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Mind the Gap: Teaching Research As A Fluid, Ever-Present Concept in the First-Year Legal Research and Writing Classroom, 66 Mercer L. Rev. 651 (2015)

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by Julie Spanbauer*

I. INTRODUCTION

A couple of years ago, the closed-memorandum problem I assigned as the first writing project for my fresh-faced legal research and writing students involved a legal issue that I manipulated by eliminating discussion of one of the elements of a tort in order to simplify the assignment.[1] Each of the cases provided to the students were similarly redacted to omit discussion of the same element. The students were given the standard instruction that they were not permitted to consult or cite to any outside sources.[2] When I began reading their papers, I noticed that a majority of the students had essentially modified their

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1. *See generally* Samantha A. Moppett, *Acknowledging America's First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum,* 35 OKLA. CITY U. L. REV. 267, 329-30 (2010). "A closed universe memorandum assignment is an assignment in which the students are provided with a fact pattern and all of the authority necessary to answer the question posed." *Id.* at 330 n.374.

2. Mark E. Wojcik & Diane Penneys Edelman, *Overcoming Challenges in the Global Classroom: Teaching Legal Research and Writing to International Law Students and Law Graduates,* 3 J. LEGAL WRITING INST. 127, 137 n.25 (1997). "Because students are usually discouraged from doing any additional research when everything they need has already been given to them, the students' energies should presumably focus on assimilating the material and developing strong writing skills." *Id.*

legal analysis to include, as a part of the rule synthesis section[3] of their discussion, rules related to this missing element. These additional rules were never applied to the facts; they were merely mentioned at the outset of the legal analysis.

Acting on a hunch, I consulted Wikipedia[4] and found that many students not only violated my rule against consulting outside legal sources, but they also plagiarized some of what they added to their discussions.[5] If the students intended to deceive me, they would have used the information obtained from Wikipedia to understand the legal issue and its analysis without expressly referring to the legal requirements that were not included within their closed universe of cases.

Although I was slightly dismayed that they had not absorbed my classroom discussion regarding the nature of binding and persuasive authorities,[6] I attributed their collective misstep to the fact that they

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3. Michael D. Murray, *The Promise of Parentheticals: An Empirical Study of the Use of Parentheticals in Federal Appellate Briefs,* 10 LEGAL COMM. & RHETORIC: JALWD 229, 233-34 (2013) (describing rule synthesis as referring "to the use of multiple authorities for the purpose of determining what is the prevailing law–the prevailing legal rule–on an issue."); *see generally* Gerald Lebovits, *Cracking the Code to Writing Legal Arguments: From IRAC to CRARC to Combinations in Between,* N.Y. ST. B.J. July-Aug. 2010, at 64 (discussing IRAC and its many variations).

4. Wikipedia has described itself thusly:

> [A] collaboratively edited, multilingual, free Internet encyclopedia that is supported by the non-profit Wikimedia Foundation. Volunteers worldwide collaboratively write Wikipedia's 30 million articles in 287 languages, including over 4.4 million in the English Wikipedia. Anyone who can access the site can edit almost any of its articles, which on the Internet comprise the largest and most popular general reference work.

Description, WINDOWS, http://apps.microsoft.com/windows/en-us/app/my-wikipedia/88d439-cd-da41-4eb9-8f45-ba36bd7f58cb (last visited Aug. 26, 2014).

5. Although a discussion of plagiarism is beyond the scope of this Article, it bears noting that some scholars believe that Millennial students do not understand the concept of plagiarism because they believe that "copying and pasting is writing a paper. The millennial generation has lost the distinction between what is yours and what is mine, in part because digital communication has blurred formerly clear boundaries of intellectual property ownership." Deborah Kemp, *Copyright on Steroids: In Search of an End to Overprotection,* 41 MCGEORGE L. REV. 795, 802-03 (2010) (footnote omitted).

6. The students were not provided any secondary authority in the closed-universe problem, and all cases provided were from the controlling jurisdiction. The Wikipedia entry did not cite to any case law. It was merely a descriptive secondary source of information. *See generally* M.H. Sam Jacobson, *The Curse of Tradition in the Law School Classroom: What Casebook Professors Can Learn from Those Professors Who Teach Legal Writing,* 61 MERCER L. REV. 899, 913 (2010). The nature of authority is just one skill taught by research and writing professors. "[S]kills taught by professors teaching legal writing include analyzing enacted law, separating binding from persuasive authorities, synthesizing multiple sources of binding authority to determine the test that applies for an issue, establishing a hierarchy of authorities when multiple authorities exist on a point,

were overwhelmed with this entire new culture–the culture of law[7] and the law school classroom.[8] I was also very curious to understand how the students interpreted what they did when they consulted Wikipedia, and thus, decided to raise the issue in class rather than limiting my feedback on this issue to my comments on their individual papers. Those students who resorted to Wikipedia responded by stating that this was how they approached any assignment for which they had no baseline knowledge: they initially referred to a brief and straightforward online summary to gain a foothold in the subject.[9] The students who limited their analysis to the cases did not object to or appear upset by the fact that many of their classmates consulted an outside source for information for the simple reason that they too routinely used the internet as a source of information.

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and applying authorities to facts." *Id.*

7. *See generally* Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners,* 34 SAN DIEGO L. REV. 635, 650-51 (1997).

> Law engenders a complex, hermeneutic process which includes its own specialized language and its own shared knowledge, i.e., "legal culture." The field of law (or legal culture) has a recognizable internal organization based on "protocols and assumptions, characteristic behaviors and self-sustaining values" forming an incomplete but autonomous social field. Law is also fundamentally constitutive. "[L]aw is intimately involved in *the constitution of* social relations and the law itself *is constituted through* social relations." Law could be said to operate inseparably from society, and therefore, from culture. Law is local knowledge, a cultural institution comprising complex processes which vary from place to place and period to period. Law, therefore, may be characterized as a component of culture and the relationship between law and culture is dynamic and creative. The study of law has shallow meaning when abstracted from its cultural context.

