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A Jurisprudential Approach to Teaching Legal Research

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Advanced legal research (ALR) courses have become popular additions to the landscape of legal education,[1] typically justified under a mandate to teach practical legal skills[2] without cramming more into an already demanding first-year curriculum. Advocates of ALR curricular refinements often propose three primary goals: (1) ensuring that students obtain a more profound understanding of the complexities of the research tools covered in the first year; (2) introducing students to new tools and specialized subject areas, such as tax or international law; and (3) teaching students to be informed consumers of research products through understanding the underlying principles of research.

The last of these goals is the most important, because it teaches students to become lifelong learners about research tools and processes. However, it is also the most often ignored. After all, ALR is the quintessential methods course. Law students must leave law school with practical research skills. Why would anyone want to confuse the issue by sullying it with theory?

But the dichotomy between the "practical" and the "theoretical" is false. Students need both to be effective researchers. Specifically, students often lack any appreciation of the structure and organization of legal resources because they are rarely exposed to the jurisprudential and

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1. *See, e.g.*, Ann Hemmens, *Advanced Legal Research Courses: A Survey of ABA-Accredited Law Schools*, 94 LAW LIBR. J. 209 (2002).

2. *See generally* Robert MacCrate, Task Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS B. Since the MacCrate Report, law schools have been forced to pay homage to the principle that they should produce, in the vocabulary of the law firms that are the primary consumers of their educational product, "practice-ready" attorneys.

theoretical foundations underlying our conceptions of particular fields of doctrine and the research tools we have developed to synthesize and systematize those fields. Without such foundational materials, students lack a structure in which to achieve the first two goals of ALR.

Effective teaching of ALR requires an integration of basic jurisprudence with the practical "how to" list of research nuts and bolts. The theoretical structures underlying legal research are as much a branch of jurisprudence as they are of information science. Only by understanding the philosophy underlying a research tool—not just how it works, but why it works—can students exploit its strengths and work around its weaknesses. Critical examination of the power and limitations of the variety of research tools available equips students not only to deploy a greater variety of sources to the research tasks at hand, but also to become critical judges of new sources as they are encountered for the first time.

Legal research as typically taught focuses upon providing students with a toolbox of disconnected skills. The students have not been exposed to overarching principles that will guide them in choosing which resources to use, and in adapting to a swiftly changing legal research environment. Consequently, students tend to view legal research as if it were as simple as following a cookbook recipe. They may know how to find a rule in the Code of Federal Regulations, but that means little if they do not understand how that rule finds its place in our scheme of law. Upon graduation, students at best are proficient at basic legal research using a handful of standard legal research tools. At worst, the shift from the closed law school environment leaves new attorneys inefficient, ineffective, and confused, and their employers frustrated. In either case, new attorneys not only fail to "hit the ground running," but also must spend substantial time and costly resources learning how to research through trial and error.

The rapidly changing needs of legal service providers over the last two decades have, in turn, imposed substantially new requirements upon the pedagogy of legal research. This changing environment has been described by many authors, most notably Robert Berring.[3] Unfortunately, these authors typically conclude that their observations are too recondite to form part of a legal research curriculum:

> [I]t is wise to avoid the legal research training question completely. This Essay is about legal information. It concerns what constitutes legal information, who controls it, and how it is changing. Most legal research courses could not possibly approach such questions, for lack of time. Furthermore, it is unlikely that the instructor has thought through the question.

3. *See, e.g.*, Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1675 (2000).

