LEGAL RESEARCH INSTRUCTION IN LAW SCHOOLS THE STATE OF THE ART

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WHY DO recent law school graduates have difficulty using a law library? This question is a never ending source of puzzlement to private law librarians and others who come in contact with new lawyers. Why do they so often need to be taught the fundamentals of legal research? Why aren't the law schools doing their job? The following is an attempt to explain this phenomenon, so to speak, by describing the typical kinds of legal research and writing courses law schools offer and discussing their strengths, weaknesses and goals. Perhaps the issue will be somewhat clarified through a consideration of where we have been, where we are now and where we are going in this area of legal education. There are no easy solutions to the problems of legal research and writing instruction, but the puzzlement and frustration of those having to train new lawyers in these skills may be lessened by a clearer understanding of the legal education product with which they are dealing.

The Development of Legal Research and Writing Programs

In the late 19th century when law schools were young, students were not provided with any training at all in the techniques of legal research. This fact is hardly surprising, for there really was not much legal research to be done. The emphasis of legal education was not, as yet, on the case analysis approach and even if it had been, nationwide case reporting and case locating systems were just beginning to be developed. However, as the case method of law teaching grew in popularity, as case reporting expanded, and as case digests and other research tools gained prominence, the need for legal research instruction began to be felt.[1] This was especially so as the use of "casebooks" for student instruction

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1. *See, e.g.,* Foote, "Need for College Instruction in the Use of Law Books", 10 *Law Lib. J.* 25 (1917); Keasbey, "Instruction In Finding Cases", 1 *Am. L. Sch. Rev.* 69 (1903); Moore, "Law School Instruction in How to Find the Law", 7 *Law Notes* 64 (1903).

inereased. It was no longer necessary for the student to locate the cases discussed in class ; he had them all compiled for him in one source.[2] But it was not the law schools that were the leaders in getting legal bibliography instruction into their programs. It was the law book publishers.[3] In the early 1900's their representatives travelled to the various law schools giving lectures to law students on how to use the books of particular companies. It was after seeing the popularity of these lectures and their usefulness to the student that the law schools joined the bandwagon. By the mid 1920's, nearly half of the law schools, accredited by the Association of American Law Schools were offering instruction in legal bibliography,[4] and the first of many legal research handbooks had been written.[5] The popularity of courses in legal bibliography grew, and over the next twenty-five years they became an accepted part of the law school curriculum. Frequently taught by librarians they were essentially drills in the use of various legal research tools, instruction being based on lectures and many exercises or short problems to be worked out fairly mechanically in the library.[6]

It was in the late 1940's, however, that the situation began to change. Law school enrollments rose at a rapid pace right after World War II because of the influx of returning veterans. Law schools had for some time felt the need for better instruction in legal writing and in other legal skills, but the pressure for additional skills training reached a new high at this time.[7] Responses to this felt need caused significant alteration of the first year curriculum including legal research instruction.

The first noticeable change was the inclusion of more significant legal writing instruction in the first year curriculum, combining the teaching of legal research techniques with practice in the various forms of legal exposition. The purpose of these courses was, in addition to teaching legal research and writing skills, to introduce the beginning law student to the techniques of case analysis, legal reasoning and oral advocacy.[8] Frequently called "Legal Methods," these courses caught on

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2. Wigmore, *Job* "Analysis Method of Teaching the Use of Law Sources", 16 Ill. *L. Rev.* 499 (1922).

3. *See* Hicks, "Teaching of Legal Bibliography" 11 *Law Lib. J.* 1 (1918) for a more thorough discussion of how instruction in legal bibliography entered the law school curriculum.

4. Wigmore, *supra* note 2, at 500.

5. Frederick C. Hicks, Law Librarian at Columbia University, published the first edition of his *Materials and Methods of Legal Research* in 1923, and West Publishing Company's *Brief Making and the Use of Law Books*, edited by Roger W. Cooley, was in its fourth edition by 1924.

6. Rombauer, "First-Year Legal Research and Writing: Then and Now", *Legal Educ.* 538, 539-40 (1973).

7. *Id.* at 540.

8. *Id.*

quickly, their popularity being reflected by a flood of writing about them in the literature.[9]

The introduction of this kind of program into the first year, because of its emphasis on the development of thinking and writing skills, required that much individual attention be given the student. However, at the same time, law school enrollments were dramatically increasing. Serious staffing problems arose, and law schools began searching for ways to meet them. Thus, the other major change in the way first year students were to be taught was brought about. It began with the experimentation done by the University of Chicago with its first year legal methods program, an experiment involving the use of graduate instructors hired for one year appointments to handle the first year students in small groups for their legal research and writing training. The project was described publicly in 1948[10] and quickly became influential.[11] The tutorial program at Harvard was also being developed at that time,[12] and it, too, soon served as a model.[13] Before long, many schools had developed similar programs using either upperclass law students or graduate instructors and the trend was set.

