

2008

## **Standing at the Gates: A New Law Librarian Wonders About the Future Role of the Profession in Legal Research Education**

Nolan Wright

Follow this and additional works at: [https://digitalcommons.law.uw.edu/law-lib\\_borgeson](https://digitalcommons.law.uw.edu/law-lib_borgeson)

---

### **Recommended Citation**

Nolan Wright, *Standing at the Gates: A New Law Librarian Wonders About the Future Role of the Profession in Legal Research Education* (2008), [https://digitalcommons.law.uw.edu/law-lib\\_borgeson/121](https://digitalcommons.law.uw.edu/law-lib_borgeson/121)

This Article is brought to you for free and open access by the Law Librarianship Program at UW Law Digital Commons. It has been accepted for inclusion in Borgeson Paper Archive by an authorized administrator of UW Law Digital Commons. For more information, please contact [lawref@uw.edu](mailto:lawref@uw.edu).

---

Standing at the Gates: A New Law Librarian Wonders About the  
Future Role of the Profession in Legal Research Education

---

Submitted by Nolan L. Wright, May 23, 2008  
In partial satisfaction of the requirements of LIS 595  
University of Washington Information School  
Law Librarianship Program

## I. Overview

In 1989 a task force was formed under the auspices of the American Bar Association Section of Legal Education and Admissions to the Bar for the purpose of studying and improving the processes used to prepare prospective new members of the profession for the practice of law.<sup>1</sup> In 1992 the Task Force issued a report, subsequently referred to as the MacCrate Report after the name of its Chairperson, which included a “Statement of Fundamental Lawyering Skills and Professional Values.”<sup>2</sup> That statement, described as “a central feature of the report’s analysis and ... foundation for its recommendations,”<sup>3</sup> lists legal research as one of the ten skills that every attorney should acquire before assuming responsibility for representing a client, making professional judgments, or giving legal advice.<sup>4</sup> Summarizing the nature of that skill, the Report states as follows:

In order to conduct legal research effectively, a lawyer should have a working knowledge of the nature of legal rules and legal institutions, the fundamental tools of legal research, and the process of devising and implementing a coherent and effective research design.<sup>5</sup>

The widely held perception at the time was that a significant number of law school graduates did not meet that standard.<sup>6</sup> Some observers insisted in fact that

---

<sup>1</sup> Task Force on Law Schools and the Profession: Narrowing the Gap, *Statement of Fundamental Lawyering Skills and Professional Values* (1992).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 3, identifying the full list of ten skills as follows: problem solving; legal analysis and reasoning; legal research; factual investigation; communication; counseling; negotiation; litigation and alternative dispute procedures; organization and management of legal work, and; recognizing and resolving ethical dilemmas. As indicated by its title, the Statement also identified a number of fundamental values of the profession, specifying four as follows: the provision of competent representation; striving to promote justice, fairness, and morality; striving improve the profession, and; professional self development. *Supra* note 1, at v. and described in detail at 87-101.

<sup>5</sup> *Id.* at 31; and see the related detailed breakdown of each of those three major components together with a commentary from the Task Force at 31-37.

<sup>6</sup> See for instance, Joan S. Howland & Nancy J. Lewis, *The Effectiveness of Law School Legal Research Training Programs*, 40 J. Legal Educ. 381, 382-387 (1990) (reporting the results of a survey of law firm librarians from eight major metropolitan areas in the United States with an average of twenty-one summer clerks and nineteen first-year associates per firm; noting deficiencies in the clerk and associates’ abilities to design expedient research strategies, determine appropriate research sources for specific subject matters, competently use basic legal research

many new attorneys were incompetent in this regard.<sup>7</sup> Fifteen years later, the observations continue that law schools are graduating law students that lack the requisite research skills for legal practice,<sup>8</sup> raising legitimate questions about what has transpired during that time period.

So what happened? What have the professionals responsible for addressing this in our law schools been doing since the MacCrate Report was issued and why hasn't it made more of a difference? What opportunities do law librarians have and what challenges do we face in order to contribute to better outcomes in the future?

A survey of the literature, as discussed below, leads this author to conclude that there are more good things going on in first year legal research and writing classrooms than we law librarians may realize. If a newcomer can be so bold, it is also the author's impression based on these readings that if librarians want to participate more fully in and make more of a difference in the state of legal research education that we will need to reconsider some aspects of our professional culture. Specifically, we need to be willing to engage in intellectual dialogue with one another, through peer-reviewed publications, not just special interest list serves, and actually discuss and not only cite to each other's scholarship and opinions. Historically, there does not appear to have been much of that in the law librarianship community. The most notable instance when it did occur, the exchange quickly became heated and quite personal.<sup>9</sup> That is not

---

tools, and efficiently incorporate the use of computerized legal research and traditional legal research methodology); and see also Donald J. Dunn, *Why Legal Research Skills Declined, or When Two Rights Make a Wrong*, 85 Law Lib. J. 49, 49 note 2 (1993) (summarizing anecdotal accounts by law firm librarians at a conference held at Wake Forest University in November 1990; as a shorter, redacted version of the article was published a year earlier under the same title, this version is referred to hereafter as "Dunn II").

<sup>7</sup> Thomas A. Woxland, *Why Can't Johnny Research? Or It All Started with Christopher Columbus Langdell*, 81 Law Lib. J. 451 (1989).

<sup>8</sup> See for instance, Michael Vander Heijden, *Bridging the Abyss: Law Librarians Come Together to Prepare New Attorneys*, 12(1) AALL Spectrum 40 (2007).

<sup>9</sup> I am speaking of course of the exchange between the Christopher Wren and Jill Robinson Wren ("the Wrens") and Robert Berring and Kathleen Vanden Heuvel, ("Berring and Vanden Heuvel"), beginning with the Wren's article, Christopher Wren and Jill Robinson, *The Teaching of Legal Research*, 80 Law Lib. J. 7 (1988) ("Wren & Wren I"), followed by the rejoinder from Berring and Vanden Heuvel, *Legal Research: Should Students Learn It or Wing It?* 81 Law Lib. J. 431 (1989) ("Berring & Vanden Heuvel I"), the Wren's response, Christopher Wren and Jill Robinson, *Reviving Legal Research: A Reply to Berring and Vanden Heuvel*, 82 Law Lib. J. 463 (1990) ("Wren & Wren II"), and the rather cryptic finale from Berring and Vanden Heuvel, *Legal Research: A Final Response*, 82 Law Lib. J. 495 (1990) ("Berring & Vanden Heuvel II").

conducive to intellectual debate, and the author here can only hope that if this piece gets a public airing that it does not arouse a similar response.

We also need to be willing to look more closely and consistently into the educational experiments being undertaken by legal research and writing instructors and clinicians by paying attention to their publications. Many of those exercises have been focused on public interest and social justice issues,<sup>10</sup> and there is much to commend that. However, the lessons learned through those experiments about how to engage students in learning the most effectively do not appear to be dependent on that theme and would seem to apply to legal research education more broadly.

If librarians want to step in and play a more active day-to-day role, perhaps even taking back the lead that librarians once played,<sup>11</sup> we would be wise to stop and consider these broader issues about adult education. Effective teaching takes more than a thorough knowledge of the subject matter. It also takes an understanding of how learning as opposed to training occurs.<sup>12</sup> In the case of legal research education it may also require legal training in addition to bibliographic knowledge and perhaps experience in actual legal practice as well, at least if the individual is the sole instructor.

## II. Background

A number of reasons had already been cited by the time the MacCrate Report was released in an effort to explain why law school graduates had inadequate legal research skills.

Some pointed to the emphasis law schools had been placing on teaching legal writing as a significant factor and argued that it had come at the expense of legal

---

<sup>10</sup> See for instance, Michael A. Milleman and Steven D. Schwinn, *Teaching Legal Research and Writing With Actual Legal Work: Extending Clinical Education Into The First Year*, 12 *Clinical L. Rev.* 441 (2005-2006).

<sup>11</sup> Marjorie Dick Rombauer, *First-Year Legal Research And Writing: Then And Now*, 25 *J. Legal Educ.* 538, 539 (1972-1973) (noting that librarians routinely were the ones that taught the bibliographic courses that sprang up soon after the beginning of the twentieth century and that the bibliographic component was initially the dominant partner in the new union after the emergence of research and writing courses after World War II).

<sup>12</sup> See generally, Paul Douglass Callister, *Beyond Training: Law Librarianship's Quest for the Pedagogy of Legal Research Education*, 95 *Law Lib. J.* 7 (2003), and related discussion and sources below.

research education.<sup>13</sup> It was observed that these courses were often being taught by inexperienced or part time personnel, including upper level students, recent graduates, and adjuncts, with a high turnover rate,<sup>14</sup> recruited because they had good grades and/or were good writers, not because of their research skills.<sup>15</sup> In the process, law librarians were cast in a diminished role.<sup>16</sup>

A related argument had also been raised that law students simply did not place a high value on learning legal research, taking their cue from the comparatively low status of the instructors that the schools were providing and the fact that many of the classes were also ungraded or pass/fail and/or were not awarded as many credits as the substantive courses.<sup>17</sup>

The increasing volume and complexity of legal information was also cited as an explanation,<sup>18</sup> along with the increasing prevalence and impacts of Computer Assisted Legal Research (CARL).<sup>19</sup>

---

<sup>13</sup> Donald J. Dunn, *Why Legal Research Skills Declined, or When Two Rights Make a Wrong*, in EXPERT VIEWS ON IMPROVING THE QUALITY OF LEGAL RESEARCH EDUCATION IN THE UNITED STATES (1992) (hereafter "EXPERT VIEWS")(one of 16 papers selected by West Publishing Company from responses to its January 1991 Call for Papers), (hereafter "Dunn I"). An expanded and updated version of Dunn's article tracing the evolution of this process in considerably more detail was subsequently published under the same title at 85 Law Lib. J. 49 (1993) ("Dunn II").

<sup>14</sup> Helen S. Shapo, *The Frontiers of Legal Writing: Challenges for Teaching Research*, 78 Law Lib. J. 719, 721-725 (1986) (including a summary of statistics from ABA surveys in 1973 and 1983 that showed a decrease in research only classes, with combined legal writing and research courses increasing from 43 percent to 82 percent of the reporting schools over that ten year period). See also Rombauer, *supra* note 11, at 539 (tracing the emergence of legal research and writing courses back to the early post World War II period and discussing the opportunities that were missed to have developed programs built around legal problem solving as a unifying theme).

<sup>15</sup> Robert C. Berring & Kathleen Vanden Heuvel, *Legal Research: Should Students Learn It or Wing It?* 81 Law Lib. J. 431, 438, 440 (1989); Dunn II, *supra* note 9, at 57.

<sup>16</sup> Shapo, *supra* note 14.

<sup>17</sup> See for instance, Davalene Cooper, "Adopting the Stepchild Into the Legal Academic Community: Creating a Program For Learning Legal Research Skills," in EXPERT VIEWS, *supra* note 13, at pages 11-18; John D. Edwards, "Teaching Legal Research: Evaluating Options," in EXPERT VIEWS, at 29-36; Rosalie M. Sanderson, "Point of Need Analysis: Improving Legal Research Skills by Providing Specialized Training at Point of Need," in EXPERT VIEWS, *supra* note 13, at 79-84; Kathleen G. Sumner, "An Alternative to Traditional Legal Research, Legal Writing, Legal Drafting and Appellate Advocacy Programs," in EXPERT VIEWS, *supra* note 13, at 112-117.