Id. (alteration in original) (footnotes omitted). Law and culture are socially and reciprocally constructed and law is a powerful "institutional cultural actor whose diverse agents (legislators, judges, civil servants, citizens) order and reorder meanings." Naomi Mezey, *Law as Culture,* 13 YALE J.L. & HUMAN. 35, 45 (2001).

8. Not only are entering law students learning a new vocabulary, they are also learning new conventions for speaking, writing, and analyzing. Julie M. Spanbauer, *Using a Cultural Lens in the Law School Classroom to Stimulate Self-Assessment,* 48 GONZ. L. REV. 365, 375 (2012-2013) [hereinafter Spanbauer, *Using a Cultural Lens*]. "[C]lassroom talk is deeply embedded in culture." Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students,* 35 INT'L J. LEGAL INFO. 396, 421 (2007) (alteration in original) [hereinafter Spanbauer, *Lost in Translation*].

9. Nancy P. Johnson, *Should You Use a Textbook to Teach Legal Research?,* 103 LAW LIBR. J. 415, 433-34 (2011) (asserting that "secondary sources are often the easiest place to begin research, but to understand them you need to know something about the primary sources they discuss" (quoting KENT C. OLSON, PRINCIPLES OF LEGAL RESEARCH v (2009))).

When asked why many of the students who consulted Wikipedia included the additional legal requirements in the rule section of their discussion of the issue, they were less clear, but their responses seemed to indicate that they did not understand the qualitative difference in the governing law as stated in Wikipedia and in the cases they were provided. They did not see a need to sort through the information I provided to determine any consistencies with or differences from the information they found. Instead, they assumed that their electronic research was consistent with the case law that I provided.

On a positive note, the students were already sophisticated electronic researchers; they were able to quickly find legal information on an assigned topic.[10] However, they naïvely viewed all information equally[11] and assumed that because the information was available on the internet, it was reliable[12] and useful[13] to their writing assignment. This experience caused me to question the way I taught research to these "digital-native,"[14] "Millennial"[15] students. This Article presents the modest, yet pervasive, changes I have since made to my first-semester, first-year legal research and writing course that I believe have had a positive impact on my students' learning experiences.

Part II of this Article presents a brief summary of the available research on those students who have used computers throughout their entire educational careers, including their strengths, their weaknesses,

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10. "[E]fficient, effective research skills are expected by legal employers." Ian Gallacher, *Forty-Two: The Hitchhiker's Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151, 167 (2006).

11. "They do not know how to adequately evaluate the quality of the information resources found on the web." Kari Mercer Dalton, *Bridging the Digital Divide and Guiding the Millennial Generation's Research and Analysis,* 18 BARRY L. REV. 167, 173 (2012).

12. "Students often visit certain websites because they are the easiest to use versus the most relevant or reliable." *Id.*

13. "They are simply gathering quick information not necessarily the best information." *Id.*

14. Digital natives are individuals who have used computer and other similar technology throughout their educational careers and lives to search for information. Ellie Margolis & Kristen E. Murray, *Say Goodbye to the Books: Information Literacy as the New Legal Research Paradigm,* 38 U. DAYTON L. REV. 117, 120-21 (2012); *see also* Dalton, *supra* note 11, at 173.

15. Dalton, *supra* note 11, at 167-68.

> According to Wikipedia, Millennials are known also as Generation Y, Generation Next, Net Generation, and Echo Boomers. They have a birth range from the 1980s to early 2000s and are characterized by their "increase[d] use and familiarity with communications, media, and digital technologies." They grew up during a time when the Internet caused great change to all traditional media. And this was the most significant event that shaped this generation.

Id. (footnotes omitted).

and how they differ from their instructors–many of whom did not use computers to any significant degree for research during college and law school.[16] Part III of this Article asserts that these differences are cultural and argues that, in the interest of better educating and preparing our students to become lifelong learners who are equipped to self-assess their research, law school teachers must adjust their teaching styles to not only teach to these students' strengths and enlighten them about their weaknesses, but to also teach in a manner that reflects the way the students think and learn.[17]

Because students are always plugged into technology and are always searching the internet, Part IV of this Article advocates the incorporation of research throughout the entire semester as a fluid, ever-present component to teaching all other skills and concepts.[18] Several examples are presented, including a closed-memorandum problem illustrating its dual function as a vehicle for introducing a deductive, analytical paradigm for written analysis and its use as a guide to, and self-assessment of, research.[19] A second example involves a statute that can be used to introduce statutory analysis and interpretation as well as the close reading skills necessary to conduct an informed and complete research process.[20]

II. ASSESSING THE CULTURAL DIVIDE IN THE LEGAL RESEARCH AND WRITING CLASSROOM

The majority of entering law students were using computers by age five.[21] "They grew up plugged into technology. They used laptops, iPods, the Internet, cell phones, iPads, tablets, digital music players, video cameras, video game technologies and other forms of technology from an early age."[22] They rely on, and are always plugged into, technology for social and professional communication and connection via, for example, text and email messages, YouTube, and Facebook.[23]

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16. *See infra* notes 21-47 and accompanying text.
17. *See infra* notes 48-66 and accompanying text. Others have argued that legal research should teach to students' strengths and focus on improving their weaknesses. Dalton, *supra* note 11, at 183.
18. *See infra* notes 67-112 and accompanying text.
19. *See infra* notes 69-94 and accompanying text.
20. *See infra* notes 95-112 and accompanying text.
21. Dalton, *supra* note 11, at 169.
22. *Id.* at 168-69 (footnote omitted).
23. *Id.* at 170.