The legal research and writing programs for first year students developed in the 1950's have remained substantially unchanged. Most law schools today have programs which seem to vary little from the original experiments with this kind of instruction. Concern about these first year programs did flare up again in the early 1970's, this renewed interest once again being reflected in the literature by a spate of "how we do it in our school" articles and suggested model programs.[14] It might

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9. See, *e.g.*, Gausewitz, *Teaching Legal Method and Analysis*, 23 Rocky Mtn., L. Rev. 67 (1950); Kepner, "Rutgers Legal Method Program", 5 *J. Legal Ed.* 99 (1952); Matthews, "First Year Legal Writing and Legal Methad in a Smaller Law School", 8 *J. Legal Ed.* 201 (1955); Roalfe & Higman, "Legal Writing and Research at Northwestern University", 9 *J Legal Ed.* 81 (1956); Schwartz, "Legal Method at Montana", 6 *J. Legal Ed.* 102 (1953), Shestack, "Legal Research and Writing-Northwestern University Program", 3 *J. Legal Ed.* 126 (1950).

10. *See* Kalven, "Law School Training in Research and Exposition", 1 *J. Legal Ed.* 107 (1948). See also Kalven, "Legal Writing Program in the Law School", 2. *U. Chi. L. Rev.* 8 (No. 1 1953).

11 . Rombauer, *supra* note 6 at 541.

12. See Cavers, "The First Year Group Work Program at Harvard", 3 *J. Legal Educ.* 39 (1950).

13. Rombauer, *supra* note 6, 541 n. 22.

14. See *e.g.*, Aaron, "Legal Writing at Utah—A Reaction to the Student View", 25 *J. Legal Ed.* 553 (1973); Achtenberg, "Legal Writing and Research : The Neglected Orphan of the First Year", 29 *U. Miami L. Rev.* 218 (1975); Germain, "Legal Writing and Moot Court at Almost No Cost : the Kentucky Experience", 25 *J. Legal Ed.* 595 (1973); Marple, "Basic Legal Techniqeres Courses at Catholic University School of Law: FirstYear Lawyering Skills", 26 *J. Legal. Ed.* 556 (1974); Comment, "A Student View of the Legal Research and Legal Bibliography, Course at Utah and, Elsewhere— A Proposed System", 25 *J. Legal Ed.* 553 (1973).

be speculated that the reasons for this upsurge of interest in the programs are similar to those responsible for the flurry of activity in that area in the 1950's major social changes, returning war veterans and the resulting upswing in enrollment figures. However, the writing done during this period is not so very much different from the reports of the 1950's. The first year legal research and writing programs may have added some cosmetics with the use of videotapes and other audiovisual materials but they are not fundamentally changed from those a quarter of a century ago.

Legal Research and Writing Programs Today

First year legal research and writing programs vary so much from school to school that there are probably no two of over 160 that are identical. These variations are, however, more in detail than in general concept. Thus, when the programs are surveyed,[15] a composite picture of the typical research and writing course emerges. The usual program begins when the student first enters law school and it runs from one to three semesters. Students normally receive one to three semester hours of credit (or quarter equivalents) for their work. Usually the fairly large first year class is broken down into small sections of about twenty students each, this being the only course in which they meet in small groups. Sometimes each section is taught by a regular full time faculty member but this is not too frequently the case. The use of graduate instructors on one year appointment, often pursuing graduate work of their own, is still common. Another popular model is to have a faculty member supervising the program, using upperclass law students to work with the first year group in their small sections .[16] Local practitioners are also sometimes used for this purpose.

Typically, the students are first introduced to the techniques of case analysis and shown how to brief cases for class and study for exams.

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15. Recent surveys include Huffman, "Is the Law Graduate Prepared to Do Research"? 26 *J. Legal Ed.* 520 (1974) (As part of a larger survey of law school research and writing opportunities for all students, gathers some statistics on first year programs); Rombauer, "First-Year Legal Research and Writing : Then and Now", 25 *J. Legal Ed.* 538 (1973) (Surveys staffing, faculty attitudes, and general course content) ; Sadow & Breede, "Library Instruction in American Law Schools", 68 *Law Lib. J.* 27 (1975) (Surveys how bibliographic instruction is given to law students and by whom) ; Comment, "A Student View of the Legal Research and Legal Bibliography Course at Utah and Elsewhere—A Proposed System", 25 *J. Legal Ed.* 553 (1973) (Compiles student descriptions of these programs and reactions to them). A look at the majority of current law school catalogs verifies that these surveys and the composite picture in the text are still essentially accurate.