<sup>18</sup> See for instance, Cooper, *supra* note 18; Virginia J. Wise, "Managing Information Inflation," in EXPERT VIEWS, *supra* note 13 at 119-124.

There were also voices questioning what they viewed as the received orthodoxy of the importance of materials over process and insufficient attention paid to the need to build on students' pre-law perceptual frameworks of understanding.<sup>20</sup> That was initially shouted down, however, and the debate had apparently already been pushed aside by the increasing concern already cited about CALR.<sup>21</sup> Others went farther, saying the fault lay in what they perceived as the dysfunctional case book approach to legal education generally.<sup>22</sup>

Finally and perhaps most significantly given the subsequent focus on advanced research education that it appears to have helped hasten,<sup>23</sup> Robert Berring, the influential Director of the Law Library and Professor of Law at the University of California School of Law at Berkley, asserted in an article that he coauthored with Kathleen Vanden Heuvel that it was a mistake to think that much could be accomplished with first year students regardless of how they were taught. Specifically, he stated that “[t]rying to teach systematic research in the first year is trying to teach the wrong people the wrong material at the wrong time.” Explaining, he stated that the material can’t make any real sense to them

---

<sup>19</sup> See for instance Jackson H. Mumey, Transforming Our Thinking: Responding to the Gap Between LRW Pedagogy and Knowledge Based Systems,” in EXPERT VIEWS, *supra* note 13, at 1-10; and Dunn II, *supra* note 13. These are clearly issues that have understandably continued to dominate the attention of the law librarianship community, as discussed more fully below. See generally, Ian Gallacher, Forty-Two: The Hitchhikers’ Guide to Teaching Legal Research to the Google Generation, 39 Akron L. Rev. 151 (2006); Barbara Bintliff, Context and Legal Research, 99 Law Lib. J. 249 (2007); Carry W. Teitcher, Rebooting the Approach to Teaching Research: Embracing the Computer Age, 99 Law Lib. J. 555 (2007); Shawn G. Nevers, *Candy, Points, and Highlighters: Why Librarians, Not Vendors, Should Teach CALR to First Year Students*, 99 Law Lib. J. 757 (2007); Suzanne Ehrenberg and Kari Aamot, *Integrating Print and Online Research Training: A Guide for the Wary*, 15(2) Perspectives: Teaching Legal Research and Writing 119 (2007). It is interesting to note though with regard to the assertion that research skills have diminished, both as a result of CALR and the emergence of legal writing programs after World War II, that there are complaints about the poor research abilities of law students and lawyers dating back to at least 1902. See Callister, *supra* note 12, at 9-10.

<sup>20</sup> See Wren I and II and Berring and Vanden Heuvel I and II, *supra* at note 9.

<sup>21</sup> Callister, *supra* at note 12, discussed more fully below, noting at page 20 that the debate was set aside without having been resolved, due to the increasing focus on CALR within the law librarianship community.

<sup>22</sup> See Woxland, *supra* note 7.

<sup>23</sup> See Peter C. Schanck, *Mandatory Advanced Legal Research: A Viable Program For Law Schools*, 92 Law Lib. J. 295 (2000) (subsequently stating that many of the nations law schools were trying to improve or expand their advanced legal research offerings and that the most important reason was “the inherent limitations of first-year students to absorb legal research instruction,” citing Berring & Vanden Heuvel I at 295, n. 1, as an authority for that proposition).

until they go through the “imprinting process” that takes place in the first year where “students learn jargon and how to frame issues according to some version of legal doctrine, and that “no matter how it is taught, students will perceive it as disjointed data” until that imprinting has occurred.<sup>24</sup> In contrast, he suggested that second year students are ideal, both because the necessary imprinting has occurred, and because those students are motivated by the discomfort they will have experienced trying to carry out research assignments during their first year summer employment.<sup>25</sup>

### III. Post-MacCrate Developments

#### A. Strategies Under Contemplation Generally

Representatives of various segments of the law library and legal research and writing communities were already working on ways to approach improving legal research education before the MacCrate Report was issued.<sup>26</sup> Indeed, a number of suggestions had already been made of strategies that might be employed, many summarized in a collection issued by West Publishing Company in 1992, the same year that the MacCrate Report was issued.<sup>27</sup>

Among those strategies: the recommendation that law schools use full time faculty or instructors who are part of the law school community;<sup>28</sup> that the courses

---

<sup>24</sup> Berring & Vanden Heuvel I, *supra* note 9, at 441-42.

<sup>25</sup> *Id.* at 442. *But see* Michael J. Lynch, *An Impossible Task But Everybody Has To Do It – Teaching Legal Research in Law Schools*, 89 *Law Lib.* 415, 436 (1997) (noting that law students are likely to devote more energy to their courses balanced against their personal lives during the first year of law school than in subsequent years, and advising that while there are other reasons that teaching legal research later is better this factor should not be forgotten); *and see also*, Theodore A. Potter, *A New Twist on an Old Plot: Legal Research is a Strategy, Not a Format*, 92 *Law Lib. J.* 287, 293 (2000) (advocating for teachers to set high standards from the start, inviting them to use more sophisticated research strategies and rewarding them for doing so); Ian Gallacher, *supra* note 19, at 168-70 (noting valid points in Berring and Vanden Heuvel’s argument, observing, however, that “designing a first-year curriculum that leaves students “unprepared and misinformed” and makes them “angry” is poor pedagogy and is, in any case, a wasted opportunity. Even if it only provides a grounding in research, a first year legal research program can play a valuable role in the students’ development as lawyers); *and see related discussion re first year clinic and LRW programs below* at Section III(D)

<sup>26</sup> *See* Dunn, *supra* note 13, at 49.

<sup>27</sup> *See generally*, EXPERT VIEWS, *supra* note 13.

<sup>28</sup> *See, for instance*, Cooper, *supra* note 17; Dunn, *supra* note 13.

should be graded and given credits proportional to the workload;<sup>29</sup> that they should incorporate or be integrated with a topic in one of the first year substantive courses,<sup>30</sup> and/or should be integrated with the students' small section, with a librarian teaching research and assisting the professor in the design of the research exercises.<sup>31</sup> A number of suggestions for upper level research training also emerged, perhaps as a function of Robert Berring's assertion cited above about the greater efficacy of emphasizing research training after the first year. Those included: advanced research classes;<sup>32</sup> specialized research instruction during upper level substantive courses, related to the course topic;<sup>33</sup> having faculty include assignments requiring research from their students as part of second upper level classes;<sup>34</sup> increasing the number of journals so that more students had the opportunity to participate and gain additional research experience in the process;<sup>35</sup> integrating research training and a school's clinic program, addressing real problems faced by real clients, and/or through use of simulations.<sup>36</sup> Others suggested concentrating on instruction at a "point of need," such as during moot court, research assistantships for law school professors, journal write-on, as a component of legal clinic internships, and/or during summer clerkships.<sup>37</sup> Mandatory pre-licensure legal internships were also suggested as an option,<sup>38</sup> as was the possibility of adding the subject to bar examinations.<sup>39</sup>

---

<sup>29</sup> See, for instance, Sanderson, *supra* note 17.

<sup>30</sup> See, for instance, Edwards, *supra* note 17

<sup>31</sup> See, for instance, Fritz Snyder, *Improving Law Student Research Skills*, in EXPERT VIEWS, *supra* note 13, at 99.

<sup>32</sup> See, for instance, Dunn, *supra* note 13; Edwards, *supra* note 17; S. Blair Kauffman, *Advanced Legal Research Courses: A New Trend in American Legal Education*, Legal Reference Q., 1986, nos. 3—4, at 123.

<sup>33</sup> See, for instance, Dunn, *supra* note 13, at 26-27.

<sup>34</sup> See, for instance, Cooper, *supra* note 17; Dunn, *supra* note 13.

<sup>35</sup> See, for instance, Snyder, *supra* note 31, at 104.

<sup>36</sup> See, for instance, Carol L. Golden, *Teaching Legal Research as an Integral Step In Legal Problem Solving*, in EXPERT VIEWS, *supra* note 13, at 37.

<sup>37</sup> See, for instance, Sanderson, *supra* note 17.

<sup>38</sup> See, for instance, Stephen R. Alton, *Mandatory Prelicensure Legal Internship: An Idea Whose Time Has Come Again?*, 41 U. Kan. L. Rev. 137 (1992).

<sup>39</sup> See, for instance, I. Trotter Hardy, *Why Legal Research Training Is So Bad: A Response to Howland and Lewis*, 41 J. Legal Educ. 221, 224-25 (1991) (noting that "nearly everyone gives lip service to the need for research skills, so there cannot be any objection in principle to testing research as a condition for admission to the bar)..

Similar strategies to those listed above and others began being circulated more broadly with West Publishing Company's launch of the newsletter *Perspectives: Teaching Legal Research and Writing* in August 1992.<sup>40</sup> It appears though that law librarians may not have been as involved in that dialog as the first year legal research and writing (LRW) community. The law librarians appear to have been concentrating their advocacy instead more narrowly on expanding the number of advance legal research courses.<sup>41</sup>

### B. Advanced Legal Research (ALR) Courses As the Solution

There have clearly been significant gains in advanced legal research education since the MacCrate Report was issued.<sup>42</sup> According to the results of a survey and literature review conducted by Ann Hemmens in 2000, for instance, the number of schools stating that they were offering ALR courses increased from nine to seventy-two between 1983 and 2000.<sup>43</sup> The number has continued to climb since that time according to results of surveys by the Association of Legal Writing Directors and the Legal Writing Institute. Those surveys, conducted annually, include a number of questions about staffing for both first year and

---

<sup>40</sup> See Dunn II, *supra* note 13, citing this publication date at note 2.

<sup>41</sup> Law librarians serving on the American Association of Law Libraries (AALL) Research Instruction Caucus, Subcommittee on Research Certification, also directed considerable effort toward expanding the six page statement of legal research competencies stated in the MacCrate Report into a far more detailed, 114 page blue print *Core Legal Research Competencies: A Compendium of Skills and values as Defined in the ABA's MacCrate Report* (Ellen M. Callinan ed., 1997) The intended purpose of the document is unclear though, and as a practical matter it does not appear to have had much impact if any on legal research education. By 1997 the Caucus no longer existed and responsibility for the document had passed to the Research Instruction and Patron Services Special Interest Section (RIPS). See *Reports of Chapters, Special Interest Sections, Committees, Special Committees and Task Forces, Representatives, and Washington Affairs Office 2000-2001*, 93 Law Libr. J. 651, 685 (2001) (noting that RIPS was invited to resubmit the proposal to the full committee after adding a preface or introduction and a table of contents, and that the Publications Committee was not persuaded that it was more advantageous to publish the Core Competencies as part of the AALL/Hein Publications Series, as the Research Instruction Committee had suggested, than to update and enlarge upon the publication as it then existed on AALLNET); and see *Reports of Chapters, Special Interest Sections, Committees, Special Committees and Task Forces, Representatives, and Washington Affairs Office 2002-2003*, 95 Law Libr. J. 643, 680-81 (2003) (still debating what to do with the document, describing it as a "historical reflection.")

