BRUTAL CHOICES IN CURRICULAR DESIGN...

WHAT SHOULD BE TAUGHT FIRST: PRIMARY AUTHORITY OR SECONDARY AUTHORITY?

Brutal Choices in Curricular Design ... *is a regular feature of* Perspectives, *designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. Readers are invited to comment on the opinions expressed in this column and to suggest other "brutal choices" that should be considered in future issues. Please submit material to* Helene Shapo, Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611, phone: (312) 503-8454, fax: (312) 503-2035.

Editor's Note: *In this installment of* **Brutal Choices**, *Penny A. Hazelton and Donald J. Dunn, two experienced legal research teachers who are also well known for their writings on the subject, take up the difficult curricular decision of what to introduce first to 1L students: primary or secondary authority.*

WHY DON'T WE TEACH SECONDARY MATERIALS FIRST?

BY PENNY A. HAZELTON[1]

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Just one of the "big four" legal research textbooks (*How to Find the Law*,[2] *Fundamentals of Legal Research*,[3] *Legal Research in a Nutshell*,[4] *The Process of Legal Research*[5]) includes chapters on secondary sources before chapters on primary legal materials. Why do Christina Kunz and her co-authors use this organizational structure when none of the other textbooks do? Because teaching about secondary sources first is the right way to teach legal research!

OK, OK! Give me a few minutes of your time to persuade you to at least think about my recommendation. I know that legal research has always been taught by starting with court reports, digests, and case verification systems. And, as we all know, "always" has the weight of tradition, even precedent behind it! I know that primary materials are "the law" and important. I agree that the ultimate goal in legal research is to find "the law" relevant to the problem. But teaching students first about court reports misleads them about the role of judicial decisions in the rule of law and confuses them as they later learn how to solve a legal research problem.

For many years I have been using a modified version of Professor Marjorie Rombauer's research strategy from her book, *Legal Problem Solving*.[6] She suggests five steps in the research process—preliminary analysis; search for statutes; search for mandatory case authority; search for persuasive case authority; and refine, double-check, and update your work.

As part of my explication of the first stage of research—preliminary analysis—the classroom discussion focuses on what a good researcher needs to know before beginning the process of research itself. The relevant facts must be isolated from the mass or paucity of information known about the problem. From these relevant facts, the researcher should try to formulate the issue(s) that need to be researched. The jurisdictions whose law will control need to be identified. From this basic information, the researcher then

[1] I am indebted to Donald Dunn, who recently started arguing with me about this topic. I became exetcised and decided to try to put my money where my mouth is.

[2] Morris L. Cohen et al., *How to Find the Law* (9th ed. 1989).

[3] J. Myron Jacobstein et al., *Fundamentals of Legal Research* (7th ed. 1998).

[4] Morris L. Cohen & Kent C. Olson, *Legal Research in a Nutshell* (6th ed. 1996).

[5] Christina L. Kunz et al., *The Process of Legal Research* (4th ed. 1996).

[6] Marjorie Dick Rombauer, *Legal Problem Solving: Analysis, Research & Writing* (5th ed. 1991).

must identify words and phrases that will help find relevant legal material.

We can probably all agree that these are essential elements in the preliminary analysis of a research problem. Now, however, we separate the wheat from the chaff! As an additional stage in the preliminary analysis step, researchers all analyze what they know about this subject matter. If the researcher knows little or nothing, some time spent using secondary sources is usually advised. And how often do we really know much about what we are researching? We're usually doing research because we don't know the answer to the client's problem!

The breadth and depth of a search using secondary sources will vary with the problem, the researcher, and how much the researcher needs to educate himself or herself about the problem. For example, if the issue is hard to formulate or express, the researcher may find a legal encyclopedia useful to help conceptualize the problem. If the issue is very narrow and specific, ALR® might be a good choice for a quick search. If jurisdiction is in doubt, a recent law review article can help formulate a research plan that includes resources from the correct jurisdiction(s). If the researcher can identify the broad area of law—contracts, banking, torts—finding relevant passages in publications from the Nutshell Series® or Hornbook Series® or in treatises will include specific terminology and definitions, jurisdictional analyses, context, history, and the like.

