Chapter 3 – Thinking about Law as an Object of Research – Basic Principles of Legal Research

As you have noticed from the previous chapters, it is very hard to talk about the law in any concrete way without mentioning specific names and specific repositories where the various statutes, cases, or rules and regulations are published. Learning about the law is a long process. It requires familiarity with its specific language and the formal organization or hierarchy of the legal system. It requires knowledge about what constitutes the law, generally, abstractly, and specifically. Where a specific norm is published often establishes its binding value, its normativity, within the United States legal system. Through legal research, you will become more at ease with the entire legal learning process.

In this book, legal research is presented as an intrinsic component of any class on law and policy. Here are its basic principles:

1. FIRST PRINCIPLE OF LEGAL RESEARCH: KNOW (A) THE AREA OF THE LAW TO RESEARCH AND (B) HOW LEGAL INFORMATION IS PUBLISHED

The first basic rule has two prongs: a) your research is as good as your understanding of the substantive legal issue at hand, and b) your research depends on your knowledge of how legal information is published. This book focuses on environmental law and policy, and the research necessary to answer legal questions related to these topics. As a result, you need to become familiar with both environmental issues and the information gathering process.

Environmental law represents the normal growth of the administrative state where people engage in more and more complex activities which need to be regulated by state agencies. Environmental issues are of such magnitude, that only government agencies might be able to safeguard the interests of the society at large when they come into conflict with powerful economic interests of the few.

Originally, there was no environmental jurisprudence per se. Environmental law started in courts, and it developed through torts cases, such as Boomer v. Atlantic Cement Co, 26 N.Y.2d 219 (N.Y. 1970). Today, we say that cases such as Boomer mark the beginning of the modern environmental era. Our journey in environmental law and policy is a step-by-step process, which differentiates between public nuisance as an unreasonable interference with the right to common enjoyment of public spaced by the general public, and private nuisance as unreasonable interference with individuals enjoying the same sets of rights. In fact, President Nixon signed the Clean Air Act Amendments of 1970, only a few months before the Boomer decision. Soon afterward, in December 1970, the Environmental Protection Agency (E.P.A.) was created.

Since then, environmental law has flourished at the federal, state, and municipal level, with all three branches of the government participating in creating what could be called the Environmental Rule of Law. There are federal statutes delegating powers to agencies to explain and apply statutory provisions which are further interpreted by courts in instances of conflict and controversies. There are also state statutes which establish higher standards of environmental protection, and sometimes even more stringent municipal ordinances. In this very complex environment, it makes sense to understand the issues, and have a plan for how to find your research answer, as stated in 1.a). You also need to understand the limits of authoritative free online publications, so your answer contains the relevant binding law, as addressed in 1.b).

2. SECOND PRINCIPLE: STRATEGIZE YOUR RESEARCH

All research implies a macro and a micro level. At the macro level, you use a plan of research. At the micro level, you implement that plan.
Part of your research plan is to find ways to understand both the question, as well as the names of the places (repositories) containing the answer. Vocabulary helps us focus our thoughts. Similarly, legal research language enables you to strategize your options. So, let’s see how it works.

Primary vs. Secondary Sources of Legal Research

We will devote separate chapters to the ways to research primary and secondary sources. But before we do that, here are a few general research tips. As a legal researcher, think about yourself as a house builder. You need to use bricks and mortar. In this analogy, primary sources are the bricks, and secondary sources are the mortar.

Primary Sources

The law itself represents these bricks, and they are, listed hierarchically:

- the Constitution;
- statutes, state and federal (where federal statutes can sometimes ratify international treaties);
- court decisions, often called opinions; and
- administrative rules, as well as administrative hearings, and Executive Orders.

Secondary Sources

The mortar of legal research, the secondary sources, is the glue which makes your answer coherent. It may contain:

- dictionary definitions,
- legal analysis provided by
  - academic writings, which have been published in
    - treatises for the benefit of law students and sometimes legal practitioners; or
    - law review articles;
  - commentaries which come from various restatements of the law; or even
  - brief notes one found by searching the Internet and clicking on research guides written by librarians.

