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START WITH ENACTED LAW, NOT COMMON LAW

BY PAUL BENEKE

Paul Beneke is the former Associate Director of the Legal Research and Writing Program at the University of Oregon School of Law in Portland. He currently practices criminal defense.

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.

There has long been a debate in the legal writing academy about the best starting point and pedagogical structure for a first-year legal research and writing course. One side of the debate holds that it is best to start with primary sources. The other side believes that the better approach is to teach secondary sources first.

This debate, in my opinion, misses the mark because of how the sides have framed the issue. While each side of the debate advocates beginning with a different category of books (or, in this electronic age, databases), both sides assume the issue is about books, and which should be taught first.

The more crucial issue, however, is how best to introduce beginning law students to sound research and analysis strategies that they can apply to clients' problems. Framed in terms of such strategies, the debate shifts to whether instruction should start with enacted law or with common law. I contend that legal research instruction should start with and emphasize enacted law. So too should instruction in legal analysis and writing.

In this sense, those who advocate the teaching of primary sources before secondary sources are only half right. They understand that if a legal

writing course begins with primary sources, students can more easily understand the role of secondary sources in legal research. Those who advocate teaching primary sources first, however, often list the major legal primary sources starting with cases. They typically fail to examine whether students should research and read statutes before cases, enacted law before common law.

By “enacted law” I mean not only statutory law, but also constitutional law, administrative law, rules of evidence and procedure, municipal ordinances, and any other rule with fixed terms that has a general, prospective application. The term *enacted law* may be better understood by what it is not, namely common law, or so-called judge-made law.

While enacted law is the proper starting point, any first-year course that starts with and emphasizes enacted law should focus initially on statutes to the exclusion of other forms of enacted law. This is not to say that other forms of enacted law should be ignored; to the contrary, every legal writing course should explain the basic structure of the American legal system at the outset, including the various forms the law takes, and the relationships between those forms. Such an explanation should address the federal nature of American government. It should clarify that all law must be constitutional. It should ensure that students have a basic understanding of the role of the courts and *stare decisis*. After this short explanation, however, the course should move to instruction focusing exclusively on statutory analysis, including instruction in research and writing skills relevant to that kind of analysis.

Instruction that begins with statutes naturally evolves into research and analysis of administrative law. Similarly, students who have first acquired the ability to research and analyze statutes and who have learned to find and read with precision judicial opinions interpreting and applying statutes can readily learn constitutional law and analysis.

Starting with and emphasizing enacted law, particularly statutes, makes sense for several reasons. Today, statutory law is far more prevalent than common law. Many common law rules have been codified. Thus, sheer pragmatism should lead to an emphasis on statutes. Second, dealing first

with statutes forces students to read carefully and to think critically. Finally, and perhaps most important, starting with and emphasizing statutes provides students with a framework for legal analysis, and, by extension, legal research and writing.

Of course, students must not be led to believe that the common law is unimportant. Our legal system is a common law system. But there are several reasons why a course should not begin with common law and principles of common law analysis. Beginning law students struggle to understand the nature and relative importance of common law. Common law often has an indeterminate quality. By contrast, the terminology of a statute is fixed.

More than a few students think that all case law is common law. They reason that anything a judge writes must be common law. A course that starts with statutes corrects that perception. Many students have a hard time evaluating the importance of common law rules relative to other sources of law. They often have more questions than answers. For instance, when a common law rule and a statutory rule conflict, which prevails? What about a statute that codifies a common law rule? Do the cases brought under that common law rule still have any effect? What about a statute that codifies merely part of a common law rule? What is the status of the part of the rule that was not explicitly codified? Is it still good law?

When a legal writing course emphasizes statutes at the outset, students readily learn to distinguish among the various forms of law. Starting with statutes emphasizes that common law can be subordinate to statutory law. Students are thereby provided with a basis for evaluating the relative importance of common law in the legal system. They receive a grounding in basic legal concepts before they are forced to confront the kinds of questions and complexities that accompany common law analysis, particularly the relationship between common law and statutes.

In sum, a legal research and writing course should begin and proceed in a manner that reflects the world in which students will practice law, that builds sound reading and thinking skills, and that reinforces sound research and analytical strategies.

