

## FOREWORD

### OH, THE TREATISE!†

*Richard A. Danner\**

#### INTRODUCTION

In his foreword to the *Michigan Law Review*'s 2009 Survey of Books Related to the Law, my former Duke colleague Erwin Chemerinsky posed the question: “[W]hy should law professors write?”<sup>1</sup> In answering, Erwin took as a starting point the well-known criticisms of legal scholarship that Judge Harry Edwards published in this journal in 1992.<sup>2</sup>

Judge Edwards indicted legal scholars for failing to engage the practical problems facing lawyers and judges, writing instead for the benefit of scholars in law and other disciplines rather than for their professional audiences.<sup>3</sup> He characterized “practical” legal scholarship as both prescriptive (aiming to instruct attorneys, judges, and other decisionmakers) and doctrinal (dealing with the sources of law that constrain and guide practitioners, decisionmakers, and policymakers).<sup>4</sup> Having served on the law faculties at Michigan and Harvard before joining the Court of Appeals for the District of Columbia,<sup>5</sup> Judge Edwards was well positioned to critique the direction of legal scholarship, but he is not the only judge to have done so. In recent years Chief Justice Roberts has made clear his opinion of most academic writing,<sup>6</sup> and Justice Kennedy has pointedly expressed his concerns about

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1. Erwin Chemerinsky, *Foreword: Why Write?*, 107 MICH. L. REV. 881, 881 (2009).

2. *Id.* at 883–86. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). Chemerinsky references most of the pertinent follow-up to Judge Edwards’s article. See Chemerinsky, *supra* note 1, at 884 n.8.

3. Edwards, *supra* note 2, at 42–57.

4. *Id.* at 42–43.

5. Judge Edwards also practiced for five years before coming to Michigan. *Harry T. Edwards*, U.S. COURT OF APPEALS, D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+HTE> (last visited, Sept. 5, 2012).

6. See, e.g., *Interviews with United States Supreme Court Justices—John G. Roberts Jr.*, 13 SCRIBES J. LEGAL WRITING 5, 37 (2010) (“What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law. . . . [I]t doesn’t help the practitioners or help the judges.”).

the diminishing relevance of law reviews to appellate court decisionmaking.<sup>7</sup>

Edwards characterized the legal treatise as “[t]he paradigm of ‘practical’ legal scholarship,” and listed several “classic examples” of treatises that answered his concerns.<sup>8</sup> For Edwards, all were works that “create an interpretive framework; categorize the mass of legal authorities in terms of this framework; interpret closely the various authoritative texts within each category; and thereby demonstrate for judges or practitioners what ‘the law’ requires.”<sup>9</sup> However, he neither discussed the individual treatises he cited before moving on to other matters, nor expanded on why the treatise has been so important to American lawyers.

Chemerinsky eloquently defended the value of scholarship written for academic audiences and others beyond the judiciary and the bar,<sup>10</sup> but agreed with Edwards that “doctrinal scholarship is much less valued today than in prior generations.”<sup>11</sup> He noted that law professors still “continue to write legal treatises that describe and critique legal doctrines,”<sup>12</sup> but also wondered when the editors of the *Michigan Law Review* had last chosen a casebook or legal treatise for inclusion in the annual Book Review issue.<sup>13</sup>

7. 9thcirc, *Justice Kennedy Speaks at the 2010 Ninth Circuit Judicial Conference*, YOUTUBE (Aug. 19, 2010), <http://www.youtube.com/watch?v=xQRPnQmWOU> (“It’s perfectly possible and feasible, it seems to me, for law review commentary immediately to come out with reference to important three-judge district court cases, so that we have some neutral, detached, critical, intellectual commentary and analysis of the case. We need that.”).

There is some evidence that federal judges, including the justices of the Supreme Court, cite law review articles in their opinions, particularly in important and difficult cases. *See, e.g.*, Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court’s Use of Legal Scholarship*, 106 N.W. U. L. REV. 995 (2012). *But see* Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399 (2012).

8. Edwards, *supra* note 2, at 43.

9. *Id.*; *see also* Harry T. Edwards, *Another “Postscript” to “The Growing Disjunction Between Legal Education and the Legal Profession”*, 69 WASH. L. REV. 561, 564 (1994).