Technology has also been an ever-present source of information in these students' learning and research processes.[24]

In the classroom, these students multitask: they conduct research on the topic being discussed in class while simultaneously answering email messages and checking Facebook.[25] They send messages to each other during class and have been known to send email messages–again during class–to the professor teaching that class.[26] They constantly engage in this behavior and apparently do not consider it disrespectful or disruptive of the classroom process because they do not hide or disguise their multitasking behavior. The students also appear to believe that their multitasking behavior does not interfere with or hinder their classroom experience.[27]

This aspect of their learning experience has impacted the way they process and organize information and conduct research.[28] These digital natives have a "fluid and immediate relationship with information."[29] They are more likely to search for information on an as-needed basis rather than synthesize new information into an existing framework of old information because they have faith that additional information will

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24. Margolis & Murray, *supra* note 14, at 131. Although these students are very comfortable using computer technology, they are frequently criticized for lacking "high levels of proficiency with electronic research tools." *Id.*

25. Bryan Adamson et al., *Can the Professor Come Out and Play?–Scholarship, Teaching, and Theories of Play,* 58 J. LEGAL EDUC. 481, 482 (2008).

> [A] generation of students who seem unlike any we have seen has begun to fill the seats in our classrooms. Whether our students are from generation X or Y or Z, their world is an E-culture of podcasts, blogs, sound-bites, and bouncing graphics that pop off their screens as they cruise the internet, watch DVD's, text message each other, do their e-mail, and check out the latest video on YouTube–and all during class time! To them, present-day legal education as taught in the classroom must feel like it belongs to a world of relics: printed cases in hard-bound books, green or blue bound treatises, printed study aids and flip-cards.

Id.

26. *Id.* After class, upon returning to my office, I have frequently found email messages sent during class time by students who were present in my class.

27. This has been my observation in my classroom. *See* Adamson et al., *supra* note 25, at 482.

28. Dalton, *supra* note 11, at 176. In fact, "particular parts of their brain are larger and more highly developed." *Id.* "Children raised with the computer 'think differently from the rest of us. They develop hypertext minds. They leap around. It's as though their cognitive structures were parallel not sequential.'" *Id.* (quoting Marc Prensky, *Digital Natives, Digital Immigrants, Part II: Do They Really Think Differently*, ON THE HORIZON, Dec. 2001, at 1, 3, *available at* http://www.marcprensky.com/writing/Prensky%20%20Digital%20Natives,%20Digital%20Immigrants%20-%20Part2.pdf).

29. Alistair E. Newbern & Emily F. Suski, *Translating the Values of Clinical Pedagogy Across Generations,* 20 CLINICAL L. REV. 181, 193 (2013).

be readily available in the future if needed.[30] These digital natives are thus more likely to adopt a "surface-learning strategy."[31] The prevalence of computer technology in their educational experience also affects their attitude toward legal research instruction. Whether we like it or not, these students come to us with a different approach to research, and their approach has value.

> An internet search on the World Wide Web is the usual start of a research assignment, even one conducted by professionals. Search engines such as Google, Yahoo and Bing, or an online encyclopedia like Wikipedia, are so powerful that refusing to start your research in this way could be self-defeating. Internet sources may not always be reliable, exact or supported by empirical data, but despite these known disadvantages, the first search session is always valuable to obtain some idea of the scope, significance and global meaning of the subject to be researched.[32]

Over time, information technology has expanded and become more sophisticated.[33] Sources such as Google Scholar provide case law, law review articles, and journal articles free of charge.[34] Federal and state court websites now include court opinions, statutory law, and legislative history.[35] These governmental online sources are also becoming more

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30. *Id.*

31. *Id.* at 194.

32. Ben Beljaars & René Winter, *The University Library: A Driving Force for Reform in Legal Education?*, 40 INT'L J. LEGAL INFO. 1, 9-10 (2012) (footnote omitted).

33. Computerized research was introduced via LexisNexis in 1973, and Westlaw was introduced in 1975. Gallacher, *supra* note 10, at 164. "The advent of the computer chip and the ability to store more and more information in a smaller and smaller space has meant that computers now occupy the central societal role with which we are all familiar." *Id.*

34. Vicenç Feliú & Helen Frazer, *Embedded Librarians: Teaching Legal Research as a Lawyering Skill,* 61 J. LEGAL EDUC. 540, 545 (2012).

> Research materials available on the Internet fall into six categories: 1) primary source materials available, e.g., on Lexis, Westlaw, Loislaw, and non-commercial alternatives such as Google Scholar; 2) court docket and case information services; 3) secondary sources for topical legal research, legal periodicals, and other legal materials; 4) financial and business news; 5) public records; and 6) non-legal and legal-related general sources.

Id.

35. *Id.* at 544-45.

> Legal materials are now more accessible online through fee based databases, court sites, federal and state government sites, and other free databases. The proliferation of information creates a situation that requires the researcher to be more effective and efficient at the research process. In addition, changes in government publication, globalization, and reliance on Internet-based sources have expanded the types of materials relied on by courts in their decisions.

comprehensive.[36] Because many of these online sources are offered free of charge, they remove a barrier to access.[37] Although these sources are not yet as comprehensive as Westlaw and Lexis, they are changing the way law students, entry-level associates, and, in turn, law firms think about the process of legal research.[38] In fact, Westlaw and Lexis have each adapted their research technology to these realities via WestlawNext and Lexis Advance.[39] WestlawNext has been described as "Google for lawyers" and has changed traditional electronic legal research.[40] Its search engine employs algorithms that rank both secondary and primary sources, with the most important documents appearing first in the list, and it permits the user to conduct searches without first limiting the search to a particular database or library.[41]

In contrast, many legal research and writing professors are "digital immigrants" who "were born when the computer was not personal, the cell phone did not exist and the best source of information was the library."[42] These professors think about and conduct research in a linear fashion.[43] They believe it is best to begin with a traditional

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Id.; *but see* Kenneth H. Ryesky, *From Pens to Pixels: Text-Media Issues in Promulgating, Archiving, and Using Judicial Opinions,* 4 J. APP. PRAC. & PROCESS 353, 384 (2002).