In any of these situations, the legal researcher's foray into legal information is by way of the secondary literature. If you know little about the subject matter, how else can you determine what kind of law (court decisions, statutes, regulations, constitutional provisions) is most likely to answer your question? Knowing this before you begin searching in bewildering and arcane statutes or millions of court decisions can help make your research efficient and productive.

Secondary sources can help you determine the relationships between different types of primary authority. If the common law rule has been changed by statute, your research strategy will be very different than if you find that there are both federal and state statutes relevant to your research problem.

Another reason to use secondary authority early in your research stems from the difficulty of formulating legal analogies, especially in this day of electronic legal information. Searching online for cases using facts may actually hide the potential legal analogies. Secondary sources tend to focus more on legal issues so that relevant analogies are easier to identify.

Not only do secondary sources analyze and synthesize legal doctrine, rules, and precedent, but secondary materials also refer to cases, statutes, regulations, and other primary and secondary legal information. Reading that key law review article or treatise may give you a direct lead to the important statutes, cases, or regulations that will help answer your question, thereby satisfying the first rule of any research: find someone who has already done the work for you!

Once the legal researcher has completed preliminary analysis of the research problem by identifying the issue(s) to be answered, the jurisdiction(s) involved, and the appropriate words and phrases, then a search of relevant statutes is the next step. Why? Because statutes rule.

I hope that I have convinced you that most legal researchers cannot begin to understand and make use of primary materials—statutes, cases, or regulations—without some early help from secondary materials. If this is so, why don't we teach students about secondary sources first?

I assume that legal research courses have historically taught court reports first because most law students only deal with court decisions in their first-year courses. But, in my opinion, a legal research course that teaches court reports, digests, and citation-checking systems first reinforces the notion that law is only made by judges. Most of us realize that students are very likely to misconstrue the relative roles played by the various sources of law—statutes, cases, regulations, constitutions/charters, and the common law (if you wish to think of common law as a source of law). Teaching a legal research course by beginning with secondary sources can help dispel the notion that case law is all that matters in the law.

In fact, since 1Ls read so many cases in their other classes, they might actually be more ready to learn secondary sources first. When law review

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articles or legal encyclopedias cite to cases, the students already know what they are. And students love it when they learn that a civil procedure hornbook can help them understand *Pennoyer v. Neff*!

So, next time you are planning a legal research course, think about the organization of your syllabus. Are you sure you want to teach students about court reports first? And even if you are not willing to change the order of your course for first-year students because yours is the only class that teaches students about the elements of a court decision, consider starting with secondary sources in your advanced legal research classes. It makes a lot more sense. And, besides, secondary sources are awesome!

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Why We Should Teach Primary Materials First

BY DONALD J. DUNN

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When teaching legal research, some differences of opinion exist as to which sources the instructor should expose the students to first—primary or secondary authority. Frankly, I had never given the issue a great deal of thought until I found myself debating the issue with Penny Hazelton in the midst of a *Perspectives* Editorial Board meeting. Thereafter, I was asked to write this article presenting my side of the argument. The answer is self-evident. Primary means "main" or first. Everything else is secondary. In other words, "secondary" comes after primary.

Imagine this scenario: You are before a judge and you put forth a brilliant legal argument, throwing in some policy and concluding with a black letter principle of law. At this point the judge asks, "Counselor, can you cite some authority for that proposition?" You respond, "Yes, your honor, I have a C.J.S. section, an ALR annotation, a law review article, and a learned treatise." I don't even want to think about what happens next, but I assure you it's not a pretty sight. If you want to make yourself look even worse, try rattling off a few digest paragraphs to the judge.

During the first days of law school, law students are likely to find themselves in a course on constitutional law, another focusing on the Federal Rules of Civil Procedure, and still others involving the Model Penal Code and the Uniform Commercial Code. The first deals with the ultimate primary authority, the U.S. Constitution—it trumps everything else. Interpretation of the Constitution and its amendments are found in the cases. The federal rules are a massive statutory compilation, with subsequent cases providing clarification. Criminal law, another part of the first-year course package,