10. Chemerinsky, *supra* note 1, at 886–90; *see also* Sanford Levinson, *Judge Edwards’ Indictment of “Impractical” Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010, 2013–14 (1993) (discussing the appropriateness of multiple audiences for legal scholarship).

11. Chemerinsky, *supra* note 1, at 889.

12. *Id.* at 885; *see also* Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1339 (2002) (“Doctrinal analysis . . . remains the method of choice for the vast majority of legal scholars.”).

13. Chemerinsky, *supra* note 1, at 886. In 2011, the Book Review editors included a review of a treatise on the law of state constitutions. *See* Jim Rossi, *Assessing the State of State Constitutionalism*, 109 MICH. L. REV. 1145 (2011) (reviewing ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (2009)). In 2012, Douglas Laycock reviewed the *Restatement (Third) of Restitution and Unjust Enrichment*. Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929 (2012).

In a study of citation of practice-oriented treatises in law review articles, Fred Shapiro noted that “[t]he best measure of the success of the treatises is probably their totals of citations in judicial opinions.” Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, 29 J. LEGAL STUD. 397, 404–05 (2000).

In the following year's foreword to the Book Review issue, Eugene Volokh described how electronic-book technologies would change books related to the law, but he explicitly omitted from his speculations such characteristically legal publications as treatises and other books aimed at practitioners.<sup>14</sup>

Edwards's comments regarding the continuing value of legal treatises likely raised a few eyebrows. A.W.B. Simpson and Morton Horwitz had each already chronicled the decline of the American legal treatise,<sup>15</sup> and Lawrence Friedman had written that "[m]ost 19th-century treatises were barren enough reading when they first appeared, and would be sheer torture for the reader today."<sup>16</sup> Friedman's writings on American legal history have generally offered only grudging acknowledgement of the efforts of treatise writers. In 2002 he pointed out that, although doctrinal research had been "the heart of legal scholarship" for most of the twentieth century, even the highly regarded major treatises were "elephantine works" that "tied together vast masses of cases, giving them some kind of coherence, real or imaginary."<sup>17</sup> Friedman also noted with apparent satisfaction that by the 1980s "there were law professors who actually wrote real books."<sup>18</sup> Most likely, these books were of the sort Edwards would view as being of little use to practitioners and judges.

In *Law Books in Action*, their 2012 collection of essays devoted to the Anglo-American legal treatise, Angela Fernandez and Markus Dubber conclude that while the form remains popular in other common law countries, "few if any legal scholars in the United States today wake up filled with a burning desire to devote their professional lives to the production of a treatise."<sup>19</sup> Yet the academy's lack of interest in writing treatises tells us little about the needs of twenty-first-century lawyers and judges. Would today's practicing bar benefit from more of the prescriptive and doctrinal writing that Edwards's "paradigm of 'practical' legal scholarship" once provided?<sup>20</sup> This Foreword takes a historical approach to this question by reviewing the history of the American legal treatise through the lens of several works that

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14. Eugene Volokh, *Foreword: The Future of Books Related to the Law?*, 108 MICH. L. REV. 823, 837 (2010).

15. See A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981); Morton J. Horwitz, *Treatise Literature*, 69 LAW LIBR. J. 460, 460 (1976).

16. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 624 (2d ed. 1985). Later references to Friedman's history are to the most recent edition. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 477 (3d ed. 2005) [hereinafter FRIEDMAN (2005)].

17. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 487 (2002).

18. FRIEDMAN, *supra* note 17, at 488; Edwards, *supra* note 2, at 42–57. *But see* Carl E. Schneider, *The Book Review Issue: An Owner's Guide*, 96 MICH. L. REV. 1363, 1367 (1998) (noting that "the range of legal doctrine has expanded hugely . . . [and] widely incorporates ideas from other disciplines").

19. Angela Fernandez & Markus D. Dubber, *Introduction: Putting the Legal Treatise in Its Place*, in *LAW BOOKS IN ACTION* 1, 20–21 (Angela Fernandez & Markus D. Dubber eds., 2012).