> Very few legal scholars have even thought about these issues, and if they do, they find it almost impossible to escape the constraints of their own experience. The way one learns to perform research becomes second nature. It can be put into perspective only with the greatest difficulty. Legal research training is conducted under chaotic conditions.[4]

This essay suggests that the legal research instructor must find the time to at least approach these theoretical and foundational issues with students. Absent exposure to the "why" behind the "how," students will continue to approach legal research as automata, trained to press particular buttons in a particular order without any understanding of the reasons why this often produces suboptimal research. The author's experience in teaching advanced legal research has shown that students are capable of absorbing theoretical concepts and applying them to the practical task of legal research. This results in a substantial improvement in their work, and these students are much better equipped to adapt to a changing research environment.[5]

I. STRUCTURING JURISPRUDENCE DISCUSSIONS IN ALR CLASSES

A. Philosophies of Communication

It is best to admit at the outset that the discussion of jurisprudence in a single lecture launching a class in advanced legal research will be neither complete nor nuanced. Nonetheless, some basic introduction to the relevant principles is possible. The goal is that students consider how structures of legal thought affect structures of information, with a particular focus on the contrast between late nineteenth century formalism and early twentieth century realism.[6] The class opens with an excursion into research as part of the process of communication, and the effect of differing purposes of communication on the way we carry out a research plan.

It is the premise of the ALR course that research is a fundamental part of the process of communication. That seems ludicrous to most students. For most of them, research is just about the most solitary activity imaginable, and conjures up a picture of rows of monastic carrels with silently brooding scholars. Students normally think of written and oral

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4. *Id.* at 1677-78.

5. This is indeed that most despised of formats, the "how-I-do-it-good" article. With the full recognition that a single teacher's experience with a limited number of students is anecdote rather than data, that experience may provide a useful point of departure for others to consider changes in the way legal research is taught.

6. This is about half of the theory covered in our course. The remainder deals with concepts from information science; this will form the subject of another essay.

advocacy as the communicative aspects of legal work, and an important first step in opening up their minds is asking them to think about why research is the third leg of that stool.

It is a commonplace of legal writing courses that legal advocacy is essentially storytelling, the lesson being that the audience must be given a coherent and compelling story if you wish to persuade that audience to do what you want. When you plunge into a research project, in order to decide what to research, you must already have formulated some idea of what that story will be. Most of us do not recognize this, or it so quickly becomes intuitive that we do not think about it. But the types of information we search for will limit and establish a form for the answer that emerges. You cannot begin a research project without having some preconceived notion of the story you want to tell—that is the obvious part. What is less obvious is that the process of your research will change that story, and this is where students so often go wrong. Maybe it *should* change that story, and just maybe you do not want it to. Either way, you have lost control of your own work if you do not realize that that is what is happening. But it is critical that you recognize the tendency of the story to run away with itself and plan carefully how you want to communicate with your audience. At the same time, you must recognize that no matter how well you plan, you will sometimes be led down the wrong road. That is all right. Sometimes you learn a lot by trying to tell the wrong story, or telling your story the wrong way. But again, self-awareness is what really matters. Students must internalize the element of storytelling before they can achieve a balanced view of the process of research.

If research is a part of the process of communication, students must consider the nature of legal communication. Aristotle characterized three elements as comprising communication—the speaker, the speech, and the audience[7]—and asserted that the audience is the ultimate reason for communication. I elicit from students the variety of audiences they face in the process of legal communication,[8] and a roughly corresponding variety of styles of communication.[9] The next step is to convey to the students that the audience, and the way in which we address it, presupposes important choices about the information we wish to convey—in other words, that we have already selected some form of plot or story line even before we begin the process of legal research.

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7. *See* ARISTOTLE, RHETORIC 16 (Lane Cooper trans., D. Appleton-Century Co. 1932).

8. E.g., courts, judges, juries, other attorneys (colleagues or opponents), clients, legislators, lobbyists, scholars, administrators, and the general public.

9. E.g., persuade, negotiate, counsel, advise, command, demand, explain, educate, or intimidate.

B. Bridging the Gap Between Philosophy and Jurisprudence—Formalism, Realism, and Communication Through Research Tools

While ALR students must grasp the relationship between jurisprudence and their research tools, it is neither possible nor desirable in such a class to provide more than a basic introduction to fundamental jurisprudential concepts. The point is not to engage in extended exegeses of H.L.A. Hart, John Rawls, or Critical Legal Studies. Rather, the primary focus of research-related introductions to jurisprudence must be upon schools of thought that gave form to the basic tools of legal research.