36. *See* Deborah K. Hackerson, *Access to Justice Starts in the Library: The Importance of Competent Research Skills and Free/Low-Cost Research Resources*, 62 ME. L. REV. 473, 483 (2010).

> Researchers should be able to find opinions by case name or by topic. By using the advanced search feature, researchers will be able to limit their search to a particular jurisdiction or even select multiple jurisdictions to search simultaneously. This is an exciting development for those who want to be cost-effective researchers and for those citizens who want to be better informed on legal issues. Equal access to justice demands that everyone be able to research any legal or political issue. We should all be concerned about making sure that credible resources for legal research are available to everyone.

Id. at 483-84; *see also* Randy Foreman, *The Risk of Exclusive Reliance on Online Research,* MICH. B.J., Jan. 2013, at 52, 53 (praising the Michigan Courts' website).

37. *See* Hackerson, *supra* note 36, at 483.

38. *See* Feliú & Frazer, *supra* note 34, at 545-46. "It is not surprising, then, that practitioners turn to online sources, especially free, general information sources, as a means to conduct cost effective legal research." *Id.*

39. *See generally* Ronald E. Wheeler, *Does WestlawNext Really Change Everything? The Implications of WestlawNext on Legal Research,* 103 LAW LIBR. J. 359 (2011).

40. *Id.* at 360.

41. *Id.* at 360-61.

42. Dalton, *supra* note 11, at 176.

43. *Id.* at 179. This traditional form of research

> impose[s] a structured hierarchy on the law and provides a shared context for legal research and analysis and, by extension, for the law itself. It is organized by topic–broadly and narrowly through a digest system. Indexes, table of contents, chapters, and sections all give . . . access[] [to] the structure . . . [of the]

research process; books and secondary sources are consulted first to provide background information and vocabulary to better perform electronic research and assist in the process of ultimately locating relevant, binding primary authority.[44] Many who teach legal research embrace this approach as the "correct" approach to legal research.[45] When professors adopt this inflexible approach while teaching research, they lose their students who will continue to use electronic research resources not only at the outset, but also exclusively throughout their research process.[46] Digital immigrants also fail to recognize that the differences that separate them from their digital-native students are cultural differences that they should embrace as a classroom reality and, in turn, should adapt their teaching methods to focus upon what is best for their students rather than steadfastly clinging to what is most comfortable for them.[47]

III. ADOPTING A CULTURAL-OUTSIDER APPROACH TO TEACHING LEGAL RESEARCH

Entering law students are "cultural outsiders" in the sense that they "are encountering a new discourse and culture complete with distinct conventions" related to authority, written and oral analytical paradigms, and vocabulary and language.[48] They also bring assumptions and

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> resource[]. In traditional research, the researcher is working in a linear fashion. When working in this linear fashion, it is easier for a legal researcher to determine the legal context surrounding an issue and to draw comparisons to other legal principles. In turn, current legal educators/digital immigrants also think in this same linear fashion. They start with a general area of law, find the rule and then apply the rule to the facts.

Id. (alterations in original) (footnotes omitted) (internal quotation marks omitted).

44. Gallacher, *supra* note 10, at 160.

> The traditionalist view of legal research has, at its core, the firm conviction that book-based legal research is superior to electronic research, at least as a first step in almost any research project. This traditionalist approach is rooted in the history of American legal research and the limited nature of the resources available to lawyers until recently.

Id.

45. *Id.* at 162-63.

46. *See id.* at 167 (describing current law students as being "irretrievably married to computers as their primary research tool").

47. *See* Margolis & Murray, *supra* note 14, at 149 (arguing that it is time "to let go of the process-based, bibliographic method of legal research instruction" and time to "start to conceive of the teaching of legal research as an expansion of law students' baseline information literacy").

48. Spanbauer, *Using a Cultural Lens, supra* note 8, at 375. "For purposes of this article, culture is simply defined as a process 'by which meaning is produced, performed, contested, or transformed' through 'any set of signifying practices.'" *Id.* at 375-76 n.50

views of the law that may or may not be accurate based on cultural projections[49] and constructions resulting from the larger cultures in which they live.[50] Layered upon and interwoven into these cultural differences are the students' computer-dependent and non-linear approaches to thinking and researching.[51]

Studies indicate that the cultural differences these students bring to the classroom are hard-wired differences–their brain structures are different than their digital-immigrant professors' as a result of a lifetime of exposure to and use of this technology.[52] Therefore, digital-immigrant professors must be flexible and refrain from continuing to rigidly adhere to a one-size-fits-all, "correct" approach to legal research.[53]

> If a professor remains attuned to the phenomenon that all entering law students bring with them a view of law [and research] influenced by the larger cultures within which they have lived, the professor will be in a [better] position to navigate the inevitable dichotomy of the cultural context within which [the professor's and students' attitudes toward research have evolved].[54]

If, however, professors do not adopt a flexible approach to legal research–one that incorporates teaching research fluidly throughout the semester and that recognizes the strengths that entering law students bring to the classroom–these students will reject classroom teaching of research processes and methodologies.[55] They will continue to "access

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(quoting Mezey, *supra* note 7, at 42).

49. *Id.* at 375-76. A cultural projection creates a perception of law based upon "constructed images or fictional narratives" rather than through a detailed acquaintance with legal doctrine or practice. *Id.* at 375. Such "narratives not only influence lay expectations, but also profoundly influence the law itself." *Id.* at 376.

50. *See* Mezey, *supra* note 7, at 45-46.

51. *See supra* notes 28-31 and accompanying text.

52. *See* Dalton, *supra* note 11, at 170-72 and accompanying text. "They develop hypertext minds. They leap around. It's as though their cognitive structures were parallel not sequential." *Id.* at 176.