<sup>42</sup> It is not clear whether the MacCrate Report played any role in this whatsoever. The question does not appear to have been asked as part of any published study reviewed for this paper.

<sup>43</sup> Ann Hemmens, *Advanced Legal Research Courses: A Survey of ABA-Accredited Schools*, 94 Law Libr. J. 209 (2002) (reporting on surveys in 1983, 1986, 1992, and 1997, in addition to her own conducted in 2000).

advanced classes. According to the 2007 survey results, 146 (73.3%) of the 186 schools that responded reported some form of advanced research course taught as part of the elective curriculum, up from 95 in 2000, with 107 taught by librarians, up from 64 in 2000.<sup>44</sup>

Those numbers are impressive, but excitement over the results should be weighed against the fact that the benefits of these classes only flow to a relatively small number of students. More than three-quarters of the schools responding to Hemmens' 2000 survey reported that they have a class limit of twenty students or less, and more than eighty percent offer the class only one or two times a year.<sup>45</sup>

The instructional format might also be seen as a drawback in light of the emerging understanding about the importance of active learning, discussed more fully below. Hemmens notes, for instance, that classroom lecture by the instructor was the clearly dominant approach employed, reported by nearly ninety-nine percent of the respondents in her 2000 study.<sup>46</sup> That was followed by computer laboratory sessions (83.1%), in class demonstrations of both traditional (i.e. print) and electronic resources (tied at 80%), then guest-lectures (67.6%), library tours and email list or discussion groups (49.3%), small groups sessions (22.5%), field trips (12.7%), and the "other" category (8.5%), which included short in-class research assignments and student presentations.<sup>47</sup> The law library was reportedly responsible for the ALR courses at almost all of the schools responding to Hemmens' survey, and she characterizes that finding as indicating that these ALR courses were "overwhelmingly a product of librarian initiative and commitment to legal research education."<sup>48</sup> Presumably that means the instructional approach taken reflects a choice on the instructor's part to proceed in the manner described.

---

<sup>44</sup> ALWD/LWI 2007 Survey Results, responses to question 35(j), available at <http://www.alwd.org> and <http://www.lwionline.org>, last accessed on April 16, 2008, and using the 2002 Survey Results, including 2000 data, for comparison, also available from the sites noted immediately above and last accessed on that same date. Note that the numbers reported for 2000 in the ALWD/LWI 2002 Survey Results are higher than reported in the Hemmens study cited *supra* at note 42 for that same period. While it is possible the higher number are attributable to differences in question design it seems more likely that it is a function of response rates.

<sup>45</sup> Hemmens, *supra* note 42. at 223. The ALWD/LWI Survey does not provide any data on that issue.

<sup>46</sup> *Id.* at 229.

<sup>47</sup> *Id.* at 229-30.

<sup>48</sup> *Id.* at 223-24.

The ALR curriculum reported above by Hemmens may seem quite diverse, but it is still largely passive. There is little to indicate it provides students with research experiences that simulate the kind of situations they are likely be confronted by once in actual practice, let alone actually confront them with real clients with real problems requiring research. That may not be a problem for the students who self-select themselves into these classes. They may be perfectly comfortable with this learning model or at least more so; some may, like we librarians, take pleasure in research for its own sake. However, given the arguments discussed below about the importance of active learning and of engagement generally for learning to occur, especially in adult education, wholesale changes seem necessary for these advance classes to be much more effective for students as a whole than the first year classes they are meant to supplement. If that argument is sound, then adding ALR classes in itself is not the answer, even if enough were added to reach every student and they were required to attend.

### C. Changes in Circumstances for the LRW and Clinic Communities

Meanwhile, circumstances appear to have changed a great deal in a number of important respects for the LRW community. Of particular note, these changes address a number of the shortcomings cited earlier that were thought to have contributed to the perceived decline in legal research skills.<sup>49</sup> By 2002, ten years after the MacCrate Report was issued, the vast majority of legal writing and research courses in the United States ran at least two full semesters in length, were graded the same way as other first year courses, with those grades counting toward the student's Grade Point Average (GPA), and were awarded an average of more than two credits per semester.<sup>50</sup> Legal research was taught as an integrated subject with legal writing in 117 of the 153 schools that responded to the survey, with an increasing number of those classes taught by LRW faculty,

---

<sup>49</sup> As noted earlier, questions can and have been raised about the extent of this reported decline, as there have been complaints about the research skill level of law students and practicing attorneys going back more than one hundred years. *See Callister, supra* note 12, at 9-11. Perhaps as Robert Bering has suggested, the real issue is that it is more difficult to get away with sloppy research training and execution now that a rudimentary knowledge of the West Digest system is not enough, given the growing amount of and different sources of law and access to full text online material, exceeding the capacity of the Digest System as an informational system. *See generally, Robert C. Bering, Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 Wash. L. Rev. 9 (1994) (particularly pp. 24-25 and 29-34).

<sup>50</sup> ALWD/LWI 2002 Survey Results, *supra* note 44, at Section IV, Curriculum, questions 12, 14-16.

either alone or with librarians, and fewer classes were taught by librarians alone.<sup>51</sup> Changes had taken place with respect to the status of instructors as well, as an increasing number were employed in their positions full time, and while still typically not tenured or on tenure track, they were typically on contracts of 1, 2, or 3 years or longer, and more than ninety percent had no cap on contract renewals.<sup>52</sup> Increasingly they were permitted to serve on faculty committees and did so, usually as voting members, and an increasing number were referred to by use of some variation on the term professor.<sup>53</sup> Salaries were also increasing and an increasing number were eligible for summer research grants, department funding to attend conferences and purchase books, etc., and funding to pay teaching assistants.<sup>54</sup>

Those trends have all continued in the past five years, with average salaries for full time LRW positions reported at \$63,313.00, an increase of more than \$14,000.00 since 2003, plus summer research grants averaging more than \$7,000.00.<sup>55</sup> More than ninety percent of the schools now report that they do not have a cap on renewals.<sup>56</sup> More than eighty percent now report that they teach research and writing in an integrated fashion, and the number of schools using both LRW faculty and librarians to teach the course is increasing.<sup>57</sup>

The changes for the clinicians since the MacCrate Report was released have been even more dramatic. Assessing that impact as part of a symposium of clinicians on the tenth anniversary of the Report, Russell Engler, Professor of Law and Director of Clinical Programs at the New England School of law observed as follows:

Even if the overall impact of the MacCrate Report on legal education is unclear, the Report's impact on clinical teachers is not. The MacCrate Report's greatest success might be as an effective organizing tool for activities and thinking of clinical teachers and proponents of clinical legal education.... Clinical

---

<sup>51</sup> *Id.* at question 18.

<sup>52</sup> *Id.* at questions 65-66.

<sup>53</sup> *Id.* at questions 83 and 68.

<sup>54</sup> *Id.* at questions 75-80.

<sup>55</sup> ALWD/LWI 2007 Survey Results, *supra* note 44, at questions 75-76.

<sup>56</sup> *Id.* at question 66.

<sup>57</sup> *Id.* at question 18.

teachers were extremely active throughout the 1990's, and the MacCrate Report was front and center as a tool for fueling these efforts. Although references to the Report itself faded from the section newsletters and titles of articles appearing by the end of the 1990's, the issues raised in the Report have remained in the forefront of clinical legal education, and the Report continues to influence clinical scholarship. The latter point is hardly surprising, since the MacCrate Report gave a substantial boost to clinical pedagogy and to clinics, and since clinical teachers played such an important role in shaping the document. It would be hard to imagine that the subject of the Report would stray too far from the center of the clinical world.<sup>58</sup>

Indeed, the Report includes language extolling the importance of clinical legal education in the teaching of skills and values, stating that

[c]linics have made, and continue to make, an invaluable contribution to the entire legal education enterprise. They are a key component in the development and advancement of skills and values throughout the profession. Their role in the curricular mix of courses is vital.... Much of the research leading to the advancement of knowledge about lawyering, the legal profession and its institutions is found in the work of clinicians, and many are recognized to be among the most dedicated and talented teachers in law schools. Clinics provide students with the opportunity to integrate, in actual practice settings, all of the fundamental lawyering skills.<sup>59</sup>

Engler also points out that the Report and its proponents played a crucial role in spurring a series of amendments to the ABA accreditation standards, including amendments to Standard 301(a) in 1993 to explicitly instruct “that law schools have a responsibility to maintain an educational program that is designed to prepare graduates to participate effectively in the legal profession.”<sup>60</sup> Continuing advocacy by clinicians and their allies led to further changes by the ABA that strengthened the standards related to clinical legal education and the teaching of

---

<sup>58</sup> Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 *Clinical L. Rev.* 109, 144 (2001-2002).

<sup>59</sup> *Id.* at 114, quoting page 238 from the MacCrate Report.

<sup>60</sup> *Id.* at 145.

skills and values,<sup>61</sup> resulting in “an impressive array of new clinics,” with clinics and externships coming in at number 11 in the top 25 areas of curricular growth reported in 1997.<sup>62</sup>

New clinics are expensive to establish, requiring “significant institutional investments.”<sup>63</sup> It follows that unless they are funded from new sources their increase has to come from and at the expense of existing budgetary lines, i.e. from other programs and individuals. The legal writing and research teachers reportedly criticized the MacCrate Report for failing to elevate the status and role of their field,<sup>64</sup> perhaps with that danger in mind, but it appears that they managed to improve their position never-the-less as discussed above.

The success that both the LRW and clinical communities have had in their professional advocacy efforts should be food for thought within the law librarianship community. There is good cause to pay attention to what they have done and how they have gone about it. It does not appear that our profession has fared as well in improving the perception of the importance that it does or should play in legal education, and with it our status in the legal education community. Some might even suggest that it is a critically important time for the law librarianship community to engage in this assessment, given the oft commented upon changes in information technologies and resulting decline in circulation and reference transactions that have already led some to question the continued necessity of libraries and librarians.<sup>65</sup>

Be that as it may, the clinic and LRW communities have educational experiences and insights to offer as discussed below that the law librarianship community might benefit from as it assesses and develops strategies to improve legal research education.

#### D. Perspectives From the LRW & Clinic Communities

##### 1. Passion, Motivation & Engagement

---

<sup>61</sup> *Id.* at 145.

<sup>62</sup> Deborah Jones Merritt & Jennifer Cihon, *New Course Offerings in the Upper-Level Curriculum: Report of an AALS Survey*, 47 *J. Legal Educ.* 524, 534-35 (1997)

<sup>63</sup> *Id.* at 551.

<sup>64</sup> Engler, *supra* note 58, at 119.

<sup>65</sup> Charles Martell, *The Elusive User: Changing Use Patterns in Academic Libraries 1995 to 2004*, 68 *College & Research Libraries* 435 (2007).

