

PERSPECTIVES

Teaching Legal Research and Writing

BRUTAL CHOICES IN CURRICULAR DESIGN ...

WHY I DON'T GIVE A RESEARCH EXAM¹

BY JUDITH ROSENBAUM

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Most of us who teach legal research, whether as part of a stand-alone Legal Research course or as part of an integrated Legal Research and Writing course, would agree on the pedagogical goals we are trying to accomplish in our research training. We want students to learn that legal research is part of a process leading to oral or written analysis of legal rights and duties relevant to a client's problem. Thus, we want students to learn about the types of primary authorities used in legal analysis;² the range of finding tools that analyze the law or cite to primary authorities, or both; and the mechanics of using the various finding tools.³ Ultimately, but probably not until they understand the webbed relationship between

¹ I would like to thank Helene Shapo, who taught me just about everything I know about teaching Legal Research and Writing. Her insight and advice guide much of what I do in this field. I would also like to thank Helene Shapo, Mary Lawrence, and Mary Hotchkiss for their encouragement about my writing this article and their patience waiting for it. Last, but not at all the least, I would like to thank the creators of the research exams cited in this article. I hope you will take my comments in this article as an appropriate subject for professional debate. I am very grateful to you for your willingness to share your exams by publishing them in print and on the Internet.

² The goal of research is to "find the relevant binding and persuasive primary authorities of law." Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, *Writing and Analysis in the Law* 209 (4th ed. Found. Press 1999).

³ See Maureen Fitzgerald, *What's Wrong with Legal Research and Writing? Problems and Solutions*, 88 *Law Libr. J.* 247, 257 (1996) ("[T]he focus in legal research and writing should be on the process of legal research and writing, which teaches students when particular sources are needed, where to look for them, and how to use them.").

authorities and finding tools, we want students to understand how to develop a research strategy so that regardless of the substantive area their issue involves, they will be able to research that issue with facility.⁴

Legal research teachers would also probably agree that students do not remember nearly as much after completing our courses as we would like them to remember and that students and

⁴ Susan S. Katcher, *Reflections on Teaching Legal Research in Expert Views on Improving the Quality of Legal Research Instruction in the United States* 46, 47 (West 1992) (suggesting that sources should be taught before introducing students to strategy).

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even recent graduates often struggle putting what they do recall into practice in their jobs.⁵ Most of us would agree as well that we need to use good assessment and feedback tools in our teaching to motivate our students and to stimulate learning.⁶ We would disagree, however, on why they don't retain what they learn in our classes as well as we would like⁷ and also on what constitutes a good assessment and feedback tool.⁸

Although legal research assessment tools have been called by a myriad of different names,⁹ all of them seem to fall into one of two categories. These assessment tools are either exercises designed to guide students in the various legal research resources or exams designed to test what they have learned at an earlier point in the year. Of course within the categories of exercises and exams, there are further subdivisions. For example, there are

⁵ In the late 1980s and early 1990s, many law librarians and legal research teachers engaged in vigorous written debate about the reasons for students' poor research skills. Citing all these articles would take up too much space in this short essay. However, many longer journal articles written after this debate do provide citations to this rich debate in its entirety. See, e.g., James B. Levy, *Better Research Instruction Through "Point of Need" Library Exercises*, 7 J. Leg. Writing Inst. 87, 89 n. 7 to 90, nn. 8, 9 (2001).

⁶ *Id.* at 92. See also Kristin B. Gerdy, *Teacher, Coach, Cheerleader, and Judge: Promoting Learning through Learner-Centered Assessment*, 94 Law Libr. J. 59 (2002).