53. *See* Gallacher, *supra* note 10, at 163. Traditionalists tend to believe "that students are insufficiently knowledgeable about the law to use online research as a first step." *Id.*

54. Spanbauer, *Using a Cultural Lens, supra* note 8, at 377.

55. *See generally* Gallacher, *supra* note 10, at 160. Students find book research to be

> substantially less important than [it was] to us and electronic research has been a successful strategy for them up to the point where they encounter legal research instruction. It is logical, therefore, for them to believe that their teachers are simply out of touch with the way things are now, and while they might hear what their teachers say about the importance of book-based research, it is unclear whether they really believe what they hear.

Id.

information randomly and process it."[56] They will begin their research process using the internet and search without first "using their legal analysis and reasoning skills to develop a research plan."[57] Their digital-immigrant professors must find a way to bridge this cultural gap as these students immerse themselves in the culture of law so that they learn to "fully understand the information they are gathering" and also learn to evaluate and question the information they retrieve for accuracy, quality, and completeness.[58]

The professor must also be mindful that the information the students are retrieving and utilizing is not familiar to them; it does not generally include sources similar to the information found in conventional college textbooks and secondary sources in other disciplines.[59] The bulk of research will consist of cases that "were never intended as teaching material and which were written by legal experts (judges) to resolve a narrow legal dispute with other legal experts (i.e. lawyers) as the intended audience."[60] These cases are "dense, filled with legal jargon and procedural and other technical legal complexities the students cannot possibly understand at the outset."[61] Even if the students were inclined to closely read[62] these cases, "[g]iven the tailored and individualized dispute-resolution purpose of each case, the reading material inevitably provides an incomplete and myopic synthesis of any area of law."[63]

Engaging these digital-native students in the legal research and writing classroom is especially important because that "is where law students first begin to think of the law in a problem-solving light and

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56. Dalton, *supra* note 11, at 177.

57. *Id.* at 180; Aliza B. Kaplan & Kathleen Darvil, *Think [and Practice] Like a Lawyer: Legal Research for the New Millennials,* 8 LEGAL COMM. & RHETORIC: JALWD 153, 165 (2011).

58. Dalton, *supra* note 11, at 181 (commenting that "[t]hey are simply gathering quick information not necessarily the best information" and that "they implicitly trust the Internet").

59. Jacobson, *supra* note 6, at 908 (commenting, in the context of law school, that "no novice learner could simply read a casebook and understand the subject matter").

60. Spanbauer, *Using a Cultural Lens, supra* note 8, at 373.

61. *Id.*

62. Close reading has been defined as "a method of teaching students to move beyond a superficial, paraphrase-driven level of analysis to achieve deeper insight, which is then reflected in more thoughtful writing." Barbara J. Busharis & Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses,* 33 J. MARSHALL L. REV. 303, 312 n.67 (2000).

63. Spanbauer, *Using a Cultural Lens, supra* note 8, at 373-74.

where, in true Kingsfieldian terms, they begin to think like lawyers."[64] A professor who focuses on cultural gaps in student expectations and understanding of research will gain "immediate feedback in the classroom as to both student understanding and misunderstanding" and will be in a better position "to capitalize on such gaps as teaching moments to demonstrate to the students how their cultural perceptions" of their research processes and results differ from a trained lawyer's perceptions.[65]

Professors who teach their digital-native students to become aware of and to question their cultural perceptions regarding research will enable these students to

> develop some of the critical self-learning skills necessary to their professional growth as attorneys[.] A most important aspect of assessment is student self-assessment. Throughout an attorney's professional life after law school, her success in practice will depend on the ability to self-assess professional performance, behavior, and attitudes. An indispensable trait of the truly competent lawyer, at whatever stage of career development, is that of knowing the extent and limits of his competence: what he can do and what requires the assistance of others.[66]

IV. TEACHING METHODS AND RESEARCH ASSIGNMENTS ADAPTED TO DIGITAL-NATIVE STUDENTS

Although students will conduct research even when a closed-universe problem is assigned, the closed-memorandum assignment continues to serve important functions; it is an effective vehicle for introducing case analysis, rule synthesis, and analogical reasoning.[67] When constructing

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64. Gallacher, *supra* note 10, at 158; *see also* Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools,* 39 U. BALT. L. REV. 173, 209 n.245 (2010).

65. Spanbauer, *Using a Cultural Lens, supra* note 8, at 377; *see also* Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques,* 40 CAP. U. L. REV. 149, 193 (2012) (offering self-assessment tools as a means of providing professors with additional information "to assess their students' learning").

66. Spanbauer, *Using a Cultural Lens, supra* note 8, at 378 (internal quotation marks omitted) (quoting Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 96 (2010)).

67. Lucia Ann Silecchia, *Designing and Teaching Advanced Legal Research and Writing Courses*, 33 DUQ. L. REV. 203, 229 n.81 (1995). As one legal research and writing professor explained,

such an assignment, however, it is important for the professor to anticipate both the non-traditional and traditional legal electronic research sources their digital-native students will consult and the potential analytical problems that these sources will create for the students given their tendency to conduct research on a surface level in a random, non-linear manner and "to simply search for words instead of using their legal analysis and reasoning skills to develop a research plan."[68]

A parental alienation of affection claim, based on Illinois law, has functioned well as a closed-memorandum problem and as an introduction to legal research.[69]

Because the problem is a closed-research problem with an ungraded first draft due after three weeks, it may be best to initially limit discussion of research to the nature of the precedent included with the problem, its use as research, and its function as binding primary authority.[70] After the first draft has been submitted, and armed with the knowledge that the students will have ignored the admonition against consulting outside resources, a professor will have multiple teaching opportunities to provide feedback on their unassisted, unguided research process and will have the ability to guide the students to incorporate more sophisticated, thorough legal research techniques into their existing research framework.[71]

The problem provides multiple opportunities to teach legal research because of the following: (1) It is a limited, narrow topic where only a

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> Closed universe packets allow students to focus on developing their analytical and writing skills without having to devote significant time to doing research. They also enable a large number of students to work on the same problem without draining library resources. Finally, they are an excellent vehicle for controlling the skills that will be taught since instructors dictate the boundaries of the task and include information in the packet that highlights the source materials with which the instructor hopes students will become familiar.