The importance of engaging the student stands out as a key point to take away from the LRW and clinic literature. Deborah Maranville, Professor and Director of the Clinical Program at the University Of Washington School Of Law, notes for instance, that “good teachers have always recognized [that] motivating and engaging students is the critical first step in helping them learn.”<sup>66</sup> It is her further contention that the path to achieving that engagement lies in nurturing the positive passions that direct many students to law school in the first place and/or which can be imparted once they get there, such as passion for people, craft, justice, or public service, and that when legal educators fail to do that students disengage and do not learn effectively.<sup>67</sup> Others have noted more simply that students learn skills more effectively when they take the class more seriously and that the closer the student comes in an assignment to being responsible for some aspect of an actual client’s matter “the greater the motivational and therefore educational value of the work.”<sup>68</sup> This may be even more of an issue with the current generations of law students, who often differ in significant ways from their instructors, ways that make active, collaborative learning even more salient.<sup>69</sup>

This factor would certainly seem to be more important than the status of the instructor, for instance, or, whether s/he introduces primary sources first as opposed to secondary, print as opposed to electronic, or approaches legal research education from a bibliographic as opposed to process orientation. Perhaps the primary reason legal research education has not been more successful is that too many instructors and theorists have not understood this or not given it enough weight. In the case of law librarians specifically, it may be that we have expected students to share or adopt our passion for research tools and processes themselves. That is fine for the nascent law librarians amongst them, but for most it is not realistic and they disengage. We need to meet our students where we find them,

---

<sup>66</sup> Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. Legal Educ. 51, 52 (2001).

<sup>67</sup> *Id.* at 51-53 and 58.

<sup>68</sup> Millemann & Schwinn, *supra* note 10, at 444-45.

<sup>69</sup> Joanne Ingham & Robin A. Boyle, *Generation X In Law School: How These Law Students Are Different From Those Who Teach Them*, 56 J. Legal Ed. 281 (2006); Gail Lynn-Nelson, *The Next Generation of Learners, Training Issues Law Librarians Face In the 21<sup>st</sup> Century*, 11 Spectrum 8 (2007); and see generally, Marc Prensky, *Digital Natives, Digital Immigrants* (2001), and *Digital Natives, Digital Immigrants, Part II: Do They Really Think Differently?* (2001), available online at <http://www.marcprensky.com/writing/Prensky%20%20Digital%20Natives,%20Digital%20Immigrants%20-%20Part1.pdf> and <http://www.marcprensky.com/writing/Prensky%20%20Digital%20Natives,%20Digital%20Immigrants%20-%20Part2.pdf>, respectively.

tapping into their passions or providing visions of possibilities they can get excited about.

## 2. The Importance of Context

Another focal point discussed in the clinic and LRW literature to take note of is the important role that context plays in learning. Professor Maranville cites several reasons for its importance:

First, students are more interested in learning when the information they are studying is placed in a context they care about. Second, when teachers provide context for their students, they increase the likelihood that students will understand the information. Third, and especially significant for the law school experience, in learning information, we may organize and store it in memory differently for the purpose of studying for a test than we do in order to retrieve it for legal practice.<sup>70</sup>

Elaborating on the last of those factors, Maranville argues that context plays a critical role in determining both how our students organize information and whether they will be able to retrieve it later in life.<sup>71</sup>

For information to be usable in practice, our students must not only remember the concepts and rules we teach them; they must also be able to recognize the relevance of the information when faced with a real-life problem. To accomplish that, students need what I term “anchor points” in memory, around which to organize the

---

<sup>70</sup> Maranville, *supra*, note 66, at 56. (explaining that there are several different aspects to the meaning of “context” for purposes of law school education as she sees it: (1) exposure to the people and real-life circumstances in which legal doctrine arises; (2) familiarity with the institutions and practices giving rise to legal disputes; (3) familiarity with the legal institutions and processes in which legal doctrines are applied, and; (4) familiarity with the legal tasks that lawyers perform and the ways that knowledge of legal doctrine is integral to those tasks). Maranville continues on at page 57, using contract law as an example, explaining that related rules “, will make more sense and be more interesting) if students are familiar with the circumstances in which the contract would be entered, have themselves engaged in the process of forming a contract or can see examples of written contracts and are familiar with how those contract rules will be used by an attorney, either in negotiating or drafting a contract, or in arguing over the meaning of the contract after a dispute has arisen.” There are obvious analogies as discussed below between this understanding of context and the concept of “frameworks” as articulated by the Wrens and further developed by Paul Callister, *see* Wren & Wren I, *supra* note 9, and Callister, *supra* note 12.

<sup>71</sup> Maranville, *supra* note 66, at 57.

information for retrieval. They need an experiential base of representative situations for which the information is relevant.<sup>72</sup>

Building on that theme, Maranville contends that we should be pursuing a “spiral curriculum,” exposing students to fundamental doctrinal concepts and lawyering tasks repeatedly throughout their legal education at increasing levels of sophistication.<sup>73</sup> In this regard it may not seem like what is being talked about differs greatly from what Berring and other have advocated in building on first year LRW classes with increasingly sophisticated material in advanced legal research courses. However the approach that Maranville is advocating is much more of an active hands-on learning experience in which the students feel that they are doing “real” legal work, often because they are, and they are exposed to far more contextual information.

### 3. The Value of Experiential Learning As a Means of Engagement and a Method For Providing Context

The typical model of instruction where the teacher lectures and the students’ role in the classroom is reduced to functioning as passive listeners has been identified by many as a reason for the lack of effectiveness in education.<sup>74</sup> Conversely, the value of “an active learning environment that encourages students to take responsibility for the learning process and to interact with faculty and other students as colleagues” has been cited for its effectiveness.<sup>75</sup> Gerald Hess, summarizing it in simple terms, states that active learning is important for one fundamental reason: it enhances learning.<sup>76</sup>

Active learning has specifically been cited as an effective way of achieving many of the goals of legal education, such as development of critical thinking and

---

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 61. Additionally, see Engler, *supra* note 58, at 153-58 discussing the sequencing issue at length with extensive citations.

<sup>74</sup> See for instance, Tom Cobb, *Public Interest, Collaboration, and the Promise of Wikis*, 16 *Perspectives: Teaching Legal Res. & Writing* 1, 5 (2007), citing Donald L. Finkel, *Teaching With Your Mouth Shut* (2000).

<sup>75</sup> Cobb, *supra* note 74, at 5, specifically citing Finkel’s suggestion that the instructor center the class in inquiry, “for example, a problem that hasn’t and cannot easily be solved” and his further suggestion of using team teaching, modeling collaboration, as another way “to shift authority, agency, and responsibility to students.”

<sup>76</sup> Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 *J. Legal Educ.* 401 (1999).

higher-level cognitive skills such as analysis, synthesis, and evaluation, in order to interpret and make informed judgments about facts, arguments and conclusions; content mastery, the ability to “grasp, retain, and apply content;” and professional skills, such as interviewing and negotiation.<sup>77</sup>

Experiential learning in particular, involving real and/or simulated client representation activities or other activities that allow students to observe or participate in the legal system at work, has been cited as an especially valuable approach.<sup>78</sup> A point of particular interest for our purposes is that this approach has been used to teach legal research skills, with first year students specifically, and the reported results have been extremely positive.

Professors Michael Millemann and Steven Schwinn report, for instance, that both their first and second year students at the University of Maryland School of Law in courses where they used this approach conducted better research, more comprehensive and on point, than students in their traditional classes.<sup>79</sup> They describe the legal analysis as deeper, the theories of the case and resulting arguments better developed, more persuasive and nuanced, and state that the students found and developed arguments the instructors had not previously identified, adding new components to the predicted arguments and refining them in ways the instructors had generally not observed in their traditional classes.<sup>80</sup> They also report that the students’ factual statements and use of facts in their legal arguments were also substantially better.<sup>81</sup> And they report that using real legal work helped them achieve their secondary educational goals as well, allowing them to introduce the students to client-centered problem solving, confront them with professional responsibility issues, and develop a basis for critical analysis of law and justice systems.<sup>82</sup>

---

<sup>77</sup> *Id.* at 402

<sup>78</sup> Maranville, *supra* note 66, at 57-60 (and related sources footnoted therein).

<sup>79</sup> Millemann & Schwinn, *supra* note 10, at 480 (describing the instructors’ experience team teaching a group of second semester first year students, with the students working under the oversight of outside attorneys at a small firm in private practice representing individuals in police brutality cases, working with a public interest organization representing clients in dependency proceedings on right-to-counsel issues, and teaching a group of third semester students working with the school’s post-conviction clinic, representing an individual in a capital murder case).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 481.

<sup>82</sup> *Id.* at 484-90.

The clients Millemann & Schwinn's classes worked with were represented by attorneys in private practice. The students met with the clients and interviewed them, however, and many of the students reportedly came to think of them as "their" clients. Commenting that a little bit of responsibility went a long way, the instructors noted that the students' level of engagement was evident in the amount and quality of their participation in class discussions, and the comments that the students made as part of the course evaluation.<sup>83</sup> But that did not explain all of the differences in performance that the instructor's observed. Much of it in their view was attributable instead to the fact that the students were confronted with both factual and legal indeterminacy in the real cases where that was not true in the traditional class assignments, and the students' comments bore that out.<sup>84</sup>

---

<sup>83</sup> *Id.* at 479-80.

<sup>84</sup> *Id.* at 480-84, with the instructors citing the following illustrations, the first two drawn from evaluations submitted by third semester students who had been in the traditional classroom the prior year, followed by comments from some first year (second semester) students (see following):

[W]hen you have a real ... case you don't have the guarantee that there are some cases on each side. It's not like you're going to just [take] the requisite amount of time and find the golden ring, because it might not, in fact, be there. And, even if you find it you still have to keep looking because there might be more things. And, I understand though, that certainly plays out in a regular [LRW] class but I don't think it plays out anywhere near to the extent that it did in this class. [There were] some of the foundation cases [that] were easy. But once you got past those, it was a wide-open world and that was, I thought, a little bit more challenging. *Id.* at 480.

\* \* \*

[I]t's my understanding of the canned cases that they are built around certain court cases, and there's [sic] ten cases on the one side and ten on the other, and once . . . you've found those ten everything's good. Whereas, [in this course], you didn't know what was out there. You could push a little bit further beyond the cases." The student added that "[you did a] legislative history" when necessary and "[you did] all the research that you could possibly do versus just . . . finding those ten cases, and you're done."

\* \* \*

It was a "struggle" to "sit down in front of a computer, in front of Lexis and WestLaw, and . . . try to come up with an answer that didn't exist. And there's so much out there." "[We had] this big problem", and "[we had] to make this choice about what we thought was the right answer and then go out and find cases that would back up our ideas." Another said: "[I]t's . . . nice to think on our own again. It was important that there was "no right answer", and that students were invited to come up with different answers. This student compared this course to the first research and writing course in which, in this student's view, the students were trying to find the single, right answer that the teacher had pre-selected. *Id.* at 483-84.

Tom Cobb, an instructor at the University of Washington School of Law, has similarly commented on the enhanced quality of student research in a class that he team-taught in the school's first year LRW program in 2007 with Cheryl Nyberg, a reference librarian at the Marian Gould Gallagher Law Library, using a WIKI as a tool for student collaboration on research.<sup>85</sup> Like Millemann & Schwinn, Cobb stresses the importance of indeterminacy.