Starting with and Emphasizing Enacted Law, Particularly Statutes:

1. Reflects Reality

Perhaps the best reason to start with enacted law, particularly statutes, is volume. Today, enacted law predominates over common law. Not only are 51 legislatures hard at work creating new law on an almost daily basis, but, driven in no small part by special interests, they are stepping into areas of the law, such as tort law, that have long been the exclusive province of the common law. As more than one legal commentator has observed, common law is undergoing “statutorification.”¹

Similarly, administrative agencies continue to expand their reach. This trend will likely continue. The energy “crisis” of 2001, whether real or not, soured much of the public on the promises of deregulation; in fact, it led to calls for reregulation. The events of September 11, 2001, suggest, as a very general matter, that the role of government in our daily lives will only increase.

At the state level, voters are using the initiative process at an accelerating rate to enact both statutory and constitutional law. For instance, in Oregon 26 citizen initiatives qualified for the ballot in 2000; nine were passed. In California during the same year, 21 citizen-sponsored initiatives made the ballot; 12 were enacted.

The bottom line is that today’s students will in all likelihood practice in a world that will be even more dominated by enacted law than it is today. It only makes sense to emphasize enacted law in light of that reality.

Other practical reasons support starting with and emphasizing enacted law. Students can understand more easily the material covered in their other first-year courses, which, in turn, gives them greater confidence in their ability to research and analyze legal problems. Some subjects in the first-year curriculum, criminal law, for example, deal almost exclusively with enacted law. The

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¹ Guido Calabresi, *Common Law in an Age of Statutes* 1 (1982); William Eskridge Jr. & Philip Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691 (1987); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 13 (1997).

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Uniform Commercial Code is routinely taught in first-year contracts courses. Most first-year courses, even those that deal with statutes, however, use the case method, which focuses on judicial opinions and tends to blur the distinction between enacted law and common law. The texts used in these classes often jump back and forth between judicial opinions interpreting enacted law and those in which common law is at issue. Starting with and emphasizing enacted law provides students with a means to recognize the distinction and better comprehend the cases they are reading.

2. Teaches Critical Reading and Thinking Skills

Starting with and emphasizing enacted law, particularly statutes, forces students to develop the critical reading skills they will need to succeed in practice. Because every word in a statute is presumed essential to the statute, statutory analysis requires students to parse statutory language in order to determine how it applies to the facts of the client's problem. Simply put, starting with statutes makes students more careful readers. Students must read denotatively, cataloging the possible meanings of each term they come across. More important, students must examine the context within which each term appears. To determine the intended meaning of each term, students are often required to look to other, related statutory provisions that use identical terms.

Starting with and emphasizing statutory text also forces students to develop the critical thinking skills they will need to succeed as lawyers. When faced with a client's problem, novice researchers often look for cases first in a futile search for a case with an identical fact pattern. Students who learn to always look for statutes first are more efficient and accurate researchers.

When confronted with a statute, a typical student's first instinct often is to consult another source, perhaps a secondary source, to determine what the statute means and how it might apply. After consulting the source, the student (from lack of confidence, perhaps) will adopt the position of the writer without analysis, even though the writer's interpretation may be wrong, out of date, or at least subject to question.

By contrast, when students are asked to read statutes in isolation, they tend to think more

critically. They begin to ask questions about the policies underlying the statute, even when those policies are implicit. They think about the implications of a particular interpretation or application of the statute and reflect on the meaning of the statutory text in light of those implications. They use their common sense, and as a result they gain confidence in their own legal reasoning skills.

3. Provides a Framework for Analysis and a Strategy for Research

The primary goal of a legal research and writing course is to teach analysis. Yes, the students learn to use research tools. Yes, they practice writing. But at the heart of both the writing and the research is legal analysis.

If our goal is to teach students legal analysis, then the most logical place to start is with statutes. Starting with statutes provides students with a framework within which to analyze a legal problem, regardless of the kind of law that governs the problem or the sources that are relevant to the research.

Beginning law students have difficulty synthesizing the various kinds of law and the actors who make law. To many, the law is an undifferentiated mass. For instance, some students do not grasp that a legislature can nullify a common law rule, but that a court cannot do the same to a statute (absent constitutional problems). Others believe that common law includes anything said in a judicial opinion, including anything said about a statute. Some have a hard time understanding the role of administrative law. Many have trouble distinguishing between levels of authority.