Id.

68. Dalton, *supra* note 11, at 180.

69. Parental alienation, as used in this particular closed-memorandum context, is sometimes referred to as third-party alienation because the allegation involves a claim that either "a third party adult 'stole' a parent away from the family home" or a third party who is in an intimate relationship with one of the parents attempts to interfere with the child's relationship with the other parent. Kathleen Niggemyer, Comment, *Parental Alienation is Open Heart Surgery: It Needs More Than a Band-Aid to Fix It,* 34 CAL. W. L. REV. 567, 572-73 (1998).

70. Mark Edwin Burge, *Without Precedent: Legal Analysis in the Age of Non-Judicial Dispute Resolution,* 15 CARDOZO J. CONFLICT RESOL. 143, 179 n.162 (2013) (discussing research topics taught in a first-year legal research course).

71. For a discussion of how entering law students conduct research, see *supra* notes 28–32, 55-58 and accompanying text.

handful of published court decisions exist, and the issue is one of two distinct, yet overlapping, types of alienation of affection claims permitted under Illinois statutory law;[72] (2) It involves a subject area, concepts, and legal vocabulary that students should be familiar with due to their exposure in other first-semester courses; (3) It involves a legal claim that many courts have abolished, and therefore, raises strong competing policy interests;[73] (4) It involves a statute that presents numerous interpretation issues and problems due, in part, to its deceptive simplicity; and (5) It involves an area of law that has changed over time through legislative enactments modifying a body of pre-existing common law, including recent attempts at legislative abolishment.[74] Another benefit of using this problem to teach research is that after grappling with the facts and law for three weeks, the students will be better informed about the legal issue.[75] Class time can be devoted to asking specific questions of the students followed by time devoted to in-class research, a guided class discussion, and a critique of their research results.

Numerous teaching opportunities are available to the professor if the closed-memorandum does not identify the precise narrow legal issue for the students, but instead asks them to identify the issue presented by the facts and to analyze the precedent's relevance to the facts.[76] Classroom time can initially demonstrate that if the problem had been an open research memorandum, their typical research process using a natural-language research approach may have led them to secondary or

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72. Rudnick v. Vokaty, 406 N.E.2d 105, 107 (Ill. App. 1980) ("[E]ach member of the family has a legally enforcible right to protect the family relationship. The law protects this right, both for the parents and the children alike, by the alienation of affection action.").

73. *See supra* notes 28-31, 47-57, and accompanying text.

74. *See infra* notes 84-89 and accompanying text. "An action by a child for alienation of the affections of one of the child's parents was first recognized in Illinois in *Johnson v. Luhman*." *Rudnick*, 406 N.E.2d at 107; *see also* Johnson v. Luhman, 71 N.E.2d 810 (1947). "Four months after the *Johnson* decision, the Illinois legislature, presumably aware of the *Johnson* decision, enacted the alienation of affections act." *Rudnick*, 406 N.E.2d at 107. "[T]he legislature limited recovery in these actions to actual damages (Ill. Rev. Stat. 1977, ch. 40, par. 1902), [and] prohibited recovery of punitive, exemplary, vindictive or aggravated damages." *Rudnick*, 406 N.E.2d at 107. In 2013, a bill was introduced to abolish the alienation of affections statute in Illinois. H.B. 1452, 97th Gen. Assem., Reg. Sess. (Ill. 2013) (unenacted).

75. Rebecca A. Cochran, *Legal Research and Writing Programs as Vehicles for Law Student Pro Bono Service,* 8 B.U. PUB. INT. L.J. 429, 430 n.5 (1999) (discussing the use of closed-universe problems to teach legal research).

76. The fact pattern can involve a situation in which an estranged wife begins living with a man who attempts to alienate the child's affection for the child's father by interfering with custody and attempting to replace the father in the child's life.

persuasive primary authority,[77] and alternatively, to a larger subject area–involving, for example, child custody issues–and a much larger, unwieldy volume of case precedent.[78] The professor can guide students from a more efficient, informed research process to the narrower legal topic–alienation of affection–and, within that topic, to parental alienation claims to demonstrate the efficiency of a more informed research approach.[79] Again, the goal is not to guide the students to a linear research approach, but rather to teach them about the limitations of their non-linear, natural-language approach, to guide them to supplement their research, and to question its quality and completeness.[80]

After students are introduced to the narrow topic, they can be guided to incorporate the legal vocabulary gained from their torts class related to causation and duty of care to focus their research and understanding of the different legal requirements as included in the relevant case precedent.[81] Additionally, because the topic is narrow, if both parental and spousal alienation cases are included in the packet, classroom discussion can focus on the relevance and importance of the spousal alienation precedent to the factual scenario involving parental alienation. The students can be guided to incorporate their tort law vocabulary to enable them to draw legal analogies to these factually

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77. The following links are examples of information students might find using Google to conduct initial research on the closed-memorandum problem: http://www.psychologytoday.com/blog/caught-between-parents/201106/parental-alienation-is-emotional-abuse-children; http://parentalalienationdynamics.blogspot.com/; http://www.warshak.com/alienation/pareferences/paslegal.html;http://www.fact.on.ca/Info/pas/walsh99.htm;http://www.divorcingmistakes.com/articles/PASreview.pdf;http://www.canadiancrc.com/Parental_Alienation_Syndrome_Canada/price94.pdf; http://www.ilga.gov/legislation/97/HR/09700HR0724.htm.

78. *See, e.g.*, 750 ILL. COMP. STAT. 5/601 (2009). If the students do not include in their research legal vocabulary and background reading, they could easily be diverted to a best-interests-of-the-child analysis under divorce law rather than a tort law alienation claim. *See, e.g.*, 750 ILL. COMP. STAT. 5/602 (2009).