16. These three models are discussed in detail in Achtenberg, "Legal Writing and Research : The Neglected Orphan of the First Year", 29 *U. Maimi L. Rev.* 218 (1975).

They are usually taken through the basic kinds of legal writing, moving from client letters to office memoranda prepared from provided materials, to memoranda requiring original research in the library and then on to the preparation of an appellate brief. An assignment in legal drafting may also be included. The program is often topped off by a moot court program requiring each student to prepare and give an oral argument based on his brief. Somewhere in the midst of all this they are introduced to the mysteries of legal bibliography and citation form. The time allotted to legal research instruction varies anywhere from one to ten lecture periods and although the instruction may be given by the law librarian, that is certainly not always the case.[17] The method used for teaching legal bibliography is basically that which has been in use ever since courses in legal bibliography began—lectures, library tours and library problems requiring short answers. The students are usually given the publishers' pamphlets to study and are often required to purchase one of the basic legal research texts.[18] After this hurry-through instruction, they are expected to be able to do the research necessary for a fairly detailed memorandum of law and later for a lengthy appellate brief.

The striking thing about these programs is how much they are trying to accomplish. in a very little bit of time. Not only are they attempting to provide the students with background in legal analysis, research techuiques, citation form and the skills of legal writing, but they are also intended to function as a general introduction to the study of law and serve as an aid to the law school socialization process. This really seems a lot to expect of a course to which only one or two hours a semester are allotted. Considering that, perhaps we should not be so critical of their product.

The basic problems with these programs have been often stated and are fairly obvious. The first problem is that of status. From the student's point of view, the course requires far too much work for the effort required. Not only does it carry little course credit but it is often graded merely on a pass/fail basis. No wonder the student concentrates more on his substantive course work than on legal research and writing. Then to add insult to injury, the course is usually not even taught by a "real" faculty member. Instead, the student is subjected to upperclass law students, recent law school graduates and even librarians. Thus, the

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17. See Sadow & Breede, "Library Instruction in American Law Schools", 68 *Law Lib. J.* 27 (1975) for the argument that legal bibliography should be taught by law library reference staff members and not by the teaching faculty or even by the law library director.

18. E.g. M. Cohen, *Legal Research in a Nutshell* (2d ed. 1971); *How to Find the Law* (6th ed. 1965); E. Pollack, *Fundamentals of Legal Research* (4th ed. 1973); Price & Bitner, *Effective Legal Research* (3d ed. 1969).

student does not consider the course important. Neither does the rest of the faculty, often for the same reasons.

The actual instruction in the typical legal research and writing course is usually seen as weak. As far as the students' writing is concerned, in spite of tremendous efforts, there simply is not enough time to give students enough writing assignments and enough individual feedback to enable them to significantly improve their writing skills. The quality of instruction in legal bibliography also suffers from lack of time. It becomes merely an introduction to the very basics of legal research and many students never learn that there is anything other than a digest with which to begin a research project. Also, the emphasis throughout is on case finding because of the nature of the writing assignments given. Thus, instruction in the techniques of research in statutory or administrative law is usually lost in the shuffle. Finally, there is little if any instruction concerning how to organize a research project—how to define the problem, where to begin research and how to keep track of the research product. The student emerges with what has been called "a somewhat kaleidoscopic knowledge of basic research materials and a morbidly hopeful pride in being able to distinguish among them."[19]

This rather schizophrenic approach is almost always the only formal training law students receive in legal research and writing techniques. This is especially true when it comes to legal bibliography. There are, however, other ways they gain experience and practice before being set upon the unknowing public after graduation from law school. Many law schools now require that each student fulfill a writing requirement of some kind before completing law schools.[20] This takes the form of either a seminar paper for credit or a general requirement that the student participate in an "extracurricular" law school program, such as a moot court competition, requiring some kind of writing. However, except for those schools having this kind of requirement, opportunities for further legal research and writing practice are usually optional. There are a few (very few) schools which offer upperclass courses in legal bibliography. Most schools do offer a variety of seminars which usually require papers, and most offer the opportunity for independent legal research for credit under the supervision of a faculty member.[21] There is also, of course, the opportunity for a great deal of legal research and writing practice for those students who are members of the school's law

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19. Dean William C. Warren, "Teaching of Legal Writing and Research : A Panel", 52 *Law Lib. J.* 350, 355. (1959).