It is always hard to say whether one should start with the primary sources or begin with the relevant available secondary sources because it always depends on what the researcher knows and has available. Students at large universities have more resources than students at smaller universities. Students at universities with law schools on the same campus will have an easier time strategizing their research. Another distinction is created by the general civic knowledge the students have as well as their previous exposure to legal research.

Assuming that you have no previous experience with legal research, you may find it reassuring to learn that legal research is quite rigorous and thus manageable. But let’s continue the discussion of basic principles before we learn the steps that may produce the most efficient way to find the answer to our question: Who pays for cleaning up a dump site?

3. THIRD PRINCIPLE OF LEGAL RESEARCH: ARE YOU ABLE TO REFORMULATE YOUR RESEARCH QUESTION?

Once you have thought about your research question, reformulate it. Use the simplest legal terminology as possible without losing meaning. Keep in mind that sometimes, the best terminology is the one already used.

For instance, contract is the best legal research term you can use to describe a deal, a treaty, or an agreement. But most of the time, the fact pattern requires you to clarify it. The process can be tedious, but it is extremely useful. That is how you can generate searchable keywords.

Environmental law is a relatively new area of law. Moreover, like intellectual property, it is a federal legislative product, rather than the result of the common law. But, although many environmental law questions would inevitably direct you towards federal statutes, the answer often has a heavy administrative component. As a result, many environmental law questions can be difficult to research because the answer is rarely only one-dimensional.

Consider a scenario where a battery manufacturer dumps rejected batteries on a piece of private land and years later, when it restructures its business it donates it as the ground for a future public playground. If the municipality accepts private land to be used as the location for a public playground, without proper cleanup, a myriad of negative health consequences may happen. Under this set of circumstances, you can imagine a follow-up research question about who
should pay for the health care bills for the eventual necessary medical treatment. When it becomes apparent that the land was used as a dump site and litigation occurs the cleanup cost will be shared among all the owners who either polluted or who took advantage of a reduced price of the property, knowing it had been used as a dumping site.

In another hypothetical, the original business sells the piece of land to other businesses which use it as a dump site. Eventually, someone has to pay for its cleanup. Who should it be? Would a statutory provision contain the correct answer? Would there be cases interpreting such statutory provisions?

Because environmental law research is primarily statutory research, we need to start with the specific statutes. Thus, your research strategy should be to simplify the question and use your basic knowledge. The main research terms would be: “federal statute,” “environmental” and “liability.”

Through your research, you will find out that indeed, Congress passed the law deciding how the cost of cleanup is shared as a provision of the statute entitled The Comprehensive Environmental Response, Compensation, and Liability Act (C.E.R.C.L.A). This provision explains how the cost of environmental cleanup may be shared among parties deemed to have legal responsibility for mitigating the contamination.

C.E.R.C.L.A., a federal statute, states that any person may seek contribution from any other person who is liable or potentially liable for having polluted the area. In this instance, the primary source, C.E.R.C.L.A., contains the legally binding norm, the official pronouncement of the government.

Before we start thinking about ways to find the statute and then the provision about liability under C.E.R.C.L.A., let’s make sure that we understand what we are looking for.

i. Use an explanatory research guide
   - The best way to be sure that you do not stumble over confusing, outdated, or unreliable secondary sources is to use a subject-based guide or a library catalog.
   - Conduct a quick search using the search engine of your choice by typing the relevant keywords, “C.E.R.C.L.A.” and “liability,” will bring up a long list of research guides.
   - Some research guides are produced by government agencies, such as the EPA’s Superfund Liability, available at https://www.epa.gov/enforcement/superfund-liability.
   - Because legal research is performed mostly digitally, you should be aware of its transient quality. For instance, the address of digital information, its URL, often changes over time. To combat this problem, you should know how to use various mirror sites. In this instance, I made a copy of this page using perma.cc, https://perma.cc/FGG6-5KBB.
   - Other guides have a different URL. The first way to distinguish which research guide you are going to use is the date of publication associated with the URL which identifies the educational institution that authored it.
   - The next step is to separate the guides based on their content. It is a good idea to choose the ones which identify necessary secondary sources, such as reference materials, as well as treatises and hornbooks on this issue. Then, decide which treatise to consult based on its title mirroring your research. For instance, a treatise with the name of the statute in the title would presumably have more useful information for your research than a treatise which only references environmental law.