79. The professor can guide the students to the narrow legal topic by using the necessary legal vocabulary.

80. For a discussion of the students' tendencies toward research, see *supra* notes 28-32, 56-58 and accompanying text.

81. *See* James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons From Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595, 609 n.45 (2003). "As first year torts students learn, liability decisions can usually be stated as a matter of duty or proximate causation." *Id.* An alienation of affection action requires the plaintiff to prove "(a) love and affection of the alienated spouse for the plaintiff, (b) overt acts, conduct or enticement on the part of the defendant causing those affections to depart, and (c) actual damages." *Rudnick*, 406 N.E.2d at 108. The plaintiff must additionally prove that the defendant acted in a wilful or wrongful manner and, in so doing, "proximately caused plaintiff's actual damages." *Id.*

distinct cases.[82] This assignment thus provides an early lesson to students who continuously search for case precedent that is a perfect match to their facts.[83]

Some states have abolished alienation of affection claims due to acceptance of no-fault divorce law and experiences with "grave abuses" of such claims.

> The remedies provided by law for the enforcement of actions based upon alleged alienation of affections . . . caused extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and [have] been exercised by unscrupulous persons for their unjust enrichment, and [have]furnished vehicles for the commission or attempted commission of crime and in many cases [have] resulted in the perpetration of frauds . . . .[84]

States that have retained such claims have placed severe restrictions on them.[85] Professors can encourage students to understand the case precedent in light of these underlying policies and thereby educate the students about the importance of identifying policy as a driving force in law generally and in their understanding and analysis of precedent.[86]

In Illinois, the alienation of affection statute does not expressly declare its application to both parental and spousal alienation claims, and it does not contain the legal requirements for proof of either claim.[87]

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82. *See* Rasband, *supra* note 81, at 609 n.45.

83. Christine Pedigo Bartholomew & Johanna Oreskovic, *Normalizing Trepidation and Anxiety*, 48 DUQ. L. REV. 349, 381 (2010) (asserting that "by focusing on appropriate, attainable goals instead of the ever-elusive case 'on all fours,' more students will be more successful in their research").

84. *E.g.*, NEV. REV. STAT. § 41.370 (1997).

85. *See, e.g.*, 740 ILL. COMP. STAT. 5/1 (2010). In Illinois, the legislature declared,

> [T]he award of monetary damages in such actions is ineffective as a recompense for genuine mental or emotional distress. Accordingly, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by limiting the damages recoverable in such actions and by leaving any punishment of wrongdoers guilty of alienation of affections to proceedings under the criminal laws of the state, rather than to the imposition of punitive, exemplary, vindictive, or aggravated damages in actions for alienation of affections.

Id. Illinois law limits recovery to actual damages. 740 ILL. COMP. STAT. 5/2 (2010).

86. "It is time for legal writing professionals to take up the task of teaching students to make sound, persuasive policy arguments." Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 61 (2001).

87. *See* 740 ILL. COMP. STAT. 5/5 (2010). Illinois courts have interpreted the statutory language, "all actions for alienation of affections," as applying to both parental and spousal alienation claims. *Rudnick*, 406 N.E.2d at 107 (quoting 740 ILL. COMP. STAT. 5/5).

Thus, this research problem provides an opportunity to teach students about the interaction of case and statutory precedent–neither of which should be read in isolation–and to teach about partial statutory abrogation of a common law cause of action.[88] The students should learn that in such circumstances, they must be aware of the continuing validity of this precedent and be aware that the case law subsequent to enactment of a statute is a good starting point for making informed assessments.[89] They can be cautioned against randomly accessing information when dealing with a situation involving partial statutory abrogation and can be urged to conduct their research of precedent consistently with the timeline of the statute.[90]

In this circumstance, the student can learn to modify their typical research process and view statutory research and interpretation as a recursive process, moving from the statutory language to case law interpreting the statute, and back to the language of the statute to fill any gaps resulting from their superficial research.[91] The expansive statutory language declares that its application to "all actions for alienation of affections" claims[92] evinces "no legislative intent to exclude" parental alienation claims,[93] and thus provides additional opportunities for combined lessons in statutory interpretation and

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88. For a general discussion of the need to teach statutory interpretation in the first-year law school classroom, see Jennifer M. Chacón, *Statutory Analysis: Using Criminal Law to Highlight Issues in Statutory Interpretation,* 1 UC IRVINE L. REV. 130, 142-43 (2011).

89. *See generally Rudnick*, 406 N.E.2d at 107 (discussing whether the legislature abolished pre-existing common law for parental alienation).

90. For a discussion of research processes, see *supra* notes 28–32, 55–58 and accompanying text.

91. Research is generally a recursive process–

> A successful legal researcher applies information effectively to resolve a specific issue or need. This includes a competency that an information-literate student must understand research as a recursive process and be able to reflect on the successes or failures of prior strategies. To be an information-literate law student, the student must be an informed learner who learns though engaging and interacting with legal information. The principles and related standards therefore support the importance of a broader and deeper understanding of information literacy in the legal context.

Catherine A. Lemmer, *A View From the Flip Side: Using the "Inverted Classroom" to Enhance the Legal Information Literacy of the International LL.M. Student,* 105 LAW LIB. J. 461, 479 (2013) (footnote omitted) (quoting *Principles and Standards for Legal Research Competency*, AM. ASS'N L. LIBR. (2014), http://www.aallnet.org/main-menu/Leadership-Governance/policies/PublicPolicies/policy-legalrescompetency.html) (internal quotation marks omitted).

92. 740 ILL. COMP. STAT. 5/5.

93. *Rudnick*, 406 N.E.2d at 107.

statutory research.[94] Of critical importance in the alienation context is the need to update the statutory research to include pending legislation and failed attempts at abrogation and modification. In this way, research becomes a fluid, ever-present component of learning for first-semester law students.