I had resisted the temptation to conduct preliminary research so that I knew what students would find and could direct them more easily to fruitful paths. I wanted students to experience the sense of disorientation and possibility that comes when a legal professional receives an open-ended, collaborative assignment and must, working with a group, choose and prioritize research paths. I also did not want to shut down students' impulse to think about the problem creatively by suggesting specific strategies or methods – or by conveying a general sense that I knew how this problem should be solved (and, therefore, that they should primarily just look for my solution). In short, I wanted to develop a sense, from the beginning, that students were the primary agents in this class and that, as a group, they were responsible for setting the agenda and constructing solutions.<sup>86</sup>

Cobb has since indicated that he has also obtained very good results with his first year students in the current, 2007-08, school year using a different approach, working with materials from actual pending cases but not ones where the class had any real connection to the representation in any capacity.<sup>87</sup> He has also stated that he had some concerns when a class in a prior year functioned as a research arm for several clinics that he was not able to expose the students to all of the research issues that he would have like to because the needs of the very specific nature of the clinics' needs.<sup>88</sup> Others have commented on the coverage issue as

---

<sup>85</sup> Cobb, *supra* note 74, describing the experience with his class and Nyberg's role working with a public interest organization in Seattle, Washington representing clients with mental health issues facing eviction; *see also* Engler, *supra* note 58, at 137-38, citing efforts by several nonclinical faculty at the New England School of Law to build bridges with public interest lawyers to identify projects in need of research assistance and incorporating those projects into classroom seminars as part of required work; *and see generally*, Cobb, *supra*, Engler, *supra* note 58, Maranville, *supra* note 66, and Millemann & Schwinn, *supra* note 10, for footnoted citations to other schools that have been laboratories for these experiments.

<sup>86</sup> *Id.* at 4-5.

<sup>87</sup> Personal conversation with the author on April 22, 2008.

<sup>88</sup> *Id.*

well, with some pointing out that it is essentially impossible to cover everything in any doctrinal area in any case, due to the proliferation of law, and that there is reason to believe that students do not retain all that much of what they are exposed to in the traditional passive classroom model.<sup>89</sup> If an instructor has to choose then between giving up some coverage in order to shift to experiential learning or sticking with the traditional approach, the argument is that the benefits in terms of increased likelihood that the students will actually learn and be able to access the information may well be worth it.<sup>90</sup>

There are continuing debates within the LRW and clinic communities over a number of issues related to these courses. There is some disagreement, for instance, over the necessity of students doing “real” legal work or whether simulation is enough in order to engage students, spark their passion, and provide the needed context lacking in the traditional classroom. Among other things, this has raised questions about what “real” means, with Professor Maranville, for one, describing different aspects of meaning in this context.

An experience can be “real” in the sense of bringing students into contact with real people and the actual problems in their lives, as opposed to actors.... or a paper record. Alternately it, it can be “real” in the sense that the students have responsibility for producing work that will be used in the real world and will have real consequences for clients. Typically, these two aspects of reality will both be present, but that need not be so. In addition, the experience can be “real” in the sense that it is performed under conditions that are representative of those under which the [work] will be performed when the law student becomes a lawyer.<sup>91</sup>

There have also been ongoing issues over sequencing, such as whether to set course prerequisites and the extent to which practice oriented projects can and should be introduced in the first year.<sup>92</sup> Maranville, for instance, has expressed concern about first year students becoming more easily overwhelmed.<sup>93</sup> She concedes though that there are degrees of client contact and other hands-on experience that are appropriate for first year students, citing four projects that

---

<sup>89</sup> See for instance, Maranville, *supra* note 66, at 60.

<sup>90</sup> *Id.*

<sup>91</sup> Deborah Maranville, *Passion, Context, And Lawyering Skills: Choosing Among Simulated And Real Clinical Experiences*, 7 *Clinical L. Rev.* 123, 132-33 (2000-2001), describing several different aspects of what this can mean as follows:

<sup>92</sup> See generally, Engler, *supra* note 58, Millemann & Schwinn, *supra* note 10, and Maranville, *supra* notes 66, and 91.

<sup>93</sup> Maranville, *supra* note 66, at 63.

have been affiliated with the University of Washington School of Law.<sup>94</sup> Millemann & Schwinn concede, for their part, that the traditional canned issue hypothetical has some utility as a reasonable first step, analogous to a piano student learning scales, developing skills incrementally “without surprises such as unexpected (and intractable) legal authority.”<sup>95</sup> They also acknowledge that those exercises provide a uniform basis for evaluating student work.<sup>96</sup> However, they would limit it to the first semester or first portion of the first semester, and they contend that it is possible “even at these early stages, to base assignments on actual legal work that has the characteristics of canned problems, i.e. controlled facts and limited legal issues.”<sup>97</sup> To the extent though that the assignments are reversed engineered with students having the expectation that there is a known answer, they protest that “it encourages students to find, rather than construct, legal arguments.”<sup>98</sup>

Having created a limited set of acceptable pathways to an established answer, the LRW faculty member largely has predetermined the outcomes. Students begin with the assumption that there are pre-established legal arguments in every canned problem. They are embodied in a pre-selected and limited set of case decisions. The goal is to find the “right” set of decisions and thereby to find the “right” answers. These features give the canned problem the hallmark of a scavenger hunt, with the same payoff: a prize (high grade) to the winner.... In actual legal work, however, there is no preplanned design, no “higher intelligence (i.e. that of a professor) behind the problem. Instead it is the lawyer’s intelligence – in our case the student’s intelligence – that counts. The lawyer must use that intelligence to *build* arguments through a dialectical process in which facts, legal authority, policies, strategic considerations, and client goals interact. Lawyers describe this as “making a case” by building a factual record (in the hypothetical it is more or less static) and creating a legal strategy (in the hypothetical it has been predetermined. ....

---

<sup>94</sup> From in-person communication with the author on May 1, 2008, identifying The Immigrant Family Assistance Project (IFAP), the Housing Justice Project, the Center for Labor and Employment Justice, and the Street Youth Advocacy Project as the four projects in question.

<sup>95</sup> Millemann & Schwinn, *supra* note 10, at 458-60.

<sup>96</sup> *Id.* at 458.

<sup>97</sup> *Id.* at 460.

<sup>98</sup> *Id.* at 458.

In the end, many canned problems discourage students from developing alternative factual theories, legal arguments, and theories of the case, and ill-equip them to work with uncertainty and indeterminacy, as they must in practice. That is, they discourage creativity. Students learn to *trace* paths, not to *forge* them.

Moreover, *this approach reinforces the teacher-centric model that underlies most of the first-year curriculum.* It casts the teacher as the source of knowledge (here, the paths to the “answer”), and students as “discoverers” of the teacher’s knowledge. With reverse engineering, the canned problem has the hallmarks of a grand semester-long Socratic dialogue, with all the attendant pedagogical baggage, e.g. students do not assume control of the exercise; they tend to become passive, rather than active participants; and they are more likely to become disengaged.<sup>99</sup>

## E. Resonant Voices Within the Law Librarianship Community

### 1. The Significance of the Wrens’ Conceptual Frameworks

The Wrens 1988 article and response from Berring & Vanden Heuvel a year later<sup>100</sup> was recently identified in the Centennial Volume of the Law Library Journal as “one of the sharpest exchanges ever to appear in the pages of *Law Library Journal*” and one of the “essential readings” from the volumes published to that date that anyone involved in law librarianship should read and absorb.<sup>101</sup>

As Professor Houdek notes in his annotation accompanying that selection, a good deal of the Wrens article focused on using frameworks in a process-oriented

---

<sup>99</sup> *Id.* at 458-59 (emphasis in the original with the exception of the last paragraph; emphasis added in the last paragraph). Millemann & Schwinn make a further argument that gives pause, noting the hundreds of hypothetical assignments issued each year, the thousands of hours spent on them, resulting in nothing more than a grade and a pile of discarded copies. In short, “an extraordinary waste, akin to gratuitously destroying food in a community that has malnourished and hungry people.

It also sends disturbing messages to our students and to the communities in which our schools are located: that we do not believe law students have the ability to produce work that is useful to others, or that we cannot find ways to put their work to good use. *Id.*

<sup>100</sup> Wren & Wren I, *supra* note 9; Berring & Vanden Heuvel I, *supra* note 9.

<sup>101</sup> Frank G. Houdek, *The Essential Law Library Journal*, 100 Law Lib. J. 137 (2008).

approach to instruction.<sup>102</sup> But that is not what drew Berring and Vanden Heuvel's attention; the point that caught their attention "was the Wrens criticism of the bibliographic orientation, and especially the influence of Columbia (and later Yale) law librarian Frederick C. Hicks... in its development...[resulting in an immediate and vehement response]."<sup>103</sup> In the process Berring and Vanden Heuvel largely ignored other aspects of the Wrens article, such as the attention that the Wrens paid to the perspective of the student in the learning process.<sup>104</sup>

The Wrens argued for a shift in focus, away from the books themselves to the ways researchers use them, teaching legal research as a process.<sup>105</sup> They also premised their argument from a student oriented perspective, stating that as with any other course of study, "students in a legal research course face the fundamental problem of how to manage the information presented – how to take in information and then remember it."<sup>106</sup> In part they viewed this as a function of motivation, arguing that "success is a function of how useful the information is to [the student]."<sup>107</sup> But they also viewed it as a question of capacity and that it is the teacher's task in part to provide an organizing structure that simplifies the subject, making it manageable and understandable, which the bibliographic approach in their view failed to accomplish.<sup>108</sup> Although they do not discuss it at length, and in fact only address it explicitly by a footnote, they also make the point that the choice of organizational device is extremely important and needs to take the students pre-existing frameworks of understanding or paradigms into account.<sup>109</sup> This latter point is also evident in the specific frameworks they proposed, particularly the first of the three frameworks they described, building on students' existing familiarity with the "civics course" view of government organization, which divides government into the legislative, judicial, and executive branches,

---

<sup>102</sup> *Id.* at 161.

<sup>103</sup> *Id.*

<sup>104</sup> *See generally*, Wren & Wren I, *supra* note 9, at 50-58.

<sup>105</sup> *Id.* at 61.

<sup>106</sup> *Id.* at 50-51.

<sup>107</sup> *Id.* at 51.

<sup>108</sup> *Id.* at 54-55, including notes 153, 155, and 156.

<sup>109</sup> *Id.* at 55, n. 156, quoting the following passage from Thomas Kuhn, *The Structure of Scientific Revolutions* (2<sup>nd</sup> ed. 1970), at 113.

something like a paradigm is a prerequisite to perception itself. What a man sees depends both upon what he looks at and also upon what his previous visual-conceptual experience has taught him to see. In the absence of such training there can only be, in William James' phrase, "a bloomin' buzzin' confusion."

modifying that by presenting an organizational structure identifying the three different institutional sources of law, judicial, legislative, and administrative, “as a backdrop to understanding the books used for legal research.”<sup>110</sup>

Thirteen years later, Paul Callister, picked up the threads of the debate, concluding that the important contribution that the Wrens made was not in their pragmatic process-orientation but rather their insistence on searching for and implementing conceptual frameworks grounded in the students’ pre-existing, experience-based understanding, to facilitate the learning process.<sup>111</sup> The example from the Wrens, building on students’ high school civics-based understandings, is just a case in point; the Wrens’ genius, from Callister’s perspective, was not in the specific extensions that they built on top of that high school civics base or even the use of that base per se’ but rather that they recognized the need to base the new material on something already known.<sup>112</sup>

Callister attempts to expand the scope of the dialogue in his article, arguing that the real issue, which the debate between Berring, Vaden Heuvel, and the Wrens failed to address, is that the profession has failed to develop a suitable, comprehensive pedagogical model for acquisition of legal research skills.<sup>113</sup> In an effort to jump start a dialogue on that subject, Callister identified four elements that he characterized as mandatory for any pedagogical theory for teaching legal research:<sup>114</sup>

- (1) identification of the objective of [legal research] instruction,
- (2) a theory and understanding as to the nature of legal sources,
- (3) a mathetic theory as to the nature of students and the conditions of learning, and
- (4) a methodology that is consistent with the other three elements

---

<sup>110</sup> *Id.* at 33-34.