ii. When you have identified a research guide by a title that looks like it will be useful, use a university library catalog.
   - Using a library catalog, you can find out what research material is available to you.
   - For instance, try to locate Escaping Superfund Liability in your library collection. If you locate it, note its location and call number if it is a print or microform book, or its URL if it is a digital source.

iii. If at any point during the research you need explanations for the terms encountered, including names of the sources, such as “treatises” or “hornbooks,” try looking them up in a legal dictionary.
   - Can you find a legal dictionary in your library collection?
   - If you locate it, note its location and call number if it is a print or microform book, or its URL if it is a digital source.

iv. Once you find what you need, you will soon discover that legal writing is filled with footnotes. If at any point you feel the need for further explanation, explore the sources mentioned in the footnotes.

v. Some of the footnoted material may be available to you from the law school library’s collection of law reviews and journals. Some of those articles may be available from various universities’ digital common spaces, usually called
Academic Commons. Unfortunately, you need to identify those Academic Commons and then search their content, because the indexing is not picked up by a mere search. Of course, remember Google Scholar and its content of secondary legal sources.

- Use a library catalog, or Google Scholar and locate the law review article entitled: The end of joint and several liability in Superfund litigation.
- If you locate it, note down the title of the journal where it is published (in this instance, Duquesne Law Review), its location and call number if it is a print or microform journal, or the database containing it, such as HeinOnline, if it is a digital source.

4. FOURTH PRINCIPLE OF LEGAL RESEARCH: REMAIN FLEXIBLE AND ALTERNATE USING SECONDARY AND PRIMARY SOURCES THROUGH THE ENTIRE RESEARCH PROCESS.

In legal research, you will use secondary sources when you strategize, but there is no rule which prohibits you from using other secondary sources to explain the primary source that represents your answer. Secondary sources are your best friends. Use them to make sure you know whether your issue is governed by a statute, what type of statute, federal or not, or whether it is a common law issue. Stay with the secondary source until you know what primary source you are searching for and then keep going back to that or other secondary sources to make sure that you are finding the correct answer.

Let’s use our C.E.R.C.L.A. example. In this instance, we need to find the Superfund statute. How do you find out that C.E.R.C.L.A. is a synonym of “the Superfund statute”? You might have used a secondary source without even thinking about it as such. Any print or digital indexes or the POPULAR NAME TABLE, which is a find-aid tool accompanying the UNITED STATE CODE, for instance, are secondary sources.

Many times, it is hard to separate planning from executing your research plan. Research flexibility has many facets, as you will see briefly sketched below.

1) Finding the Superfund statute, C.E.R.C.L.A.

A. We will talk more about this aspect of legal research. But for now, it is important to understand that the benefit of starting with a secondary source is that locating the primary source becomes so much easier. For example, in a secondary source that mentions C.E.R.C.L.A., there is usually a footnote providing readers with C.E.R.C.L.A.’s full, legal citation (codified at 42 U.S.C. 9613(f)(1)). Once you click on the citation you will find the text of the statute.

B. Even when there is no such link, the secondary source identifies the primary source, the statute, by its citation so you can easily locate it.

C. Citations identify the type of document, the collection where it is located, and a specific document itself within the collection.

2) Understanding how statutes are published.

A. Before you can take advantage of the information provided by citation you need to understand how the legal information is published.

B. Statutes are published in chronological and in subject matter collections.

C. Federal statutes are published in the United States Statutes at Large, commonly known as Statutes at Large (Stat.), and in the United States Code (U.S.C.).