20. Edwards, *supra* note 2, at 43.

consider its place as a form of legal literature: Roscoe Pound's lectures on the "formative era" of American law,<sup>21</sup> A.W.B. Simpson's 1981 article on the rise and fall of the legal treatise,<sup>22</sup> and Fernandez and Dubber's recent collection of essays on the treatise and similar forms.<sup>23</sup> Part I examines the origins of the legal treatise and its early importance in the United States; Part II reviews the impact that the massive growth in published case law had on the treatise during the latter part of the nineteenth century; and Part III considers the implications for the treatise of shifts from print to electronic formats in the twentieth century. This Foreword concludes by speculating briefly on the continuing need for the treatise and its place in the digital legal-information environment.

### I. AGE OF THE TREATISE

Most considerations of the treatise exclude comprehensive or "institutional" works such as William Blackstone's *Commentaries on the Laws of England* and James Kent's *Commentaries on American Law*, each of which is distinguished by its attempt "to describe the private law of an entire legal system in a single work."<sup>24</sup> In his definition of the treatise, Simpson included only monographs dealing with a particular substantive area of law.<sup>25</sup> He relied on characteristics suggested by T.F.T. Plucknett, who had emphasized the significance of the treatise's deductive presentation of its subject and the prominence given to legal principles. According to Plucknett, the principles, once formulated, could be applied to specific questions, and the treatise could, "by its sheer intellectual weight . . . impose those principles upon teachers, students, lawyers and the courts."<sup>26</sup> Simpson's approach accords with the definition outlined in 1868 by the prolific American treatise writer Joel Prentiss Bishop, who defined the treatise as "an orderly statement of those principles in which the law consists, whether drawn from the reports of law cases, from natural reason, or from any other source."<sup>27</sup> Simpson, Plucknett, and Bishop each identified characteristics of treatises that align with Judge Edwards's ideal of legal scholarship that is simultaneously prescriptive and doctrinal, providing instruction to legal decisionmakers while focusing on sources of legal authority.<sup>28</sup> Others use the term more loosely. Fernandez and Dubber include chapters on institutional works, codes, and manuals in their recent book, arguing "that these works perform a similar

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21. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 8–9 (1938).

22. Simpson, *supra* note 15.

23. *LAW BOOKS IN ACTION*, *supra* note 19.

24. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 586 (1993).

25. Simpson, *supra* note 15, at 633–34.

26. T.F.T. PLUCKNETT, *EARLY ENGLISH LEGAL LITERATURE* 20 (1958).

27. JOEL PRENTISS BISHOP, *THE FIRST BOOK OF THE LAW: EXPLAINING THE NATURE, SOURCES, BOOKS, AND PRACTICAL APPLICATIONS OF LEGAL SCIENCE, AND METHODS OF STUDY AND PRACTICE* 137 (Boston, Little, Brown & Co. 1868).

28. Edwards, *supra* note 2, at 42–43.

rationalising and systematising function to the traditional legal treatise.”<sup>29</sup> Standard textbooks on legal research generally lump together a full range of books about the law as “treatises” and then identify categories within that heading.<sup>30</sup> Here, I will concentrate on works fitting the characteristics listed by Edwards and fitting the traditional definitions.

The early development of the common law treatise in England can be traced to Thomas Littleton’s *Tenures*<sup>31</sup> in the fifteenth century, with little more being achieved in treatise writing until the eighteenth century. Michael Lobban notes that in the early part of that century, some “[w]riters did seek to write compendious, and systematic treatments on coherent areas of law.”<sup>32</sup> But changes in English law and improvements in law reporting gradually led to publication of larger numbers of systematic, substantive treatises in the late 1700s.<sup>33</sup> The publication of Blackstone’s *Commentaries* from 1765–1769 gave treatise writers impetus to focus on specific areas of the law and “put flesh, as it were, on Blackstone’s bones.”<sup>34</sup> Simpson also suggests that Blackstone’s “discursive literary style” was considered a “better way to expound the principled science of the law”<sup>35</sup> than the lists of maxims which had been used to present the principles of the common law since the sixteenth century.<sup>36</sup>

In North America there was little publication of law books prior to the American Revolution. Eldon James found that between 1687 and 1788 “not a single book that could be called a treatise intended for the use of professional lawyers was published in the British Colonies and the American States.”<sup>37</sup> Pound concluded that, at the time of the Revolution, “[f]or practical purposes Coke’s Second Institute and Blackstone are the repositories of the law.”<sup>38</sup> One early commentator noted that in 1800, “the best library of

29. Fernandez & Dubber, *supra* note 19, at 3. They find attempts to define the treatise to be “futile and uninteresting.” *Id.* at 1.