<sup>111</sup> Callister, *Supra* note 12, at 23.

<sup>112</sup> *Id.* at 30.

<sup>113</sup> *Id.* at 8; Callister contends further that this results in a situation where the profession in his view provides “training” (conditioning students to apply certain tools and methods in a specified manner to particular types of problems), but often fails to provide “education” (learning how to “thoughtfully analyze the characteristics and nature of a specific problem and thereby develop the most appropriate technique for solving it, given one’s understanding of the strengths and weaknesses of available tools and resources.”)

<sup>114</sup> *Id.* at 23.

Clarifying his construction of that third element, Callister defines mathematics as the “art or discipline of learning as opposed to teaching,” or at its most fundamental level, “an inquiry into the human mind,”<sup>115</sup> identifying the Wrens “frameworks” as an example.<sup>116</sup> Callister also proposed some frameworks of his own, setting out criteria for development or selection,<sup>117</sup> but made it clear that neither he nor the Wrens were alone in applying frameworks or similar constructions as a pedagogical tool. He notes in that regard that a number of others were doing so as well in various disciplines, including the teaching of law, under different names and terminologies, such as “schemata” and “cognitive processing,” but not, with a few exceptions, within the legal research education literature itself.<sup>118</sup> The latter point appears to have struck a chord of concern for Callister, as he notes that it suggests that the profession is not willing to learn from the pedagogical advances and devises of other disciplines,<sup>119</sup> and indeed that is a question raised anew by this paper.

Whatever else Berring and Vanden Heuvel had to say about the Wrens positions in other respects, Callister notes that they never directly attacked the latter’s insistence upon frameworks as either unsound or lacking originality.”<sup>120</sup>

---

<sup>115</sup> *Id.* at 27-28.

<sup>116</sup> *Id.* at 23

<sup>117</sup> According to Callister,

The framework must relate to something the students already understand but extend the mental construct into the unknown;

It must serve as a vehicle for education, not simply training, enabling the student to effectively adapt the framework to solve a wide range of future research problems and to recognize the utility of new research tools and resources as they are developed, and be flexible to accommodate new types of problems, and;

It must be scalable, expressed in simple form but capable of vast expansion and comprehensiveness to permit students to appropriately manipulate and expand their model when they are ready. *Id.* at 34-35.

<sup>118</sup> *Id.* at 31-32, with noted exceptions including, Peter Hook, *Creating an Online Tutorial and Pathfinder*, 94 Law Libr. J. 243 (2002); Eileen B. Cohen, *Teaching Legal Research to a Diverse Student Body*, 85 Law Lib. J. 583 (1993); Kristin B. Gerdy, *Making the Connection: Learning Style Theory and the Legal Research Curriculum*, Legal Reference Services Q., 2001 no. 3-4, at 71; Kristen B. Gerdy, *Teacher, Coach, Cheerleader, and Judge: Promoting Learning Through Learning-Centered Assessment*, 94 Law Libr. J. 59 (2002); and see additional exceptions identified by Callister, *Id.*, at 32, n. 113.

<sup>119</sup> Callister, *supra* note 12., at 32; Callister also suggests this may support the Wrens’ criticism that traditional legal research courses were too bibliographically centered [i.e. focused on the materials as opposed to the manner in which learning takes place]. *Id.*

<sup>120</sup> *Id.* at 17..

Unfortunately it does not appear that anyone else has focused on that aspect of the Wrens' position. Moreover, despite Callister calling attention to and extended the Wrens' argument for the use of frameworks as part of the comprehensive pedagogical model that he proposed, and despite stating in the closing comments to his article that his goal in writing it was to facilitate a dialogue, few have taken up his call and responded in scholarly writings of their own. Callister's article has, for instance, only been cited once in the Law Library Journal since it was published there in 2003, and then only in passing, without commentary about what he said in the article.<sup>121</sup> This illustrates the basis for this author's concern about the lack of publicly aired scholarly dialogue within the profession, let alone between the profession and other disciplines.

## 2. Practice Oriented Legal Research Education

Members of the LRW and clinic communities are not the only ones to point to the need for a more practice-oriented legal research education or at least recognition of the differences. A few have shared observations about this from within the law librarianship community as well.

In 1997, for instance, Michael J. Lynch published a piece in the Law Library Journal calling attention to a factor that had not gotten much attention in the discussions about legal research education to that time, namely the role of thinking in the research process.<sup>122</sup> Lynch points out that finding the law and reading it are not the same thing as understanding it and finding ways to use it to address real problems for real clients, and notes that the latter often requires imagination and hard thinking, as attorneys were forced to deal with issues that had not been resolved in their jurisdictions and/or have to come up with ways to extend existing authorities to accomplish their clients' goals.<sup>123</sup> He also distinguishes this client centered research from scholarly research, observing that the latter is focused on comprehensiveness, directed toward general conclusions, with the scholar free to follow a line of thought or research wherever it leads him or her, often without time limitations, and cautions about judging the research abilities of law students against that model.<sup>124</sup> The reader would be forgiven for thinking that Mr. Lynch was in active practice or had recently been so, but in fact

---

<sup>121</sup> Richard A. Danner, *in* Hudek, *supra* note 101, at 162 (under the heading, "[i]n appreciation" in the write up about the Wrens' article).

<sup>122</sup> Lynch, *supra* note 25.

<sup>123</sup> *Id.* at 417-20.

<sup>124</sup> *Id.* at 421-24.

he was a Library Director and Assistant Professor at the John Marshall School of Law at the time.<sup>125</sup>

Paul Callister has since listed identification of the objective of research education as the first of the four requisite elements in his pedagogical model, and states that “research courses should teach students to solve problems in ways that will transcend the classroom and graduation into their careers.”<sup>126</sup> Citing Lynch’s article, Callister echoes Lynch’s observations about the different role that analysis plays in the respective tasks and orientations of librarians and practicing attorneys, and concludes by saying that “law librarians may need to stretch (or reflect on earlier days when they practiced law) to fully understand the package of skills needed by their students.”<sup>127</sup>

More recently, Randy Diamond, Director of Law Library and Technology Resources and Associate Legal Research Professor Designate at the University of Missouri-Columbia, has written about how law students increasingly need different and more sophisticated research skills than they are developing in law school, including fact-based research and research of non-legal materials.<sup>128</sup> Significantly, Professor Diamond argues for more collaborative efforts between law librarians and clinicians to better prepare law students to be able to conduct effective legal research in law practice as part of the solution.<sup>129</sup>

#### IV. New Imperatives – the Carnegie Report

Now, fifteen years after the MacCrate Report, a new report, issued by the Carnegie Foundation for the Advancement of Teaching (hereafter “the Carnegie Report”) raises questions anew about legal education generally and the role of

---

<sup>125</sup> *Id.* at 415, n. aa1.

<sup>126</sup> Callister, *supra* note 12, at 23.

<sup>127</sup> *Id.* at 24; additionally, with respect to the interrelationship between training in research and analysis, see generally, Rombauer, *supra* note 10, and Berring, *supra* note 49.

<sup>128</sup> Randy Diamond, *Advancing Public Interest Practitioner Research Skills in Legal Education*, 7 N.C. J. L. & Tech. 67, 68-69, and 84 (2005-2006) (citing reports, for instance, that students know how to do painstakingly complete appellate briefing research “but do not know how to do twenty to sixty minute visits to the library that will provide enough background to know what to seek in interviewing a client, drafting pleadings, and questioning witnesses; internal citation omitted).”

<sup>129</sup> *Id.*, at 72; and see also *Id.* at 124-127 (discussing rationale for simulating practitioner research, using customized assignments, one-on-one mentoring, emphasis on exercising judgment organizing, evaluating, and applying research than in finding a predetermined answer)

practice skills training in that education.<sup>130</sup> The Carnegie Report differs a great deal though from the MacCrate Report in its genesis.

Unlike the MacCrate Report, which represented the work of a task force of state and federal jurists, law school deans and faculty, and members of the practicing bar,<sup>131</sup> the Carnegie Report was primarily the product of outside scholars concerned with the education of professionals across a variety of disciplines, not representatives of any segments of the legal community.<sup>132</sup> The lead author, William M. Sullivan, is a senior scholar and co-director of the Foundation's Preparation for the Professions Program,<sup>133</sup> and the author of an earlier more general work on professionalism.<sup>134</sup> The five co-authors taken together reportedly have more than a century of experience in professional education.<sup>135</sup> Moreover, the report is one of a series of studies being undertaken by the Foundation, to extend to the fields of medicine, engineering, nursing, and the clergy, in addition to law, as part of the Preparation for the Professions Program.<sup>136</sup> With respect to specific background for the study, the authors report having engaged in a review of the literature on legal education; consulted with the Association of American Law Schools; met with the Law School Admissions Council; visited sixteen law schools in the United States and Canada over two academic semesters, visited classes of every type, spoke to faculty, administrative personnel, students (separately and in focus groups), at both public and private law schools (making no claim to having a representative sample); and consulted

---

<sup>130</sup> William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (2007) (hereafter "*the Carnegie Report*").

<sup>131</sup> *Statement of Fundamental Lawyering Skills*, supra note 1, at 1.

<sup>132</sup> Nelson P. Miller, *An Apprenticeship of Professional Identity: A Paradigm for Educating Lawyers*, 87 Mich. B. J. 20, 21 (January 2008). It should be noted, however, that Judith Welch Wegner, one of the co-authors and a senior scholar at the foundation during the time the law school study was carried out, was professor of law and former dean at the University of Carolina at Chapel Hill at the time of publication and past president of the Association of American Law Schools. See supra note 130, at ix-x.

<sup>133</sup> *Carnegie Report*, supra note 130 at ix.

<sup>134</sup> William M. Sullivan, *Work and Integrity: The Crisis and Promise of Professionalism in America* (2<sup>nd</sup> ed. 2005).

<sup>135</sup> James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 Int'l J. Legal Info. 1, 2 (2007).

<sup>136</sup> A report on the study of clergy has already been released as well: Charles R. Foster et al., *Educating Clergy: Teaching Practices and Pastoral Imagination* (2005).

with scholars of both the law and legal education in the United States, Canada, and the United Kingdom.<sup>137</sup>

The report thus stands on a broader conceptual foundation and offers a different perspective than the MacCrate Report or any of the critiques of the legal profession and education of its members that preceded or followed it.