⁷ Compare Ann Hemmens, *Advanced Legal Research Courses: A Survey of ABA-Accredited Law Schools*, 94 Law Libr. J. 209, 213 (2002) (suggesting that if students don't have a chance to use the research skills that we teach them soon after the skills are introduced, they will not "retain knowledge about them very long.") with Helene Shapo & Christina L. Kunz, *Teaching Research as Part of an Integrated LR & W Course*, 4 Perspectives: Teaching Legal Res. & Writing 72, 72 (1996) (arguing that students remember more about their research instruction than they used to in "some former—but unspecified—"golden age" of research instruction" as a result of better text books, improvements in the exercises used to teach research, and the integration of research and writing instruction in many law schools). See also Mary Whisner & Lea Vaughn, *Teaching Legal Research and Writing in Upper-Division Courses: A Retrospective from Two Perspectives*, 4 Perspectives: Teaching Legal Res. & Writing 72, 72 (1996) (emphasizing that continual practice is needed to develop fully a newly taught skill).

⁸ See Amy Sloan, *Creating Effective Legal Research Exercises*, 7 Perspectives: Teaching Legal Res. & Writing 8, 8 (1998).

⁹ See Dennis S. Sears, *The Teaching of First-Year Legal Research Revisited: A Review and Synthesis of Methodologies*, 19 Legal Reference Serv. Q. 5, 10-14 (2001) (referring to dozens of these names, both favorable and derogatory).

bibliographic exercises,¹⁰ process-oriented exercises,¹¹ and, increasingly, exercises that try to blend the best of both the bibliographic and the process model.¹² With respect to exams, there are objective exams, using some combination of multiple-choice, true-false, or short-answer questions,¹³ various kinds of practical application exams,¹⁴ and take-home exams,¹⁵ presumably administered in a manner similar to the bar exam performance tests. The legal education literature is filled with articles debating the merits of bibliographic or process-oriented exercises and suggesting ideas for improving on both.¹⁶ Strangely, though, there has been nothing written about the merits of giving a research exam.¹⁷ In

¹⁰ Bibliographic exercises derive their name from the bibliographic approach to teaching legal research. This approach introduces students to the various print and online sources of legal research by describing them and giving the students questions to answer about each tool. In order to answer the questions, the student has to use the particular tools, thus becoming familiar with their organization, content, and special features. *Id.* at 10.

¹¹ The process approach to legal research grew out of criticism that the bibliographic approach inappropriately taught about the tools of legal research apart from the context of a problem, which led to the need for research. Process-oriented exercises try to teach students about the sources of legal research through the context of a hypothetical client's problem that students are asked to analyze. *Id.*

¹² An example of this type is discussed in Levy, *supra* n. 5, at 97-112. See also Helene S. Shapo and Christina L. Kunz, *Teaching Legal Research as Part of an Integrated LR&W Course*, 4 Perspectives: Teaching Legal Res. & Writing 78, 80 (1996).

¹³ See Brian Huddleston, *Trial By Fire ... Creating a Practical Application Research Exam*, 7 Perspectives: Teaching Legal Res. & Writing 99, 99 (1999); Kory D. Staheli, *Evaluating Legal Research Skills: Giving Students the Motivation They Need*, 3 Perspectives: Teaching Legal Res. & Writing 74, 74 (1995) (describing types of exams).

¹⁴ Huddleston, *supra* n. 13, at 99-100, 102-03 (exam requiring students to demonstrate research skills in one-on-one 30-minute sessions with librarians; Mary Brandt Jensen, *Breaking the Code" for a Timely Method of Grading Legal Research Essay Exams*, 4 Perspectives: Teaching Legal Res. & Writing 85 (1996) (exam consisting of a problem that a student had to research and report results in a narrative research log).

¹⁵ See Terry Jean Seligmann, *Beyond "Bingo!": Educating Legal Researchers As Problem Solvers*, 26 Wm. Mitchell L. Rev. 179, 198-99 (2000); Craig Hoffman and Kristen Robbins, Conference Presentation, *Encouraging Transferability and Independence: Using a Combination of In-Class and Take-Home Examinations in the First-Year Legal Writing Curriculum*, Knoxville, Tenn., May 30, 2002 (copy of handout on file with the author).

¹⁶ Michael J. Lynch, *An Impossible Task but Everybody Has to Do It—Teaching Legal Research in Law Schools*, 89 Law Libr. J. 415, 430-32 (1997).