30. For an early example, see FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 175–79 (3d ed. 1942). See also STEVEN M. BARKAN ET AL., FUNDAMENTALS OF LEGAL RESEARCH 370–72 (9th ed. 2009).

31. THOMAS LITTLETON, LITTLETON’S TENURES (Eugene Wambaugh ed., William S. Hein & Co. 2004) (n.d., ca. 1481).

32. Michael Lobban, *The English Legal Treatise and English Law in the Eighteenth Century*, 13 IURIS SCRIPTA HISTORICA 69, 74 (1997).

33. *Id.* at 83–84.

34. *Id.* at 69; see also Jon Davies, *Aspects of Nineteenth Century Legal Literature*, 29 CAMBRIAN L. REV. 22, 22–26 (1998) (Wales) (discussing Blackstone’s influence on nineteenth-century English treatise writers).

35. Simpson, *supra* note 15, at 658.

36. *Id.* at 644–50.

37. Eldon Revare James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801*, in HARVARD LEGAL ESSAYS 159, 159 (1934); see also FRIEDMAN (2005), *supra* note 16, at 59 (“In one sense, colonial legal literature is quickly disposed of: [there was] [n]o such thing worthy of the name . . . before 1776.”).

38. POUND, *supra* note 21, at 9; see also Hugh C. MacGill & R. Kent Newmyer, *Legal Education and Legal Thought, 1790–1920*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA

American reports that could be summoned by money or magic . . . might have been borne [in] the circuits in a portfolio.”<sup>39</sup> In his classic legal research text, Frederick C. Hicks could identify only sixteen “more important volumes” of American reports published from 1789 to 1803.<sup>40</sup> Describing the conditions of legal practice after the Revolution, Anton-Hermann Chroust found that “the absence of American law reports and law books” was among several factors making administration of justice in the new country both “difficult and haphazard.”<sup>41</sup>

In the early nineteenth century, however, the remnants of English common law began to be transformed into a common law for the United States.<sup>42</sup> The first printed reports were significant factors in that transformation because they gave the legal profession a shared literature, facilitated access to out-of-state decisions, and allowed the bar to take seriously the idea of a national common law.<sup>43</sup> In 1821, Joseph Story characterized the progress of jurisprudence in the previous twenty years as “remarkable throughout all America” and saw the growth in American reports as evidence of an “uncommon devotion to the study of the law, and uncommon ambition to acquire the highest professional character.”<sup>44</sup>

There is no doubt that books were important to American lawyers in the antebellum years. In an essay on nineteenth-century law books, Ann Fidler writes that, no matter the stage of their careers, all lawyers “viewed books as absolute necessities crucial to establishing and maintaining a legal practice” and were dedicated to building personal law libraries including treatises particularly.<sup>45</sup> Fidler suggests that the treatises “[e]ncapsulated within them . . . the vocabulary, the philosophy, and the traditions used by lawyers to distinguish themselves from laymen.”<sup>46</sup> Yet, she points out that the American treatise was “born out of despair” over the “impenetrable vagaries of the

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36, 40 (Michael Grossberg & Christopher Tomlins eds., 2008) (arguing that through the Civil War “Blackstone remained the starting point [for] legal education and legal thought”).

39. Book Review, 22 N. AM. REV. 27, 29 (1826) (reviewing REPORTS OF CASES, ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE (1824)).

40. HICKS, *supra* note 30, at 135.

41. Anton-Hermann Chroust, *The Dilemma of the American Lawyer in the Post-Revolutionary Era*, 35 NOTRE DAME LAW 48, 48 (1959). Other factors were the shortage of experienced lawyers, public antipathy toward lawyers, and widespread dislike of such English institutions as the common law. *Id.*

42. *Id.* at 73; see also M.H. HOEFELICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA 26 (2010) (noting that after 1820, “[T]he development of a native American literature [in law as in other subjects] was deemed a national priority”).