The most basic tools of legal research today are the progeny, whether in electronic or print form, of the tools developed at the beginning of the twentieth century to cope with the explosion of published cases and an expanding regime of statutory and regulatory law: citators, looseleafs, and comprehensive digesting. Thus the jurisprudence component of ALR most effectively begins with the concept of formalism and the distinction between the formalist school of the late nineteenth century and the realists of the early twentieth century. Students unfamiliar with the basic vocabulary of jurisprudence nonetheless experience a shock of recognition—like the man who was pleased to discover that he had been speaking prose all his life—when they recognize the formalist and realist arguments that have long formed an intuitive part of their law school discourse and their own philosophical bent. This has the effect of integrating legal research into the patterns of discourse they have developed in their other courses, making it part of their understanding of the development of the narrative structures of law.

Having started students thinking about the concept of communication, they are ready to consider how the worldview of the speaker and the audience may distort that process. Given the close relationship between classical formalism and the basic research tools common to the vast majority of legal research—digests and annotated statutory compilations—I begin the actual jurisprudential inquiry with two readings incorporating the basic tenets of formalism: the introduction to Langdell's contracts casebook[10] and a description of Langdell's concept of the scientific method from a forthcoming work by David Barnhizer.[11]

Any number of readings could convey Langdell's attempts to make the law a learned profession and divorce it from practice, but Barnhizer

10. *See* CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS v-vii (Boston, Little Brown & Co. 1871).

11. *See* David Barnhizer, Truth or Consequences? The Impact of Political Movements on Intellectuals' Freedom and Honesty (2002) (unpublished manuscript, on file with author).

does a particularly good job of criticizing what he characterizes as Langdellian scientism: "[t]he belief that the assumptions, methods of research, etc., of the physical and biological sciences are equally appropriate and essential to all other disciplines, including the humanities and the social sciences."[12] The apparatus of scientific investigation was thereby applied to a chaos of judicial decision-making—note the premise that only appellate court decisions were the "real" source of law—and the modern study of law was born.

I summarize the basic principles underlying the scientistic/classical formalist view of the law as follows:[13]

- Rules are knowable.
- Rules can be perfectly communicated; once stated, everyone shares in the same understanding of the rule.
- Rules can be discovered by the right application of reason.
- Rules are capable of filling space, that is, of deciding all propositions capable of being formulated.

Of course this is an extremely simplistic—perhaps pejorative—view of formalist philosophy, but the purpose is to make its shortcomings obvious to students. It thereby throws a harsh and unforgiving light on the corresponding deficiencies of that monument to nineteenth century formalism—John West's digest topic and key number system.

West's indexing scheme is closely related to the Linnaean system of taxonomy, and I illustrate this by showing students the classification of the various species of bear[14]—any species would do, but it makes a nice contrast to the bulls introduced later in the lecture. Such a lineage, set forth in outline form, bears a startling resemblance to the outline of a legal topic in the digests. The problem with the Linnaean system is that it has become a substitute for reality, rather than a useful but imperfect model for describing the natural world.[15] It is a simple but illuminating jump to make this same point for West's digests.[16] What was intended as a useful and descriptive indexing system has become an end in itself. Researchers tacitly believe that there are exactly 414 legal topics, each with its own detailed outline, and that in some way this mirrors the reality of the law.

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12. *Id.* (manuscript at 164).
13. See, for example, Hart's discussion of the open-textured nature of law in H.L.A. HART, THE CONCEPT OF LAW 132 (1961).
14. *See generally* Sten Lindroth, *The Two Faces of Linnaeus, in* LINNAEUS: THE MAN AND HIS WORK 1, 1-62 (Tore Frangsmyr ed., 1983).
15. *See, e.g.*, STEPHEN JAY GOULD, WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY 98-100 (1989).
16. *See, e.g.*, F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 599 (2002).