Starting with and emphasizing statutes provides students with a framework in which they can more easily grasp these difficult concepts. Students more readily understand that there is a hierarchy in the law. Starting with statutes reinforces the idea that the legislature has primary lawmaking authority and that if the legislature enacts a statute that conflicts with a common rule, the statute prevails. Students come to see that administrative agencies and the rules they create are the offspring of statutory law. They learn to look for enabling legislation and to examine whether an adminis-

trative rule exceeds the authority granted to the agency by the legislature.

Starting with statutory law makes sense for other reasons. It helps students understand the role of the judiciary and, more specifically, the role of judicial opinions in statutory analysis. Introducing judicial opinions construing and applying statutory law only after students have read and analyzed the relevant statute for themselves enables students to see that a judicial opinion is a tool, one that can help them analyze the meaning of a statute and whether it applies to the facts of their case. Students come to understand that a legislature retains the right to rewrite a statute if it does not concur with the reading a court has given it. Starting with statutes, therefore, helps students to synthesize the relationship between the legislature and the courts.

At the practical level, starting with statutes provides students with a research strategy that they can apply to any legal problem. It reminds students that when researching a legal problem, they should look first for relevant statutory authority. They should find the most recent version of the statute. Such a strategy leads to more efficient research. For instance, in a client's problem where a recently enacted statute has changed a line of common law cases, if the lawyer researching the problem knows to always look for statutory law first, he or she is much less likely to look directly for case law and thus much less likely to spend time reading common law cases that no longer pertain.

More generally, starting with statutes provides students with a research strategy they can use when they do not know whether the problem is governed by enacted law or common law or both. First-year law students do not come to law school knowing which legal problems tend to be governed by enacted law and which tend to be governed by common law. By starting with statutes in every case, instead of jumping into research without a strategy, students are more likely to engage in accurate research and, consequently, accurate analysis.

Curriculum

The curriculum for a legal writing course that starts with and emphasizes enacted law, particularly statutory law, mirrors the pedagogical structure of the course. The curriculum for such a course proceeds incrementally by introducing new sources of law and new actors as they become relevant. It starts with exercises that involve only statutes and simple fact patterns. Later exercises introduce administrative rules and judicial opinions, and increase in complexity. The sequence of exercises requires students to engage in increasingly complex statutory analysis. Exercises are sequenced to underscore the primacy of statutes and the relationship of other forms of law to statutes. Each exercise builds on the previous exercise, in terms of both skills and subject matter.

After a brief introduction to the American legal system, students start by reading statutes to solve simple client problems. Students analyze how the terms of the statutes apply to the facts. They then can write their analyses. These first exercises should be as simple as possible, with a clear outcome; the statute either clearly applies or clearly does not.

Later exercises involve some uncertainty regarding the outcome. They require the student to use principles and techniques of statutory interpretation. Students analyze the text and context of the statute, including the text of related statutes. Students are introduced to legislative history. In their writing, students must explain and justify their conclusions through analysis and counter-analysis.

Simultaneously, students are learning about the tools needed to research statutory law. This instruction need not be limited to print sources. Because students understand that the focus is on the law itself, and not on the books, they come to understand how to do research in any jurisdiction, not just in those select few in which they are asked to research.

Only after students have been introduced to the basics of statutory analysis do they start reading judicial opinions. These cases are, of course, limited initially to issues relating to the construction and application of statutes. The cases

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can at first involve the statutes with which the students are already familiar. Students learn how to use research tools to find cases interpreting and applying statutes. When they write their analyses, students learn how to synthesize the language of statutes and judicial opinions.

Next, students learn about administrative law and the relationship between administrative and statutory law. They learn about the role and power of the judiciary with respect to administrative law. At the same time, they learn about research tools for administrative law.

Finally, only when students have a good command of statutory research and analysis, including the role of legislative history, are they introduced to common law reasoning and the relationship between enacted law and common law. By this time, students are well prepared for the common law. They understand the place of common law in the American legal system and they are already familiar with the basics of judicial opinions, the source of common law rules.

This curricular model works well in both courses where legal writing instruction is limited to the first year, and in those in which instruction continues into the second or third year. It is designed to help students master sound research and analysis strategies—strategies, moreover, that have broad application beyond the law school classroom.

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