43. See Chroust, *supra* note 41, at 75.

44. Joseph Story, *An Address Delivered Before the Members of the Suffolk Bar, at Their Anniversary, on the Fourth of September, 1821, at Boston*, 1 AM. JURIST & L. MAG. 1, 13 (1829).

45. Ann Fidler, “Till You Understand Them in Their Principal Features”: *Observations on Form and Function in Nineteenth-Century American Law Books*, 92 PAPERS BIBLIOGRAPHICAL SOC’Y AM. 427, 434–35, 437 (1998); see also HOEFELICH, *supra* note 42, at 4–6.

46. Fidler, *supra* note 45, at 438.

common law.”<sup>47</sup> Those vagaries were compounded by the growth in published case law after the admission of more states to the Union and the “growing complexity and quantity of litigation in the wake of the commercial and corporate revolution that began before the Civil War.”<sup>48</sup>

Concerns about the growing bulk of cases were not new<sup>49</sup> but became increasingly common in the United States in the first decades of the 1800s. In his address to the Suffolk bar, Justice Story warned of the danger, “not that we shall hereafter want able Reports, but that we shall be overwhelmed with their number and variety.”<sup>50</sup> It was “impossible not to look without some discouragement upon the ponderous volumes, which the next half century will add to the groaning shelves of our jurists.”<sup>51</sup> Kent noted in his *Commentaries on American Law* that it was hard to gain competent knowledge of the law “in consequence of the number of books which beset and encumber the path of the student,” and that “[t]he evils resulting from an indigestible heap of laws, and legal authorities . . . destroy the certainty of the law, and promote litigation, delay, and subtilty [sic].”<sup>52</sup> In 1846, David Hoffman’s *Legal Study* complained that “[t]he increase of this portion of our legal literature within the last thirty years, has no parallel in the juridical history of any other country. More than four hundred and fifty volumes of American law reports now load our shelves!”<sup>53</sup> A few years later, a commentator in *The American Jurist and Law Magazine* feared that “[t]here are many young lawyers who find themselves in the dilemma of [Erasmus], called upon to select between law-books and clothes.”<sup>54</sup>

The early nineteenth-century treatises were published both to document the emerging American common law and to respond to the problems posed by the growing body of case law. Initially, many treatises were either reprints of English texts or editions of English works edited for the American market.<sup>55</sup> With the publication of Justice Story’s first treatise in 1832, however, original treatises on American law became the “predominant form of

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47. *Id.* at 437.

48. MacGill & Newmyer, *supra* note 38, at 43.

49. See, e.g., M.H. Hoeflich, *The Lawyer as Pragmatic Reader: The History of Legal Common-Placing*, 55 ARK. L. REV. 87, 92–93 (2002) (noting that the problem of dealing with large amounts of legal sources extends back 2,000 years and is not limited to common law systems).

50. Story, *supra* note 44, at 13.

51. *Id.* at 31.

52. JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 441–42 (1826).

53. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 657 (Philadelphia, Thomas, Cowperthwait & Co. 2d ed. 1846).

54. See Critical Notice, 23 AM. JUR. & L. MAG. 243, 244 (1840) (reviewing A FULL AND ARRANGED DIGEST OF THE CASES DECIDED IN THE SUPREME, CIRCUIT, AND DISTRICT COURTS OF THE UNITED STATES, FROM THE ORGANIZATION OF THE GOVERNMENT OF THE UNITED STATES (1839)).

55. See MacGill & Newmyer, *supra* note 38, at 41–42.

legal writing in the nineteenth century.”<sup>56</sup> G. Edward White found that treatise writers such as Story and Simon Greenleaf, “[b]y ‘tracing every principle to its original foundations . . .’ were claiming the authority to articulate the prevailing rules and doctrines and to formulate the principal legal issues of their times.”<sup>57</sup> Simpson noted that after the publication of Story’s texts, “the treatise tradition was firmly established, and such works were produced on an extraordinary scale.”<sup>58</sup> The new treatises benefitted lawyers wallowing in the growing mass of case law and students enrolled in the newly established university law schools. Kent’s *Commentaries* were based on his Columbia lecture notes,<sup>59</sup> and the nine treatises for which Story is known were published after he joined the Harvard law faculty.<sup>60</sup> Pound would argue that “text writing by teachers” was “the stabilizing agency of change” in the antebellum period.<sup>61</sup> He identified twenty-two significant pre-Civil War treatises<sup>62</sup> and claimed that the best were written by “law teachers who had been required to formulate their ideas to the exigencies of teaching and submit them to critical hearers.”<sup>63</sup> Many of these treatises remained central to legal education continuing into the twentieth century.<sup>64</sup>