Such a stern devotion to logic naturally calls for its counterpoint. Students learn about the reaction of the early twentieth century realists with Karl Llewellyn's *Some Realism About Realism*,[17] and draw the obvious contrasts with the formalist view:

- Rules are mutable.
- Law is a means to a social, political, or economic end.
    - Rules are just predictions of behavior.[18]
    - Rules do not rule, policy rules.
- The communication of a rule is inherently ambiguous.
- Rules can be arbitrary.
- Rules do not fill space.

Most students recognize legal realism as their familiar law school world, in which they are taught not only to ask what the rule is, but why it is, and what purpose it serves. In particular, students have been taught to dwell on the point that legal arguments do not exist in a vacuum, but are always interacting with their time and place. At this point, the students begin to see why the process of legal research they learned in their first year of law school felt so out of touch with their substantive course work. It relies on a different analytical paradigm, one in which the law is a scientific enterprise independent of social, political, and economic forces. By making that distinction explicit, they are freed from an attempt to reconcile those paradigms, and can more easily manipulate them to the end of perfecting their skills at finding and communicating information.

Just for fun, and because it seems ludicrous to stop at mid-century, I also present a short version of Wittgensteinian rule skepticism and the Critical Legal Studies movement:

- Rules do not exist.
- Communication is impossible.
- Rules "legitimize a social order that most people find alienating and inhumane"[19]—much like law school.

At this point, a reference to Lewis Carroll helps to fix the concept of uncertainty in the minds of the students. "'When *I* use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less .... The question is,' said Humpty Dumpty, 'which is to be master—that's all.'"[20] It takes a substantial leavening of

17. 44 HARV. L. REV. 1222, 1233-42 (1931).

18. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." *Id.*

19. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 370 (1982).

20. LEWIS CARROLL, THROUGH THE LOOKING GLASS 94 (Random House 1946).

humor to help students see the virtue of learning the rudiments of legal philosophy in the first hours of a research methods course.[21]

As noted above, this exercise not only helps the students to understand how legal paradigms differ, but also to develop a vocabulary for dealing with that difference. The goal is to instill an abiding skepticism toward the materials of legal research. If this seems overwrought, consider what we are up against—for most students, West's digest topic and key number system feels something like the monolith in *2001: A Space*

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21. With a strong belief in humor as a mnemonic device, I present students with the following summary of these three philosophies. My thanks to the author, Daniel Barnhizer, Associate Professor, Michigan State University College of Law.

Formalism

> You have two cows. You execute a contract with your neighbor to sell her one of the cows, which cow is identified by the presence of black and white coloring, and an ear tag with the number 732 imprinted on it. You deliver the cow, and your neighbor refuses to pay. The court holds that under principles of scientifically discoverable contract law (which are clear, unambiguous, and apply in every case), there is no possible ambiguity in the contract, and the law is absolutely clear and knowable with respect to the obligations of the parties. Judgment in your favor, costs to be charged against the defendant. The court is absolutely correct, and will be so in every case.

Realism

> You have two cows. You execute a contract with your neighbor to sell her one of the cows, which cow is identified by the presence of black and white coloring, and an ear tag with the number 732 imprinted on it. You deliver the cow, and your neighbor refuses to pay. The court recognizes that there will always be conflicting rules that can govern in any case, and therefore courts must have discretion to choose between those conflicting rules and principles to achieve societal policy goals. The court weighs the rule in favor of enforcing contracts according to their terms against your neighbor's claim that the contract was unconscionable. Guided by the policy in favor of contract enforcement, the court holds in your favor. Judgment in your favor, costs to be charged against the defendant. The court, on average, consistently applies the law to achieve societal policies.

CLS

> You have two cows. Ownership of cows is an arbitrary rule, constructed by those in power to maintain their position of power and oppress those out of power. It does not really matter whether you go to court or not because rules are arbitrary, and cannot be consistently applied in every case. Judgment does not matter anyway because we cannot really know what the judge meant by the judgment. You deconstruct the cows and eat them.