¹⁷ The few articles that have been written about research exams are short pieces describing some attempts to administer a "hands on" research exam. E.g., Huddleston, *supra* n. 13; Jensen, *supra* n. 14.

this article, I would like to open that debate by explaining why I do not give a research exam. First, however, I want to make clear that when I began working on this article I intended only to explain why I do not give an objective research exam with multiple-choice, true-false, and short-answer questions. The exams described by Brian Huddleston¹⁸ and Mary Brandt Jensen,¹⁹ where a librarian trails a student through a research project either in person or by reading the student's written narrative of the student's thought processes while researching a particular problem, do not cause me the same concerns that an objective exam raises and are not part of the scope of this article.

The type of exam I am addressing in this article is the in-class exam taken outside the law library where there are correct and incorrect answers and the ability to identify correct answers depends on memorizing details about research sources. For example, the following extract illustrates how students may be tested on memorized material in a multiple-choice format:

- I. The following are legal publications: 1. C.F.R.; 2. Restatement (Second) of Torts; 3. United States Reports; 4. Supreme Court Reporter; 5. General Digest. Which of these should always be regarded as primary sources?
- A. All of the above.
 B. 1 and 3.
 C. 1, 2, 3, and 4.
 x D. 1, 3, and 4.
 E. 3 and 4.
- II. Which of the following are works in which one would *not* expect to find references to West key numbers: 1. C.F.R.; 2. C.J.S.; 3. United States Code; 4. F.R.D.; 5. Am. Jur. 2d.
- A. 3 and 5.
 x B. 1, 3, and 5.
 C. 1, 2, and 5.
 D. 1 and 4.
 E. 1 and 5.²⁰

¹⁸ Huddleston, *supra* n. 13.

¹⁹ Jensen, *supra* n. 14.

²⁰ Lynch, *supra* n. 16, at 438, n. 42.

In the following excerpt, the questions are asked in a true-false format:

6. True or False: You can find a case using a digest if you know only the docket number. [3 points]
7. True or False: United States Supreme Court cases are always binding on each state supreme court. [3 points]²¹

The following questions are asked in the short-answer format:

- Which legal periodical index would you use to find references to articles written prior to 1980? [2 points]
- It is extremely important that legal material is kept current. List two of the ways law books are updated. [4 points]
- What are three things contained in an annotated code that are not contained in an unannotated code? Please be specific. [6 points]²²

Some objective test questions use the “matching” format, which is somewhat of a cross between multiple choice and short answer. Following is an example of this format:²³

Match These ...	To These
_____ American Law Reports (ALR)	A. An individual pamphlet issued upon enactment of a statute into law.
_____ Digest	B. The same case in a different reporter.
_____ Law Reviews or Law Journals	C. A system of arranging, by subject, the headnotes of cases.
_____ Official Reports	D. Statutes enacted by a legislature, arranged chronologically.
_____ Parallel Citation	E. The first appearance of a decision issued by a court.
_____ Restatements	F. Alphabetical compilation of terms defined by the courts.
_____ Session Laws	G. The public, general, and permanent statutes of a jurisdiction in a fixed subject or topical arrangement.
_____ Shepard's Citators	H. The opinions of a given court published by the court-designated publisher.

(continued on next page)

²¹ Darby Dickerson, Stetson College of Law, Faculty and Courses, Research and Writing 1 Exercises, Fall 1999 Exam <www.law.stetson.edu/darby/r&w1.htm> (last updated Aug. 19, 2002).

²² Staheli, *supra* n. 13, at 75

²³ Douglas Miller, *Using Examinations in First-Year Legal Research, Writing, and Reasoning Courses*, 3 J. Legal Writing Inst. 217 (1997).

“Research is a process involving an interaction between thinking and doing.”