At the onset it should be noted that the report does not focus on legal research education per se.’ In fact, other than a reference to the need to develop the fundamental knowledge and skills for practice, “especially an academic knowledge base and research,”<sup>138</sup> a task held in common by each of the professions,<sup>139</sup> the report does not directly address legal research education at all. However, the authors make a number of points that have implications for arguments about how research should be taught and by whom. The remainder of this paper is an attempt to summarize those points and discuss some of their implications. A thorough assessment of the report as a whole, which is more than 200 pages in length and rich with observations, exceeds the scope of this paper.

First, it is important to note that all professions share a common task in the need to initiate novice practitioners to think, perform, and conduct themselves (that is to act morally and ethically) like professionals.”<sup>140</sup> Historically, all three aspects of professional development – which can also be conceptualized as the intellectual or cognitive, the practical i.e. skills-based domain of expert practice,

---

<sup>137</sup> *Carnegie Report, supra* note 130, at 15-17.

<sup>138</sup> *Carnegie Report, supra* note 130, at 22

<sup>139</sup> The authors list six tasks, *id.* at 22, common to each, that they identified as part of the goal of developing the necessary knowledge, skills, and attitude for novices to be initiated into their professions:

1. Developing in students the fundamental knowledge and skill, especially an academic knowledge base and research
2. Providing students with the capacity to engage in complex practice
3. Enabling students to learn to make judgments under conditions of uncertainty
4. Teaching students how to learn from experience
5. Introducing students to the discipline of creating and participating in a responsible and effective professional community
6. Forming students able and willing to join an enterprise of public service

<sup>140</sup> *Id.*

and identity or purpose<sup>141</sup> – were addressed through an apprenticeship with professionals in actual practice with the attendant “intimate pedagogy of modeling and coaching.”<sup>142</sup> That pedagogy fell by the way side, however, with the shift of professional education into the academy.<sup>143</sup>

One of the features of professional education in the academy in many cases is that typical practices of teaching and learning developed, “signature pedagogies,” that came to function as the primary means of instruction and socialization of newcomers to the field,<sup>144</sup> a “common portal.”<sup>145</sup> The bedside teaching that takes place during hospital rounds as a core method of training medical professionals is one example.<sup>146</sup>

This is equally if not more the case in academic training for the legal profession. For more than a hundred years, legal education has been dominated by a signature pedagogy, the Socratic case method (or “case-dialogue method” to use the authors’ terminology), particularly in the formative first year common-law courses of torts, contract, and property as typically taught.<sup>147</sup>

That pedagogy has proven to be a highly successful method of socialization, accomplishing what the authors of the report refer to as a “remarkable transformation,” as students from a variety of backgrounds become familiar if not yet at ease with “the peculiar intricacies of legal discourse.”<sup>148</sup> This is accomplished, as anyone who has been through it no doubt remembers, by the stress, some would say the “relentless stress,” “[placed] on learning the boundaries that keep extraneous detail out of the legal landscape,”<sup>149</sup> detail viewed as extraneous for purposes of legal analysis. This end is served by the Socratic case-dialogue method itself, but also by the choice of materials used in those classrooms, focusing on appellate cases, with their attenuated statements of fact, presented through case books which further strip them of situational detail, “so that first-year law students are always working from a highly edited and

---

<sup>141</sup> *Id.* at 28.

<sup>142</sup> *Id.* at 25.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 23.

<sup>145</sup> *Id.* at 47.

<sup>146</sup> *Id.* at 50.

<sup>147</sup> *Id.* at 23, 47, 50.

<sup>148</sup> *Id.* at 47.

<sup>149</sup> *Id.* at 53.

abstracted version of events.”<sup>150</sup> This has been described as an “acontextual context” which emphasizes the formal, procedural aspects of legal reasoning and treats all of other aspects of the cases as peripheral or ancillary.<sup>151</sup>

This enables students to practice a disposition to think in a specific way, to value and aim at both precision and generality in the application of categories to persons and situations. This is an important distinguishing feature of legal thought and of the guild of legal professionals.<sup>152</sup>

The end result is a shared experience by which students come to think like lawyers in the sense that they are able to translate messy situations “into the clarity and precision of legal procedure and doctrine and then to take strategic action through legal argument in order to advance a client’s cause before a court or in negotiation.”<sup>153</sup> In this sense, the authors conclude that law schools have been doing a good job with the cognitive apprenticeship.<sup>154</sup> They identify other benefits as well.

The central role of academic methods and patterns of thought in professional training is today taken for granted. But the transition from on-the-job training by practioners to instruction carried out far from the sites of professional practice and by full-time educators has transformed professional life. It has reduced the arbitrary and often haphazard nature of old-time apprenticeships. It has opened the induction of neophytes to a measure of quality control, as well as the likelihood that the knowledge imparted will be well tested and reasonably current.<sup>155</sup>

The problem from the authors’ perspective, is that while doing a good job with the cognitive aspect of preparing students for practice, law schools have not done a good job with the other two components, the practical and the social-ethical.<sup>156</sup> They contend on the one hand that this is not unusual, that in law, as in

---

<sup>150</sup> *Id.* at 55-56.

<sup>151</sup> *Id.* at 52, citing Elizabeth Mertz, *The Language of Law School: Learning to “Think” Like a Lawyer* (2007), and identifying Mertz as a senior research fellow at the American Bar Association Foundation and professor of law at the University of Wisconsin-Madison Law School.

<sup>152</sup> *Carnegie Report, supra* note 130, at 54-55.

<sup>153</sup> *Id.* at 54.

<sup>154</sup> *Id.* at 28.

<sup>155</sup> *Id.* at 25.

<sup>156</sup> *Id.*

other professions where instruction is dominated by a signature pedagogy, there is typically a “shadow pedagogy” of missing components that are not engaged or only weakly so:<sup>157</sup> here, most critically, that students, throughout their law school careers, focus on cases as opposed to clients in their substantive classes, even though the experience of dealing with clients is an integral part of actual practice for most legal professionals,<sup>158</sup> and that the profession as taught leaves students feeling it lacks ethical substance.<sup>159</sup> On the other hand, while noting the common aspect on a conceptual level of having this shortfall in professional education generally, they also stress the significance of these particular shortcomings in light of the legal profession’s role in society. In this respect they acknowledge that law is like the other professions in that it operates within an explicit social contract.

In exchange for privileges such as monopoly on the ability to practice in specific fields, professions agree to provide certain important services. .... This responsibility and orientation toward the public good set off professionals as members of a distinct type of occupation, one directly pledged to ideals of service to their clients and the public as a whole.<sup>160</sup>

They also point out, however, that law is a particularly public profession, as lawyers are officers of the court in addition to representing their clients and are “charged with making the legal system function.”<sup>161</sup> The legal profession also differs in scale, the number of attorneys having increased three times faster than the other professions as a whole between 1970 and 2000, as American society has become more dependent on the legal profession than ever before, with attorneys outnumbering medical doctors per capita for the first time.<sup>162</sup>

The authors do acknowledge that there have been movements in law schools to address both the missing practical-skills and ethics pieces through offerings of additional skills classes and courses in professional responsibility. They also identify a number of significant problems, however, with this “additive approach.” For one, the results have been more piecemeal than comprehensive, despite what they view as the stern messages about the shortcomings going back a

---

<sup>157</sup> *Id.* at 24.

<sup>158</sup> *Id.* at 56-57.

<sup>159</sup> *Id.* at 57.

<sup>160</sup> *Id.* at 21, 27.

<sup>161</sup> *Id.* at 1.

<sup>162</sup> *Id.*

number of decades.<sup>163</sup> They also note the efforts to add new requirements are almost universally resisted “because there is always too much to accomplish in too little time [and the] additive strategy of educational change assumes that increasing emphasis on the practical and ethical-social apprenticeships will reduce time for and ultimately weaken the cognitive apprenticeship.”<sup>164</sup> Moreover, in too many cases, the classes that have been added are electives, taught by instructors who are not granted the same status in the academy as those that teach the doctrinal courses, and the classes fail to reach a substantial portion of the students.<sup>165</sup>

The deeper problem with the additive approach, however, according to the authors of the Carnegie Report, is the presumption that the different aspects of the apprenticeship are freestanding.<sup>166</sup> They contend otherwise, arguing that “[e]ach contributes to the whole and takes part of its character from the relationship it has with the others.”<sup>167</sup> More to the point, they argue that the cognitive, practical, and ethical aspects of the legal apprenticeship are not only inseparable (in effect if not in formal approach in the academy) but that all three will be strengthened through formal integration and, critically, that this integration should be systematically pursued as an integral feature of the law school curriculum.<sup>168</sup>

They point out, for instance, that while the development of the capacity for analytical thinking is necessary for participation in legal practice it often comes most fully alive for students “when its power is manifest in the experience of legal practice.”<sup>169</sup> Citing to work done in conjunction with the Best Practices project,<sup>170</sup> they point to the opportunity to introduce students “to a richer kind of legal reasoning, one that moves back and forth between the context-based educational model espoused there and the distanced, “acontextual context” that has been a central component of the traditional Socratic case-dialogue method.<sup>171</sup> Similarly,

---

<sup>163</sup> *Id.* at 189-90.

<sup>164</sup> *Id.* at 190-91.

<sup>165</sup> *Id.* at Chapter 3, beginning at 87,

<sup>166</sup> *Id.* at 191.

<sup>167</sup> *Id.* at 58.

<sup>168</sup> *Id.* at 191-92, 194-97.

<sup>169</sup> *Id.* at 13.

<sup>170</sup> Roy Stuckey and others, *Best Practices For Legal Education* (2007) (accessible online at <http://professionalism.law.sc.edu/news.html#CLEA>, last visited on May 18, 2008; also available through the Clinical Legal Educational Association (CLEA), at <http://cleaweb.org/bestpractices>).

<sup>171</sup> *Carnegie Report*, *supra* note 130, at 57.

they contend that teaching practical legal knowledge and skill development is necessarily informed by an understanding of law that is itself dependent on the capacity for legal analysis,<sup>172</sup> with doctrinal instruction extended beyond case-dialogue courses “to become part of learning to think like a lawyer in practice settings,”<sup>173</sup> and with courses “focused on the skillful performance of legal knowledge in role... beginning in the first year and continuing thereafter.”<sup>174</sup> They also note that those practice oriented courses can motivate students to engage with the moral dimensions of professional life,<sup>175</sup> and that both the cognitive and practical components are given focus by development of an ethical foundation grounded in a sense of social responsibility.<sup>176</sup> And they cite examples of schools that already making concerted efforts at integration, particularly the social-justice oriented program at The City University of New York (CUNY),<sup>177</sup> and the efforts to integrate theory and practice at New York University,<sup>178</sup> of the schools they visited as part of the observational part of their study.<sup>179</sup> and are probably additional programs that are doing so since.

The impact of the report remains to be seen but it certainly appears to be garnering considerable attention and has already been compared to the MacCrate Report and Watergate as a signature assessment or event that demands a new paradigm,<sup>180</sup> and has been cited frequently in journal articles and at symposiums on legal education.<sup>181</sup> There are a number of reasons to believe that it will not be brushed aside and in fact may even have more of an impact than the MacCrate Report: The dissatisfaction voiced by young lawyers with the preparation for

---

<sup>172</sup> *Id.* at 14.

<sup>173</sup> *Id.* at 195.

<sup>174</sup> *Id.* (emphasis added).

<sup>175</sup> *Id.* at 88 (emphasis added).

<sup>176</sup> *Id.* at 14, 21, 27.

