

“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.”

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,

will likely blend statutory interpretation and case law. So will contracts. First-year students typically take property and torts too, where case law reigns supreme. They learn a lot about the common law.

Academic pedagogy suggests that reinforcement is a good thing. Why would teachers want to begin a course on legal research with anything other than what the neophyte law students are encountering every day? I submit that they shouldn't. Students need to understand the importance of the Constitution in the development of our legal system. They need to appreciate the role of federal and state legislatures and how laws are enacted and compiled. They need to grasp the organization of the court system, the difference between a holding and *dicta*, a majority opinion and a dissent. Students need to recognize that they are reading appellate cases and that trials make headlines, but appeals make law. The latter can be found in the law library, the former in trial transcripts (sometimes). Bottom line, students must realize what are the most powerful and forceful sources for formulating legal arguments. Teachers accomplish this best by teaching primary authorities first.⁷

The process of legal research is often compared to a treasure hunt—the search for that special gem that will bring the researcher wealth and happiness if found. Of course, no treasure hunt will be successful unless the students know what they are seeking. So, too, with primary authority. Law students need to understand the value of constitutions, statutes, and cases before they can undertake a meaningful search. Once they appreciate the precedential value of primary authorities, then and only then can they enjoy the excitement of the hunt and the thrill of the find.

I have had a long association with the *Fundamentals of Legal Research*,⁸ becoming a co-author in 1994. I worked on the assignments and instructor's manual as far back as 1985. When I began that work, I remember tracking the organizational structure of *Fundamentals* back to its founding. There it was—a discussion of primary authority followed by secondary authority. The arrangement and flow made eminently good sense. There was a logical connection with the sources students encountered in their first-year classes. Those encounters are still

the same today; students continue to confront primary authorities first in the contemporary classroom experience. Therefore, the logic of teaching these materials first in a legal research course still holds.

Don't get me wrong; I think secondary sources are wonderful tools. They help one find the law, contribute to its understanding, and synthesize the issues. These secondary sources give the law context and perspective. Oftentimes they unravel and explain the mysteries of the law in ways that a straight reading of cases and statutes never will. But use of secondary sources in this fashion begs the question about whether to teach primary or secondary sources first.

Over the years we have seen an evolution, albeit a slow one, in the makeup of the traditional casebook. Books that used to be titled *Cases on ...* have become *Cases and Materials on ...*. Gradually, casebook content has expanded to include references to, and sometimes even the text of, statutes, Restatements, and law review articles. Heck, we now even see some law professors, particularly those teaching first-year courses, listing hornbooks (secondary authority) as "recommended" or even "required" reading. Why? Quite simply, the body of the law is becoming increasingly larger and more complex. The Socratic method (or the so-called "modified Socratic") still provides the framework for developing legal analytical skills—we continue to refer to law students learning to "think like a lawyer." Law professors don't assign hornbooks to help the student do research; they assign hornbooks to give the broad overview, to facilitate the learning process, and to enhance classroom discussions. In other words, hornbooks provide narrative summaries of general principles of law. They help students grapple with the subtleties and nuances of the casebook's contents and the

⁷ Anyone needing proof of what the bench and bar thinks is most important should read the MacCrate Report. Analyzing the fundamental lawyering skills, the first listing under "Legal Research § 3.1, Knowledge of the Nature of Legal Rules and Institutions," is to "Case law" and the next is to "Statutes." Task Force on Law Schools and the Profession: Narrowing the Gap, Am. Bar Ass'n, *Legal Education and Professional Development—An Educational Continuum* 157 (1992).

⁸ J. Myron Jacobstein et al., *Fundamentals of Legal Research* (7th ed. 1998).

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sequencing of those materials.

Sometime during their first year, students are thrust into the law library (or the online environment) to prepare a moot court brief. Imagine their consternation if they didn’t have a fundamental understanding of case, statutory, and constitutional law as primary authority. How would they know the hierarchy of the court system and thus realize the distinctions in value between an opinion by the Supreme Court of the United States and one from a lower federal court or their own state court? They couldn’t distinguish a holding from dicta, overruled from affirmed, or a headnote or syllabus from an opinion. Without learning primary authority first, students won’t even recognize what a citation is and how to look it up. Nor will they recognize the difference between constitutions and statutes and the annotations that often accompany these primary authorities.

So it’s first things first. Start by teaching primary authority to emphasize its importance; teach secondary authority next to provide assistance in locating and understanding cases, statutes, and constitutions. Put it all together and you have a systematic, pedagogically sound approach to teaching legal research.

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