(continued from previous page)

Match These ...	To These
_____ Slip Law	I. Publisher-selected leading cases, both state and federal, with detailed annotations and commentary.
_____ Slip Opinion	J. The official, permanent session law publication for federal laws.
_____ Statutory Code	K. Student-edited periodicals that contain respected commentaries on the law.
_____ Treatise	L. Specialized publications whose purpose is to trace the use of earlier authority in later sources.
_____ U.S. Statutes at Large	M. Respected reiteration of major legal doctrines covering ten specific fields of law. N. Scholarly written discourse of an area of law by an expert in the field.

The problem with all of these test questions, regardless of whether they are asked in multiple-choice, true-false, short-answer, or matching format, is that they teach memorization. While it certainly is true that knowledge acquisition is a necessary foundation for learning, because raw facts have to be absorbed, and often memorized, before higher forms of cognitive activity can take place,²⁴ the essence of legal research is a search for understanding²⁵ in which finding and thinking²⁶ continually cross-fertilize each other and these mental processes cannot be emulated by an objective test.

Some research professors have recognized that knowing the answer to a question such as how many series of ALR® are published does not really demonstrate a student’s mastery of legal research ability, because these questions do not involve any analysis. These professors have attempted to devise analytical questions by building a series of multiple-choice questions based on a short

²⁴ Maureen Fitzgerald, *What’s Wrong with Legal Research and Writing? Problems and Solutions*, 88 Law Libr. J. 247, 261–63 (1996); Gerdy, *supra* n. 6, at 61–64.

²⁵ Lynch, *supra* n. 16, at 416.

²⁶ *Id.* at 416–19.

hypothetical fact pattern. The following is an example of this type of exam question:

Questions 17–20 are based on the following paragraph.

Your firm has been retained to represent Britney Moore. Ms. Moore recently had the name “Justin” tattooed around her navel by a tattoo artist in Nevada. Apparently, the tattoo dye has caused inflammation and infection of her navel. You attended a meeting with a senior partner at your firm and Ms. Moore to learn more about the facts of the case and her injuries.

17. At the conclusion of the meeting, the senior partner asked you to determine potential causes of action to be pursued in Nevada and to begin researching the law immediately. What are your next steps?
 - A. Go to the library and begin to research Nevada law on body tattoos.
 - B. Go online and pull up all law review articles from Nevada journals addressing body tattoos and tattoo dye.
 - C. Analyze the facts and formulate a preliminary research question.
 - D. Go to the library and find a secondary source discussing body tattoos.
 - E. Make a list of all sources of law.

18. The senior partner believes that there is a statute in Nevada that regulates tattoo artists. He has asked you to research this potential statutory claim. Which of the following would be the most effective way to begin your research?
 - A. Find the Nevada Revised Statutes because it will provide the governing statutory language.
 - B. Find the Nevada Revised Statutes Annotated, either in the statute books or on Lexis or Westlaw, because the annotated statutes will provide both the governing statutory

language as well as annotations to cases interpreting the statutory provisions.

- C. Search the Internet for sites about tattoos because the Internet is free for all attorneys, and searching the Internet is the most efficient method to find all information.
- D. a and c.
- E. all of the above.²⁷

The problem with all of these is that they do not measure a student's understanding of or ability to do good research. Research is a process involving an interaction between thinking and doing. It takes place in context—in the context of a client's problem for which controlling law must be located and analyzed.²⁸ Thus, a good researcher must

- understand the relevant facts;²⁹
- think about legal concepts that can serve as search terms;
- go to research sources, whether in print form or online, to test out the utility of the search terms;
- evaluate the utility of the sources and information discovered and adjust the search terms if necessary;
- read explanations in secondary authority of unfamiliar areas of the law governing the issue once the relevant search terms are identified;
- read and analyze the primary authority to determine how it relates to the client's problem;
- evaluate the usefulness of the material discovered and determine whether there are gaps that need to be filled, either by more research or by deeper analysis of the sources;
- conduct additional "spot" research when necessary or appropriate to fill in the holes;

²⁷ Hoffman & Robbins, *supra* n. 15.

²⁸ Fitzgerald, *supra* n. 24, at 268. See also Seligmann, *supra* n. 15, at 185.