## II. A MULTIPLICITY OF CASES

The number of published American decisions continued to grow rapidly throughout the 1800s, especially during the last quarter of the century. Tracing what he termed the “vast” accumulation of American law reports,

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56. Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 745–46 (1985) (citing Simpson, *supra* note 15, at 669–74).

57. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 108 (abr. ed. 1991). Friedman suggests that “these treatises were written to make money” and questions their intellectual contributions. Lawrence M. Friedman, *Heart Against Head: Perry Miller and the Legal Mind*, 77 YALE L.J. 1244, 1250–51, 1254 (1968) (reviewing PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA, FROM THE REVOLUTION TO THE CIVIL WAR* (1965)).

58. Simpson, *supra* note 15, at 670. In the 1836 second edition of his course of study for law students (aimed also at “the profession generally”), Hoffman noted the publication of “many valuable original treatises on various departments of the science.” HOFFMAN, *supra* note 53, at 657.

59. Swygert & Bruce, *supra* note 56, at 745.

60. Story taught at Harvard from 1829 until his death in 1845. His treatises were published initially between 1832 and 1845 and generated seventy-five editions by the end of the century. See G. Blaine Baker, *Story’s Paradigms for the Nineteenth-Century Display of Anglo-American Legal Doctrine*, in *LAW BOOKS IN ACTION*, *supra* note 19, at 82, 84.

61. POUND, *supra* note 21, at 143. Simpson suggests that because their authors were affiliated with law schools, the quality of American treatises was often higher than the quality of those written in England. Simpson, *supra* note 15, at 670–71.

62. See POUND, *supra* note 21, at 140–41. See generally Kate Wallach, *The Publication of Legal Treatises in America from 1800 to 1830*, 45 LAW LIBR. J. 136, 143–45 (1952) (listing treatises, manuals, and form books).

63. POUND, *supra* note 21, at 163.

64. *Id.* at 144.



Charles Warren cited counts of 800 volumes in 1848, 3,798 in 1885, and 8,208 in 1910.<sup>65</sup> As the number of decided cases increased after the Civil War, official reporters could no longer meet the demand for the latest decisions. In response, private publishers began publishing new decisions more quickly in a variety of packages.<sup>66</sup> Competing schemes called for either selective publication of cases deemed to be of greatest precedential value or comprehensive publication of appellate decisions, usually presented in groups of decisions from neighboring states. At one point, lawyers in twenty states were served by three separate series of official and commercial reports.<sup>67</sup> Willard Hurst observed that the precedent-based, multijurisdictional U.S. system “was inherently costly to work with. It required time-taking search for authorities. It called for expensive law libraries.”<sup>68</sup>

The “multiplicity”<sup>69</sup> of cases in the latter part of the nineteenth century also challenged the idea that the common law should be seen as a source of timeless principles. So-called “case lawyers,” apparently more interested in finding precedents directly on point for their immediate problem than in understanding the principles behind the decisions, were frequently denigrated in legal periodicals and at meetings of the bar.<sup>70</sup> Because of the rapid accumulation of case law, John Dos Passos wrote in 1907 that being a lawyer now “requires a different kind of intellectual development” than in the past and that “the modern advocate’s nose is always to be found in a digest.”<sup>71</sup>

The case lawyers of the late nineteenth century not only searched for precedents in fat volumes of digests, which grew ever larger with the growth in case law, but also employed treatises, which themselves increased in number. Friedman suggests that about one thousand treatises were published in the United States between 1850 and 1900.<sup>72</sup> Many post-Civil War treatises seemed, however, to be of a different order than those that came before. For Friedman, the typical treatise of this period was “somewhat drier and less imaginative than the best work of the prior generation . . . [and] tended to be humorless, impersonal, less concerned with praise and blame than

65. CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 557 (1911).

66. Edward W. Jessen, *Official Law Reporting in the United States*, in *PROCEEDINGS OF THE SECOND INTERNATIONAL SYMPOSIUM ON OFFICIAL LAW REPORTING* 28, 33–34 (2004).