20. Over 25% of the law schools accredited by A.A.L.S. have a writing requirement and 32 % of them require a seminar. Huffmann, "Is the Law Graduate Prepared to do Research"? 26 *J. Legal Ed.* 520, 524 (1974).

21. *See in general Huffmann, supra* note 20 at 524.

review. Common wisdom has it that law review students emerge from law school with the best legal research and writing skills because of the amount of research, editing, and cite checking they must do.[22] Another good experience is participation in local, national, or international moot court competition which requires considerable research and an appellate brief as well as a well prepared oral argument. Finally, the student may have an outside job which enables him to develop his research skills. This includes working as a research assistant for a faculty member or working as a law clerk for a firm which has him do research and not just title searches and errands.

The foregoing is really not intended as an indictment of the legal research and writing instruction to which law students are so briefly exposed. First of all, it should be kept in mind how very much these courses are trying to accomplish with raw material and in a short period of time. When looked at objectively, even librarians must admit that it is the legal writing and analytic skills which must receive the most attention. Although we would like to see every law student have the research skills of an experienced law librarian, that is hardly realistic and actually unncessary. Research skills are relatively easy to learn by anyone who puts his mind to it, for learning how to use most research tools is a fairly mechanical process and can be learned as needed. The difficult part is defining the problem so that quality research can be done and making effective use of the research product. That is where the ability to "think and write like a lawyer" is so important and where the student's training must be concentrated. Secondly, legal research and writing skills are not learned in three years. As in all other areas of legal education, it is a career-long process. Law school curricula are designed with this in mind as far as substantive areas of the law are concerned.[23] It should not be surprising that the same theory is used when launching students on their way in legal research and writing.

Finally, although there is indeed a great deal of similarity from one law school to another in their legal research and writing programs, it would certainly be unfair to say that there is no innovation at all taking place in the field. There have in recent years been at least three rather novel programs tried, and although it is too early to tell whether they will be trend-setters, they are worthy of consideration. First of all, a number of schools have done away with the concept of a separate legal methods or legal writing course and are instead providing that their first year students receive this training in small sections of the substantive law

22. This view is sometimes, however, refuted. See *supra* note 19 at 351-52.
23. See Redlick, "We Train Our Lawyers to Work for Wall Street", 3 *Learning and the Law* 6 (No. 2, 1977).

courses. Usually each student is assigned to a small section of about twenty students for one of his substantive courses. There, in addition to covering the usual material, the faculty member also instructs them in general techniques of legal analysis and requires that they complete writing assignments. The instruction in legal bibliography is usually given separately, as is work in appellate advocacy. These programs are considered to be quite successful by the schools which offer them. Students receive a more thorough grounding than usual in the needed skills and it is felt to be easier to teach them in the context of a substantive course rather than separately. There do, however, remain problems as to evenness of the quality of instruction and the everpresent problem of finding enough time to give the students the needed individual attention.[24] Also, a fact which is not to be considered lightly, they are very expensive to operate.

Another unusual and innovative program is one being offered on by the University of Southern California. There, entering first year students who volunteer for the program come to the law school a week before classes begin in order to participate in an accelerated legal research instruction project. For five days they concentrate on learning the basics of legal bibliography through lectures, problem exercises and a great deal of individual instruction in the library by the library staff. Although their legal research capability is not considered to be significantly better than that of the other students who have five weeks of library instruction after the semester begins, the program is seen to be quite beneficial in the law school socialization process and is very popular with the students themselves. Obviously, however, this kind of program can only be conducted on a limited basis and because of demands on the time of library staff members would be impossible in a school with a large summer school program that runs until close to the time for the fall semester to begin.[25]

Finally, a unique system is being used at Santa Clara School of Law. Instead of an ongoing legal research and writing course extending over two semesters, the first year schedule allows a block of time to be taken in the middle of the year for what is called "Legal Writing Month". Each member of the faculty takes a small section of first year students and conducts training in legal research and writing as he sees fit, a variety of methods and approaches being used. The students are involved in no other course work during this time. The concept is intriguing although not without its problems, the most serious of which

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24. Correspondence from Kathleen Price, Law Librarian and Associate Professor of Law, Duke University School of Law.