²⁹ In practice, this involves listening to a client, reading documents, and talking to other people to get a complete picture of the problem. In our classes, the best we do to imitate this process is to enact a client interview to give our students a sense of the facts. More often we give the students documents, such as pleadings, a client interview, or discovery excerpts to give them a sense of how a lawyer synthesizes the facts. Sometimes, we simply give them a canned narrative of facts.

- know when to follow a research trail to the end, when to start a new trail³⁰, and when to stop.³¹

These tasks, which are essential to a good research strategy, are part of a recursive process, in which the researcher understands the relationship among tools, authorities, and analysis and constantly fine-tunes and adjusts the steps of the research process based on reading what he or she discovers and analyzing that material in light of the oral or written report he or she will make to the client or to a senior attorney.

The problem with the objective research exam is that it is one-dimensional. The answer is there if the questions are multiple-choice, true-false, or matching format, or the answer can be recalled from memory if the questions are short answer. This type of exam does not mirror in any way the trial-and-error aspects of actual research.³² It fails to capture the internal feedback loop that comes from reading and analyzing the various sources consulted. It doesn't bring up the decision points where the researcher reaches a fork in the road, such as what to do when he or she cannot find a controlling case or statute, and must decide which way to turn. The objective exam omits the critical role that timing often plays in research, where an answer must be found by a certain date in order to be ready for a client meeting or to satisfy a court deadline. It is missing the imagination and creativity, and even a little bit of the serendipity³³

³⁰ For example, sometimes the first step in research, perhaps reading a treatise, will lead to a citation to a relevant case in the controlling jurisdiction. A good researcher might go to that case, read it, decide it is helpful, and go to either a citator or a digest to find similar cases from the jurisdiction. This is what I call following a research trail to its end. Once the end of the trail is reached, the researcher must decide whether to start a new trail, such as looking at another treatise, or perhaps *American Law Reports* or a legal periodical or whether he or she has enough material from the first trail to begin preliminary analysis of the problem.

³¹ Christina L. Kunz, *Terminating Research*, 2 Perspectives: Teaching Legal Res. & Writing 2 (1993).

³² See Theodore A. Potter, *A New Twist on an Old Plot: Legal Research Is a Strategy, Not a Format*, 92 Law Libr. J. 287, 293 (2000).

³³ We all must have had at least one time or another, at least in print research, the experience of looking for what we need in one section of a book and accidentally happening upon another section that turns out to be even more useful than what we were originally trying to find.

“The problem with the objective research exam is that it is one-dimensional.”

“The objective research exam seems to me to put the cart before the horse, or perhaps more accurately, focuses on the cart and leaves the horse in the barn.”

that research actually involves. In short, the objective exam is missing the tangible, physical interaction between thinking and doing that constitutes the essence of good legal research.

Having said all this, and having taken the time to review at least some of the research exams that our profession is using—and, of course, having been a lawyer for 26 years—I can see the other side. A lot of time and thought has gone into the creation of these exams. Many of the questions are excellent. Moreover, these types of questions have a purpose since learning theory tells us that knowledge acquisition is the first step to moving from novice to expert and these objective questions force students to know the basics and give them the motivation (or prod, as the case may be) to commit the basics to memory so that they can go on to higher forms of learning such as “comprehension, application, analysis, synthesis, and evaluation.”³⁴

The objective research exam seems to me to put the cart before the horse, or perhaps more accurately, focuses on the cart and leaves the horse in the barn. It makes the answers to questions an end in themselves and not a means to an end. These questions would seem to make an excellent in-class assignment, maybe even a game that could be played in class where students work on the questions in teams and a prize is given to the team that garners the most points. But as an end-of-the-semester evaluative mechanism, these exams miss the point. The real proof of whether we have accomplished our pedagogical goals in teaching legal research is not whether our students can answer these objective questions, but, rather, whether they can harness together “finding and thinking,”³⁵ or in other words whether they can get the horse out of the barn and in front of the cart.

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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.*

³⁴ Fitzgerald, *supra* n. 24, at 262.

³⁵ Lynch, *supra* n. 16, at 426.