Each statute is identified by the number of the Congress and by a sequential number, as well as by its title, “Brownfield Amendments.”

D.C.E.R.C.L.A. is also published in the United States Statutes at Large, and that version contains section 113(f)(1), and in the United States Code (U.S.C), where that section doesn’t exist. Instead, you’ll be referred to 42 U.S.C. § 9613, where that provision was codified, as we will explain later.

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i. Go to the United States Code, [https://www.govinfo.gov/app/collection/uscode](https://www.govinfo.gov/app/collection/uscode) and find Title 42.

ii. All the statutes published within Title 42 regard the same subject matter.

iii. Some questions to consider:

- What subject matter does Title 42 cover?
- How many titles are currently in the U.S.C.?
- Can you find 42 U.S.C. § 9613?
- Why do you think it is easier to find 42 U.S.C. § 9613 than the original C.E.R.C.L.A. statute?

E. The difference between the chronological publication and the subject matter publication is crucial. The chronological publication contains a static version of the statutory language while the codified version available from the United States Code is a dynamic version of the statute incorporating all of the subsequent amendments which followed the original chronological publication.

3) The answer represents the binding authority, the law, that is in force at the time of your research.

A. To find the liability rule under C.E.R.C.L.A. is to find what the law in force is. For that, you need to know how legal information is published. For instance, all federal statutes compiled in the United States Code (which is the subject matter compilation) are published every year on the government’s Publishing Office website, as well as in print. That annual publication of the United States Code contains the law in force as of the time of its publication.

B. Any academic library will be able to help you locate the official subject matter compilation of federal statutes and most academic libraries will be able to give you access to various commercial databases containing that information. Public libraries may have only the print version of the U.S.C.

4) Finding the relevant statutory provision governing your issue is not the end of the legal research process. Let’s find cases interpreting the relevant statutory provision.

A. Courts accept complaints involving specific statutory violations, which come out of specific facts. Naturally, facts occur within a specific geographical area, which defines the jurisdiction of the potential litigation of the issue. Each jurisdiction has its own legal precedent, which will govern subsequent litigation of that issue within similar factual circumstances.

B. Finding the cases that represent the *stare decisis* (use a legal dictionary to find its meaning) is the hardest part of the research.

i. Unlike statutory and administrative law research which you can perform knowing the date or the subject matter of the law or rule, case law research cannot be performed without using commercial databases.

ii. Some commercial databases are more expensive than others.

iii. Let’s use Casetext, [https://casetext.com/](https://casetext.com/), which is relatively new in the legal research market, to find a case on C.E.R.C.L.A. liability.

iv. If we were to type “C.E.R.C.L.A.” and “liability,” we would notice a large number of returns which would be impossible to skim through.

v. To avoid missing relevant results because of a large number of hits, you should use “filters” to focus your search as much as possible.

- One primary filter is the jurisdiction of your case, which is determined by the place where the facts occurred.

  - When the applicable statute is a federal statute, the jurisdiction is federal. For instance, if the dumpsite was located within the geographical boundaries of New York State, then the
appeal jurisdiction is the Second Circuit, where the state of New York is located.

- Another way to reduce the number of results is by using all of the relevant keywords you can think of:
  - Other relevant terms include “joint liability;” which defines a type of liability among wrongdoers. (If you do not know the meaning of these terms, you can look them up in a legal dictionary).

- Finally, remember to use connectors, the symbols which ensure that your research results contain all of the keywords in a specific order:
  - within the same paragraph (/p) or sentence (/s) (/p) will allow you to search for two words in the same paragraph and (/s) will allow you to search for two words within the same sentence).
  - C.E.R.C.L.A. /p liability /s joint.

- The cases you will locate are identified in multiple ways.
  - All cases have a “name,” which generally is given by the name of the plaintiff (the party which started the lawsuit, the party which suffered the wrong) and the name of the defendant (the wrongdoer). For instance, United States v. Alcan Aluminum Corp., identifies a case where the United States government, sued Alcan Aluminum Corporation for the cleanup of two waste sites.
  - All cases have a citation. For United States v. Alcan Aluminum Corp., the citation is 990 F.2d 711 (2d Cir. 1993).