Teaching legal research can be incorporated when teaching any concept or skill. For example, professors can implement research ideas and skills simultaneously while teaching about statutes outside the context of the closed-memorandum problem. Although statutes, such as the Americans with Disabilities Act,[95] are wonderful vehicles for illustrating the different components and functions within comprehensive statutes, the complexity and length of such statutes–and the volume of case law interpreting them–can render them too difficult for classroom research discussion.[96] Instead, a simple, straightforward statute with limited text and case interpretation would be better suited to illustrate the unique features of informed statutory research, including: (1) The operative effect of statutory language requires different scrutiny than the language contained in case law;[97] (2) The window into context and statutory purpose requires situating statutory language within its period of enactment and possible amendment;[98] and (3) Complete understanding requires situating statutory language, its period of enactment, and its purpose within the relevant case law interpreting it.[99]

The Uniform Code of Military Justice[100] includes the following, little-known statute entitled "Misbehavior Before the Enemy"[101]:

> Any member of the armed forces who before or in the presence of the enemy–
>
> (1) runs away;
>
> (2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;
>
> (3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;

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94. *See* 740 ILL. COMP. STAT. 5/5; *Rudnick*, 406 N.E.2d at 107.

95. 42 U.S.C. §§ 12101-12213 (2012).

96. For a discussion of the benefits that this statute provides in the legal research and writing classroom, see Spanbauer, *Using a Cultural Lens, supra* note 8, at 382-86.

97. *See id.* at 381.

98. *See* Michael J. Wolter, *Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?*, 5 DICK. J. ENVTL. L. & POL'Y 315, 332 (1996).

99. *See id.*

100. 10 U.S.C. §§ 801-941 (2012).

101. 10 U.S.C. § 899.

> (4) casts away his arms or ammunition;
> (5) is guilty of cowardly conduct;
> (6) quits his place of duty to plunder or pillage;
> (7) causes false alarms in any command, unit, or place under control of the armed forces;
> (8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or
> (9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;
> shall be punished by death or such other punishment as a court-martial may direct.[102]

Students can be asked to carefully read the statute during class and then to discuss its separately numbered provisions.[103] Classroom discussion should reveal that "[q]uite independent of the grimness of its sanctions," a not-so-close reading of its separately numbered, redundant, and repetitious provisions reveals that they appear to be the result of less-than-careful drafting:

> What, for instance, is running away (1) that isn't also cowardly conduct (5)? And aren't paragraphs 2 and 8, the one covering the shamefulness of cowardice on defense, the other governing slacking off on offense, really special cases of cowardly conduct punished in 5? Paragraph 7 goes so far as to make jitteriness a capital offense to the extent one's nerves lead one to overinterpret causes for alarm, while paragraph 3, in contrast, authorizes putting the sleeping sentry before the firing squad apparently because he is not jittery enough even to stay awake.[104]

A well-guided classroom discussion can also reveal that, from an analytical perspective, the statute is fascinating due to its

> strange relation with fear. All law must pay homage to fear, for if the law does not succeed in nurturing the passions that will make it self-enforcing, . . . it must have recourse to fear . . .–fear of punishment or the fear of the shame of being execrated as a lawbreaker. But this statute places fear at its substantive core, for it is fear-impelled action that it mostly seeks to regulate.[105]

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102. *Id.*
103. The statute can also be assigned for reading outside of class.
104. William Ian Miller, *Fear, Weak Legs, and Running Away: A Soldier's Story, in* THE PASSIONS OF LAW 241, 242 (Susan A. Bandes ed., 1999).
105. *Id.*

Students will likely be surprised to learn that on its face this statute commands a great deal of men and women who serve in the armed forces to be prepared to act against every instinct of fear and self-preservation or risk death at the hand of their own government.[106] The law is also shocking in that "as an official matter at least, Congress reserves" the right to kill "the person who cannot kill at all."[107]

Students can be asked to spend a few minutes of class time researching the statute in an attempt to ascertain the reasons for its poor drafting, its seemingly curious language,[108] and potentially heavy sanctions.[109] A little research into context will reveal that the curious language and poor drafting occurred when these separate provisions were "cobbled together from the Articles of War and the Articles for the Governance of the Navy into a Uniform Code of Military Justice."[110] The harshness could be ameliorated by the students' discovery that only one execution has occurred (during World War II) under this over 200 year-old law.[111] This discovery provides an opportunity for classroom discussion of whether prosecutorial desuetude excuses congressional failure to amend or repeal a death penalty statute and what the continuing existence of such a statute says about our government and its laws.[112]

V. CONCLUSION

Every teaching opportunity in the first-semester legal research and writing classroom provides additional opportunity to teach legal research skills. Because entering law students already have research skills, and because they are always on the internet, teaching research will be more

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106. *Id.* at 258.

107. *Id.* at 242.

108. Even the title of the provision, "Misbehavior Before the Enemy," is curious given that it is in fact a death penalty statute. 10 U.S.C. § 899. The language resulted from

> the modern reform, the modern consolidation of the articles providing a uniform law for all the armed services that produced the archaic, casuistic, ad-hoc absurdist look of the present statute, not the remnants of pre-eighteenth-century diction still lingering about in shameful abandonments and the casting away of arms.

Miller, *supra* note 104, at 260.

109. The statute permits the penalty of "death or such other punishment as a court-martial may direct." 10 U.S.C. § 899.

110. Miller, *supra* note 104, at 259.

111. *Id.* at 242.

112. Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status,* 88 B.U. L. REV. 1327, 1411 (2008) (discussing prosecutorial desuetude in the context of adultery laws).

effective if the process mirrors the culture in which they have learned and lived. The goal should not be to change their process, but instead enlighten them about the need to develop new research skills that build upon the skills they already possess. They also need to learn about the special features of the law that require them to supplement their existing research skills to produce thorough, complete, up-to-date research.