Odyssey. In the absence of a connection with its historical moment and underlying reasons for being, it seems so vast, complex, and arcane as to be one with the forces of nature.

At this point, having torn the idol of certainty from the students' hearts, it is time to give them some hope. The goal of the class is to produce healthy skeptics, not angry legal Bolsheviks. Having been exposed to the world of Wittgenstein and Humpty, it is best that they not be left there. A short reading from H.L.A. Hart is the tonic.[22] Philosophers may argue whether Hart's neo-formalism truly reconciles Langdell and Wittgenstein, but he furnishes amply large shoulders to support a law student. While accepting the inevitability of ambiguity and asserting the open texture of law, Hart leads the student back through the looking glass into a world in which most people do share a core of meaning and where communication is possible. Although hardly a ringing endorsement, Hart offers students the comfort that "the head-note is usually correct enough."[23]

II. INTEGRATING JURISPRUDENCE AND LEGAL AUDIENCE

At this point I ask the students to return to the question of audience, picturing themselves in front of a judge, perhaps the most difficult audience they will ever face. How do they convince this person that their clients should win? I ask them to consider what style of argument, and what corresponding legal research, would appeal to different judges with the different worldviews we have discussed. Do they know enough about judges to know what would be attractive? Do all judges have enough in common?

Students generally conclude that most judges "feel" the value behind at least a façade of determinable legal rules, and find such arguments appealing, which is why the whole digest-topic-and-key-number business was not discarded decades ago. But judges are also smart enough to know that the law is open-textured, and furnishes them with alternative possibilities. In other words, a purely formalist argument may be a good foundation, but it is a loser if it does not give the judge a hook on which to hang a happy ending to the story you are trying to tell. Overwhelmingly, that means using a legal realist style of argument to show that not only is the answer you seek the "right" answer under the rules, it also makes good sense socially, economically, and politically. The script is a simple one: "if you decide for my client, you will be upholding all that is good and just and true and beautiful. Oh, and by the way, you will be upheld on appeal, and here are all the cases that say so." A perfectly airtight formalist argument

22. I assign Chapter VII, "Formalism and Rule-Scepticism," from *The Concept of Law*. H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961).

23. *Id.* at 131.

will not prevail if it means the judge has to evict the widows and orphans on Christmas Eve.

The class closes with a return to Karl Llewellyn, who, having ridiculed predictability so thoroughly in the 1930s, had to resort to a new coinage when his views grew more Hartian late in life:

> For the fact is that the work of our appellate courts all over the country is reckonable. It is reckonable first, and on a relative scale, far beyond what any sane man has any business expecting from a machinery devoted to settling disputes self-selected for their toughness. It is reckonable second, and on an absolute scale, quite sufficiently for skilled craftsmen to make usable and valuable judgments about likelihoods, and quite sufficiently to render the handling of an appeal a fitting subject for effective and satisfying craftsmanship.[24]

It is on that core of shared understanding—the concept of reckonability—that the process of legal research depends.

How does all this affect the students who are exposed to it? First, it impresses upon them the understanding that legal research is not an endeavor distinct from the process of legal reasoning and argument. They understand why research can not proceed without an initial theory of the case, and how that theory and the information they uncover will play off against each other as their knowledge of the law grows.

Second, by understanding the value of process, they are less frustrated with the time it takes to achieve "the answer." Recognition of the disconnect between the arguments they wish to make and the structures of traditional legal research materials allows students to use those tools more effectively because they are no longer being asked to perform tasks for which they were not designed.

Finally, it teaches a healthy skepticism. While the West digest system is an incredibly powerful research tool, once students recognize that it has its limitations, they are much more likely to be able to ask the same questions about other reference sources. Making them critical consumers of legal information is the most important thing we can do in equipping them for careers that will span several decades and almost certainly see changes in the delivery mechanisms for legal information at least as startling as the advent of Lexis, Westlaw, and the World Wide Web for the preceding generation of attorneys.

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24. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 4 (1960).