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When you settled on a number of relevant cases from the relevant jurisdiction, remember that you need to make sure they are still good law. “Good law” means that those cases have not been overturned, or otherwise negatively affected, by a higher court within the same jurisdiction, or by the respective legislative body.

- Cases can be upheld, reversed, or amended by a superior court from the same jurisdiction;
- A Superfund case decided by the trial court located in Manhattan, the Northern District Court of New York (N.D.N.Y.) is reviewed by the Court of Appeals for the Second Circuit (2-Cir), and the appellate judges may decide to affirm the lower court’s decision, reverse and remand to the lower court for another trial, or as in our example, do both.
- For instance, this is the history of the case used earlier: United States v. Alcan Aluminum Corp., 755 F.Supp. 531 (N.D.N.Y. 1991), aff’d in part, rev’d in part and remanded, 990 F.2d 711 (2d Cir. 1993).

C. In our example, with the less expensive databases, the only way to make sure that the cases are still good law is to rely on your research skills. With more expensive databases, such as Lexis and Westlaw, or even Bloomberg Law, this step is performed easily by using their citing services, Shepards, KeyCite or BCite.

Let’s research the applicable administrative rules. Because environmental law is a relatively recent creation of the administrative state, it is paramount that you cover administrative rules and regulations and, in some cases, administrative decisions.

A. Since the early 20th century, all agencies are required to publish their rules.
B. The Environmental Protection Agency (E.P.A.) protects human health and safeguards the natural environment. It was established in the executive branch as an independent agency pursuant to Reorganization Plan No. 3 of 1970 (5 U.S.C. app.), effective December 2, 1970. It was created to permit coordinated and effective governmental action on behalf of the environment. The Agency is designed to serve as the public’s advocate for a livable environment. You can read it from our Companion Website, https://archive.epa.gov/epa/aboutepa/reorganization-plan-no-3-1970.html.

C. Like all agency rules, the E.P.A. rules are published chronologically in the Federal Register (F.R.), which is available at https://www.govinfo.gov/app/collection/fr.

- The Federal Register, (F.R.) is published by the Office of the Federal Register, National Archives and Records Administration (NARA), https://www.govinfo.gov/app/collection/fr. The Federal Register is the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents.
- A recent E.P.A. rule regarding “Approval and Revision of Air Quality Implementation Plans” was published in 83 F.R. 33.

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- The Code of Federal Regulations (C.F.R.) is published in annual editions. The Code of Federal Regulations is the codification of the general and permanent rules published in the Federal Register by the departments and agencies of the Federal Government. It is divided into 50 titles that represent broad areas subject to Federal regulation. The 50 subject matter titles contain one or more individual volumes, which are updated once each calendar year, on a staggered basis. The annual update cycle is as follows: titles 1-16 are revised as of January 1; titles 17-27 are revised as of April 1; titles 28-41 are revised as of July 1; and titles 42-50 are revised as of October 1. Each title is divided into chapters, which usually bear the name of the issuing agency. Each chapter is further subdivided into parts that cover specific regulatory areas. Large parts may be subdivided into subparts. All parts are organized in sections, and most citations to the C.F.R. refer to material at the section level.
- For instance, under 40 C.F.R. 3.2(a)(2), electronic reporting of documents required under Title 40 of the Code of Federal Regulations may occur after the E.P.A. has first published a document in the Federal Register announcing that the E.P.A. is prepared to receive, in electronic form, documents required or permitted by the identified part or subpart of Title 40. All rules published in Title 40 regard the protection of the environment.

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A. Because there is no precedential value in older administrative decisions, there is no mandate for any agency to publish their decisions. However, most agencies publish their decisions on their website.

- To find the rules of filing complaints with the E.P.A., the hearing procedures, and to locate orders and decisions of E.P.A.’s Administrative Law Judges, go to https://www.epa.gov/alj.

