colleagues in the field tell me that their students have similar objectives.

187. That is not to say I simply ignore their fears or distrust in planning the course. I cannot say to them “This is not a bar review course!” as though they will all nod and sagely agree that such an expenditure of their tuition dollars would be a waste of time. I cannot begin to lecture about the “values of the profession” from a vantage point that is lacks both humility and realism about the many ways in which “values” are a cover for market protection. I must acknowledge their fears and honor their diverse experiences and viewpoints. But that doesn’t mean I have to turn the course into an MPRE course and simply drill the rules of professional conduct or refrain from exploring difficult issues of values, ethics, politics and emotion. Just like clients come to you with unrealistic expectations that require a conversation and reality check, so too may your students.

188. The MPRE is required for admission to practice in 48 states. NATIONAL CONFERENCE OF BAR EXAMINERS AND AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 25 (2013), available at [http://www.ncbex.org/assets/media\\_files/Comp-Guide/CompGuide.pdf](http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf). Students realistically view this test as far more career determinative than my two-credit-hour final exam, even though I suspect that the “pass rate” for both tests is very similar.

## IV. CONCLUSION

Incorporating skills instruction throughout the curriculum and improving student learning of those skills requires significant investments. Despite increasing external demands for this improved learning, law schools appear to be moving slowly to change. It is unrealistic to expect law schools to prepare every graduate with every skill needed to practice law independently with competence. Thus law schools must make hard choices about which skills outcomes take priority and about the levels of proficiencies that they expect students to achieve.

The example of legal research skill instruction demonstrates that one of the most significant barriers to improved skills instruction is the internal dynamic of faculty ownership of their own particular doctrine or skill, so that calls for improved instruction in other skills place faculty in competition with one another, rather than having shared ownership of skills. Assessment can play an important role in building that shared ownership. Assessment requires explicit choices about learning outcomes and proficiencies, choices that engage faculty in identifying the component parts of a particular skill and describing the range of performances that would differentiate levels of proficiency. Data on student learning gained from assessment activities can focus conversations about whether and how to improve student competence on a given learning outcome. It is only through these shared conversations and ownership of skills learning that the demands for improved student preparation can be met.

## APPENDIX A: RESEARCH ASSESSMENT RUBRIC

CRITERIA	POOR 1	GOOD 2	EXCELLENT 3
Use of Authority (generally)	Many assertions have no citation to authority.	Most assertions are properly attributed including pinpoint citations, properly punctuated quotations, and placement of citations where needed.	All assertions are properly attributed including pinpoint citations, properly punctuated quotations, and placement of citations where needed.
Citation format	Many citations are improperly formatted with missing information.	Most citations are properly formatted using designated form with only occasional errors in spacing, abbreviations, and short form citations.	All citations are properly formatted using short form citation appropriately.
Use of primary authority	Many citations are to sources that are from non-professional or secondary sources	Citations are to authority that is not necessarily the best or most appropriate source (e.g. secondary sources rather than primary sources)	Citations are to sources that are the best primary authority for the proposition stated.

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Relevancy of authority	Authority is misused or irrelevant to analysis	Authority is not the most relevant source or reason for apparently tangential sources is not explained.	Authority relevant for the analysis; Research drawn from analogous fields or issues is explained.
Diversity of sources	Student has relied on only one type of source.	Student has drawn from more than one source, but the breadth of sources available for the topic is not reflected	Student has drawn from a diversity of sources, reflecting the breadth of sources available on the topic
Balance in viewpoints represented by research	Student has drawn authority from a single source or group of sources with partisan or political bias	Student has used a variety of sources without consideration of differences or tensions in viewpoint	Student's research and analysis reflects understanding of the differences or tensions in viewpoint on the research
Key authorities in the field	Student has few key primary and secondary authorities	Student has some key authority but some key authority is not included	Student has used all key authorities in the field.
Currency of research	Use of outdated research or authority	Research & authority is still valid but not most recent	All authority and research is the most current available
Article is the product of an efficient research process	Research had no specific direction or method for recording results, so that much time and money is lost in the research process. Results are either too broad or too narrow; Resources used are the most expensive and are used in the most expensive manner.	Research is planned and recorded; searches are generally targeted, so that results may be too broad or too narrow; choice of resources does not reflect cost considerations but use is efficient.	Research is planned and recorded so that there is little unnecessary duplication, searches are targeted appropriately to the results are not too broad or too narrow; resources used reflect cost considerations and researcher learned from information found following the initial research strategy and revised plan in light of new knowledge.
Article is the product of an effective research process	Another researcher would not be able to duplicate research process. Results are the result of happenstances rather than a planned and iterative process. Process does not reflect the type of problem being researched.	Research plan would allow another researcher to follow the progression, although not exactly. Plan is unlikely to miss key authority as necessary for the type of research required.	Research plan would allow another researcher to follow its progression easily and is appropriate for the problem in its accuracy and comprehensiveness.