<sup>177</sup> *Id.* described at 34-38.

<sup>178</sup> *Id.* at 38-43.

<sup>179</sup> There are a number of other programs that were headed in this direction about that same time or that may have already gone further. *See for instance*, Engler, *supra* note 58, at 143, citing the programs at the University of Maryland, the University of New Mexico, and William and Mary, in addition to CUNY and his own program at the New England School of Law.

<sup>180</sup> Nelson P. Miller, *An Apprenticeship of Professional Identity: A paradigm For Educating lawyers*, 87 Mich. B.J. 20 (Jan. 2008).

<sup>181</sup> *See for instance*, Donald J. Polden, *Educating Law Students For Leadership Roles and Responsibilities*, 39 U. Tol. L. Rev. 353 (2008) (one of several related articles in that issue of the journal).

practiced that they have received,<sup>182</sup> the dissatisfaction on the part of the organized bar as indicated in the MacCrate Report and elsewhere,<sup>183</sup> and perhaps most importantly, the diminishing trust in legal professionals by the public,<sup>184</sup> and the scale of the problem in light of the number of new attorneys entering the profession and its role in contemporary society,<sup>185</sup> all suggest that it will not be brushed aside.

To the extent that the Carnegie Report does spur change in the law school curriculum, whether modest and incremental or a true paradigm shift, the implications for the law librarianship community, particularly our role in legal research education, are certainly worth considering.

The authors of the report barely mention legal research instruction. However, the implications of the integrative strategy that they have endorsed are, at least implicitly, extremely significant, as it would seem to require that those teaching such courses have gone to law school themselves and ideally that they have engaged in legal practice. The authors appear to be saying as much, as they expressly refer to faculty teaching both doctrinal and practical courses having experienced the case-dialogue method themselves and that they “are likely to be most effective ...if they have some experience with the complementary area.”<sup>186</sup> There are many in the law librarianship community who unfortunately do not meet that criteria, not having gone through the imprinting process of the first year legal Socratic case-dialogue experience themselves, let alone legal practice. That does not mean that they can’t contribute to an integrated course including legal research along with development of analytical ability and legal writing in a practice like, experiential learning based setting. The collaboration between Tom Cobb and Cheryl Nyberg stands as an immediate example to the contrary.<sup>187</sup> But it is difficult to see how anyone without that imprinting and practical experience could teach such a course on his or her own.

---

<sup>182</sup> Ronit Dinovitzer et al., *After the JD: First Results of a National Study of Legal Careers* (2004).

<sup>183</sup> See for one recent example, Chief Justice Gerry Alexander, *Access to Justice: A Justice System Imperative*, Washington State Bar News, May 2008, at 16 (one of a series of articles under the heading “Ensuring Access to Justice” as the feature topic of that issue of the Journal).

<sup>184</sup> *Carnegie Report*, *supra* note 129, at 29-30 and authorities cited therein.

<sup>185</sup> See above notes 159-161.

<sup>186</sup> *Carnegie Report*, *supra* note 130, at 196.

<sup>187</sup> *Supra* note 74.

The group that would appear best positioned to seize the day, here as they were with respect to the MacCrate Report, are the clinicians. Consider, for instance, the following passages from Russell Engler's article in the fall of 2001:

Clinical teachers and our allies devoted a tremendous amount of time and energy to the MacCrate Report.... If a similar opportunity emerges in the future, clinical teachers will again be in the thick of things..... While we owe it to ourselves to ask whether it is worth the effort before we dedicate our resources to a future assessment, we should also understand the implications of concluding that it is not important for us to assess our current teaching in the areas of skills and values.<sup>188</sup>

\* \* \*

Ten years after the MacCrate Report, and nine years after I began clinical teaching, two lessons seem crucial in designing programs to teach skills and values. First, the important skills or values that typically are ignored by the standard law school curricula can best be taught through clinical courses. Second, however, to the extent important skills and values are left exclusively to the clinics, they are likely to be marginalized in the overall law school experience. As a result, we must not simply try to strengthen our teaching of those skills and values in our clinics but seek to achieve coordinated programs that marshal resources from the entire law school to fill those gaps.<sup>189</sup>

The reader might also wish to note that Professor Engler is on the Steering Committee for the Best Practices Project, that Robert MacCrate wrote the forward to the Project's statement of Best Practices,<sup>190</sup> and the authors of the Carnegie Report have incorporated some of its recommendations.

## V. Synthesis & Concluding Thoughts

A number of important developments have taken place in the fifteen plus years that have passed since the MacCrate Report was released in 1992 with respect to legal research education in law schools in the United States and the role that law librarians play in that process.

---

<sup>188</sup> Engler, *supra* note 58, at 149 n. 189.

<sup>189</sup> *Id.* at 169.

<sup>190</sup> *Supra* note 170, at vi-vii, ix.

The number of schools offering advanced legal research courses has increased dramatically. There still are not enough advanced courses to reach all the students who need them, but considerably more students are gaining this additional research experience than were doing so when the MacCrate Report was issued. And this is an area that is squarely in the domain of the law librarianship community as the overwhelming majority of these classes are taught by law librarians. The problem, in addition to the fact as mentioned that these classes still don't reach enough of the students who need the help, is that it appears that too many of these classes are taught using a pedagogy that is not well suited to the needs of the majority of students. If correct that means that adding more of these classes is not much of a solution. To the extent that law librarians are free to modify the format that they use in these classes they should therefore consider doing so, drawing on the work in learning theory discussed above in the process, and being willing to continue to draw on the insights of scholars and educators in other fields.

For most students, those who are not enthralled by research tools and process for their own sake, it seems pretty clear that the most important factor for predicting success in legal research education at whatever stage, first year or after, is presenting the material in ways that tap into the things that do engage them. The passions that led them to go to law school in the first place or that can be instilled in them once they get there, such as social justice, providing assistance to underserved populations, or just a sense of craftsmanship. The course should also be structured in a way that creates opportunities for active, context-rich learning, even if only through simulation initially, so students feel like they are functioning like attorneys. Ideally, this should be implemented in a way where the students each feel that they have some amount of responsibility for a matter that will touch the lives of real people in some way, thus bringing ethical issues alive, integrating research education with the development of analytical abilities and legal writing, including indeterminacy as to both facts and the law, increasing the level of sophistication over time. The debates over order of presentation of primary versus secondary materials and/or of electronic versus print seem quite frankly to be secondary. If the student is not engaged, the order is unlikely to matter, and if the material is presented out of context, in the abstract or solely hypothetical, the student is not as likely to either internalize the lesson or be able to retrieve the information from memory as s/he would be if it had been encountered working on some portion of an actual legal problem that touches people and/or institutions in the real world.

The process needs to start in the first year, including experiential learning components by the second semester or third quarter for schools on that system, through projects undertaken in tandem with the school's legal clinics and/or public interest organizations or small firms in the community. The benefits of first year enthusiasm and willingness to devote time and energy to the endeavor if engaged, importance of beginning the process of the social-ethical apprenticeship, and unfairness to both the students and their first summer employers of deferring to the second year all make this an imperative. As a practical matter, there is also a substantial first year LRW infrastructure in place, albeit one in which the role of law librarians has been diminished.

The first year legal research education landscape has increasingly been ceded to the LRW community. As discussed and documented above, the number of law librarians teaching such courses on their own is going down and the number of LRW instructors teaching them alone or in collaboration with law librarian is going up. Longevity in position for LRW instructors is up. More have tenure or are at least on multiyear contracts, with no caps on renewal whatever the length. Their salaries and financial support for professional development and research is up. In fact, the average LRW instructor may well enjoy greater pay and status at this point in the legal academic community than the average law librarian. All of which leads to attraction and retention of quality instructors, and their full time job is teaching, whereas it is just one of a number of areas of responsibility for those in the law librarianship community who teach.

The impetus advocated by the authors of the Carnegie Report toward an integrated approach to legal education generally would also seem to undercut any effort that the law librarianship community might have thought of pursuing to broaden its involvement in first year legal research education except by those of its members who have both legal training and practice experience.

There are many fine legal reference and research librarians without law degrees who are never-the-less unquestionably able to provide instruction about research tools, strategy, and web 2.0 collaborative tools, for instance, and do so, either as a stand-alone presentation or on a single-visit or continuing consulting basis in partnership with an LRW instructor.<sup>191</sup> Nothing said here should be read to the contrary. In fact, this is an avenue that the law librarianship community as a whole and librarians individually would be well advised to pursue even more

---

<sup>191</sup> Such as Tom Cobb described on the course where he teamed up with Cheryl Nyberg, *see* Cobb, *supra* note 74, at 5 n. 10. The author of this paper also notes having had the privilege of working with a superb group of such individuals, including Cheryl, as an intern at the Marian Gould Gallagher Law Library at the University of Washington.

vigorously, building on the strengths in knowledge about sources of legal and factual information and materials from other disciplines, and knowledge of related technologies, to thereby be in an even stronger position to assume the role as expert in these areas.

It is difficult though, to see how a law librarian would be able to teach the analytical piece of an integrated course, let alone to teach it in an applied context, if s/he has not gone through the Socratic case-dialogue imprinting process or otherwise developed the facility of thinking like a lawyer. In fact, even where law librarians do have a law degree, if they have not actually practiced, or a long time has passed since they have, they run the risk of coming at legal research education from the wrong perspective, teaching research with an academic instead of client-centered orientation, with ramifications both for how they prepare and evaluate their students accordingly. However, there are a number of possible strategies to fight that. If the course is taught in an experiential manner, for instance, in connection with a legal clinic, public interest organization attorneys, or attorneys in private practice, that might be all that is necessary to keep the client-centered purpose clearly enough in mind for librarians who have had legal training so that it continues to inform their approach to teaching. Law librarians who are involved in teaching legal research and who want to maintain the capacity to bring that perspective to bear might also want to consider attending continuing legal education seminars occasionally. They might even consider volunteering occasionally at a local neighborhood legal clinic if they have maintained their bar status, “to stretch their minds,” borrowing from the way that Paul Callister has described the challenge that law librarians face in this regard, “to fully understand the package of skills needed by their students.”<sup>192</sup> Law librarians who do have legal training and practice experience should in any case give thought to putting that background to use, developing lesson plans which implement the approaches discussed above. This might be pursued both at the first year level and with advanced classes, and either as sole or lead instructor or in true partnership with LRW or clinic instructors.

There is also a very real possibility that a shift to a more integrated approach to legal instruction generally may further marginalize legal research education, or at least create a risk of that result. This could occur, for instance, if LRW instructors were to shift time and attention in their first year classes to other goals, as reportedly occurred at some schools when they some LRW courses were broadened into courses in “lawyering skills.” If a push in that direction were to occur, the law librarianship community might view a successful effort to maintain

---

<sup>192</sup> See Callister, *supra* note 127.

the current status quo with respect to time and resource commitments to legal research education as a major victory.

These suggestions will no doubt give pause to some readers and will pose challenges of a different kind for the librarians involved, if embraced, to make sure they stay in proper role (academic, and librarian, not counsel) in their work at the reference desk and in assisting faculty with their research. Those are challenges, however, that the profession may find it is going to have to be willing to take, and it can only gain from a freer exchange of thoughts and debate. Ideally, the opinions expressed here will help spur that on.