5. FIFTH PRINCIPLE OF LEGAL RESEARCH: AT EVERY SINGLE STEP IN THE LEGAL PROCESS, USE COMMON SENSE

Legal research is as much science as it is art. It requires you to review the question and the answer and determine if it makes sense. Remember that legal research is a process, and until it all makes sense there is no one way of progression towards the end. You can start with a text, then move to a statute, then go back and read more about the issue at hand and find a case that seems relevant.
For instance, you need to find out if only licensed farmers can sell milk at greenmarkets in New York State. You come up with a plan. You start with a Google search and realize that this is a New York state law issue and that the answer will combine statutory and administrative law provisions, and perhaps even cases. But while executing your plan you keep a log, and you may even want to see if there is an encyclopedia entry which might make sense of all the primary sources you find. You may read an explanation and click on the primary source it cites. Then, you may go back for more explanatory analysis. Because, remember, everything eventually has to make sense.

If your plan does not make sense, then your answer has a good chance to be mistaken too. When this occurs, you need to go back and search again with an eye for the missing piece of the puzzle. The only way to do a correct and comprehensive research job is to read the question and the answer you found and see if indeed, within the set of factual circumstances, it makes sense. If it does not make sense, then return to the secondary source, the explanatory analysis, and read it again. If necessary, start planning again. Eventually, you will be able to complete the entire research puzzle.

6. SIXTH PRINCIPLE OF LEGAL RESEARCH: ONLY GOOD LAW IS BINDING

Your research needs to be current, so your answer contains the binding authority, the law. You may resist this rule thinking that you are not a practicing attorney so why should you care what the law is as of the moment of your handing in your assignment? But, in the same way that you cannot serve apples as oranges, you cannot represent unconstitutional or “expired” laws as the relevant, binding law.

For instance, while there is statutory law, 18 U.S.C. § 700, making it illegal to burn the U.S. flag, there is also subsequent Supreme Court jurisprudence holding such activity is expressive conduct protected by the First Amendment. So, merely finding the statute, though responsive and relevant, is not the correct answer. The correct answer is mentioning that burning the flag, while a crime under 18 U.S.C. § 700, it is expressive conduct and therefore protected under the law according to *U.S. v. Eichman*, 496 U.S. 310 (1990).

When it comes to federal statutory research, the official government website contains annual updates of the codified statutory provisions. The administrative rules detailing those provisions are updated daily through the Federal Register. The only problem remains with the case law interpreting the statutory provisions as detailed by federal administrative rules. At the state level, this problem only persists. The good news is that all academic libraries subscribe to a legal database which will allow you to update your results with the click of a button. The bad news is that due to their prohibitive costs, the access to those databases changes quite unpredictably and once you graduate, you will not have access to them. Of course, this may all change with the open access movement and continuing to spread the news that law needs to be publicly available in a true democracy.

7. SEVENTH PRINCIPLE OF LEGAL RESEARCH: DO YOUR FINDINGS MAKE SENSE IN LIGHT OF YOUR SUBSTANTIVE KNOWLEDGE OF THE LAW?

Now that you think you are done with your research, assemble all your findings and read through them. Does your statutory provision, as interpreted by the cases you found make sense in light of your substantive knowledge of the law? For instance, only a few years ago, when the algorithm of the two major databases, Westlaw and LexisNexis was not as sophisticated as it is today, if you searched for “nuclear family” using a natural language technique, and relying only on their algorithm, you would have received results about nuclear arms. Also, if you search for cases about divorce in Washington State, you would have been surprised to find none. Given that the divorce rate is far bigger than null, you would have realized that your results are erroneous, and your research was not done yet. Eventually, probably by consulting a secondary source, such as a treatise or an encyclopedia, you would have learned that the legal terminology used by the Washington State legislature for divorce was dissolution of marriage. These particular mistakes have been corrected because the algorithm used does more than relying on crowd sourcing results and promoting hits that users have clicked on the most. But reading through the final list of results before incorporating it in your research memo, or any other document, is sound advice which you have probably heard before.