25. Telephone conversation with Albert Brecht, Law Librarian and Assistant Professor of Law, University of Southern California School of Law.

is the great difference in quality and content of instruction from one section to another.[26]

Legal Research Instruction Tomorrow

Since legal research and writing instruction in law schools has not changed substantially in the past twenty-five years, what is the likelihood that it will change any in the next twenty-five? Actually significant changes are quite likely for a variety of reasons.

First of all, changes in legal research methods and instruction will certainly come with the increasingly rapid acceleration in the amount and kinds of legal research materials being produced. This is hardly a new observation, but it does bear repeating in this context. The more that is produced and the more ways legal information is being offered to the consumer, the more sophisticated it is necessary for research techniques to become. Thus, the amount that law students must be taught grows in geometric proportions (at least in the view of the law librarian) and one has visions of everybody getting farther and farther behind in the race to master access to all that information. As well as increases in the amount of information and in ways of getting to it, there have been and will surely be more changes in format. The introduction of microforms to the legal information market has already made startling changes in the way information is presented to us and the way we approach it. Documents heretofore unavailable to most lawyers are now right there in masses of microfiche with their own indexes, numbering systems or what have you. And the more accessible all this becomes, the more competitive legal research demands will be. No longer will a student or lawyer be able to omit researching in court records and briefs, in very old or primarily local court reports or in administrative agency materials, for they are now accessible in places other than Harvard and will have to be consulted in order to keep up with the opposition.

Another reason to anticipate significant changes in the way legal research and writing will be taught is, of course, the development of computerized legal research programs such as LEXIS and WESTLAW. A number of law schools have recently obtained access to LEXIS, and this has already substantially altered their research and writing programs in an exciting way.[27] At these schools, the first year program not only includes the usual kinds of instruction but also provides fairly extensive

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26. *See generally* Achtenberg, *supra* note 16, at 244-47.

27. *See* Dee & Kessler, "Impact of Computerized Methods on Legal Research Courses: A Survey of LEXIS Experience and Some Probable Effects on WESTLAW", 69 *Law Lib. J.* 164 (1976). See also remarks by Bardie Woolf in "Legal Bibliography : From Nutshells to Automation : A Panel", 68 Law Lib. J. 421, 426-29 (1975).

instruction in the use of LEXIS. The interesting thing about this is that
nearly all the people who have added computerized legal research
instruction to their teaching say that it is necessary first to be sure the
student understands and is able to use the manual research tools. One
might ask, not so frivolously, whether legal bibliography instruction is
going to have to be emphasized more in the future than it has in recent
years just so students can learn to cope with the computer and make the
best use of their time on it. Another interesting point is that those
involved in teaching it express the opinion that the computer will be
taught and learned just like any other research tool—that is, taught
hastily and learned hazily.[28] This is certainly not an argument for
rejecting this exciting technology but merely a warning that it is not
going to be the answer to all of our problems.

Other developments in computer technology will also have far reaching
effects on the teaching of legal research. Computer assisted legal education
programs such as PLATO and the University of Minnesota's work are
already having an impact and have the potential for bringing about
significant change in legal education as a whole.[29] As for legal research,
these programs have the potential for affecting it in three ways. First of
all, they can eliminate the need to use the library to learn how to do legal
research, for library sources can be simulated and exercises with them
can be provided on the computer.[30] Secondly, the student who learns his
law by computer will soon learn to conduct legal research by computer
as a matter of course. Finally, programs instructing the user in the
techniques of manual legal research are already being developed.[31] How
far are we from the day, then, when the student will use one computer
program in order to learn how to use another one?

Conclusion

So where does all this surveying of legal research and writing
programs past, present and future leave us? It leaves us with the
conviction that instruction in these skills never was ideal, is certainly not
now and probably has even less chance of being so in the future. The
job of the law schools is to keep trying to cope. The job of the law
librarian, either law school or private, is also to keep trying to cope and

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28. See Dee & Kessler, *supra* note 27 at 182.

29. See Generally Keeton, "And a Computer Shall Lead Them", 3 *Learning and
the Law* 46 (No. 2, 1976); "Law Schools Join the Computer Network", 3 *Learning and
the Law* 45 (No. 2, 1976); Maggs & Morgan, "Computer-Based Legal Education at the
University of Illinois : A Report of Two Years' Experience", 27 *J. Legal Ed.* 138
(1975).

30. Maggs & Morgan, *Id.* at 141.

31. Maggs & Morgan, *Id.* at 153.

to see our responsibility as one of continuing education, both of ourselves and of those we are trying to serve. The education of a lawyer is a never-ending process. The law librarian has a significant role to play in it if only that role is recognized.