67. Note, *The Lawyer’s Reports, Annotated*, 22 *AM. L. REV.* 921, 921 (1888).

68. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 308 (1950).

69. In the late nineteenth and early twentieth centuries, the growth in published case law was often referred to as the “multiplicity” or “multiplication” of reports. *See, e.g.*, John B. West, *Multiplicity of Reports*, 2 *LAW LIBR. J.* 4 (1909).

70. Friedman found that lawyers’ own “hunger for precedent” drove the publication of more and more cases with the result that they “simply gave up any attempt to grasp the whole of the law or stay abreast of it.” FRIEDMAN (2005), *supra* note 16, at 475.

71. JOHN R. DOS PASSOS, *THE AMERICAN LAWYER AS HE WAS—AS HE IS—AS HE CAN BE* 13 (1907).

72. FRIEDMAN (2005), *supra* note 16, at 477.

with bare exposition of law.”<sup>73</sup> In 1868, Bishop drew sharp distinctions between works that met his own strict definition of the treatise form and those that were called treatises but merely collected points decided by the courts and functioned primarily as digests or indexes.<sup>74</sup> In 1889, Justice Samuel Miller found that “[m]ost of these modern treatises, as they profess to call themselves, are but digests of the decisions of the courts, and though professing to be classified and arranged in reference to certain principles discussed in the book, they are generally but ill-considered extracts from the decisions of the courts.”<sup>75</sup> Pound wrote that the law-book business was based on the idea that the law was not a principled science, but “a body of detailed rules, evidenced by reported cases.”<sup>76</sup>

Pound was able to identify only three post-Civil War, nineteenth-century treatises to “stand with the great texts of the formative era,” but he also argued that by this time “our case law had reached maturity” and “for a time the need [for] writings such as those of the earlier period had ceased.”<sup>77</sup> Even so, the change from the doctrinally rich early treatises to books that were “mere key[s] to the cases” made the post-Civil War period “the nadir of American law-book writing.”<sup>78</sup> In 1909, James De Witt Andrews told an audience of law librarians that, while “text books *by masters of the subjects*” were still the best means to find the law, “one cannot approve of all the great flood of so-called text books.”<sup>79</sup> Justice Miller commented that “the whole field of the law has been explored with great industry by recent writers of books, mainly at the instance of law publishers . . . for a compensation, and not because the writer is impressed with the value or importance of the subject that he writes about.”<sup>80</sup>

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73. *Id.* at 478.

74. BISHOP, *supra* note 27, at 133.

75. Samuel F. Miller, *The Use and Value of Authorities*, 23 AM. L. REV. 165, 165–66 (1889).

76. POUND, *supra* note 21, at 158. The founder of West Publishing Co. made the following observation about the question “What is the law on this point?”: “Is it not the function and calling of the law publisher to supply the lawyers with mechanical aids toward answering the question in whatever connection it may arise?” *A Symposium of Law Publishers*, 23 AM. L. REV. 396, 400 (1889) (written comments of John B. West).

77. POUND, *supra* note 21, at 141 (listing “Cooley’s Limitations (1868), Dillon on Municipal Corporations (1872) and Pomeroy’s Equity Jurisprudence (1881–1883)” as the three).

78. *Id.* at 157. Contemporary commentators saw this period as a low point in judicial-opinion writing as well. *See, e.g.*, Alfred Russell, *Avoidable Causes of Delay and Uncertainty in Our Courts*, 14 ANN. REP. A.B.A. 197, 214 (1891) (describing “opinions filling hundreds of pages, encumbered with discussions not demanded by the case, and amounting to treatises, drawing too nice distinctions, or laboring to avoid clear distinctions”).

79. James De Witt Andrews, *The Use of the Law Library*, 2 LAW LIBR. J. 8, 12 (1909). Lawrence Friedman characterized Charles Warren’s 1911 list of important texts, which included thirty-seven late nineteenth-century treatises, as a reflection of the substantial market for practical “lawbooks that lawyers could use.” FRIEDMAN (2005), *supra* note 16, at 477 (citing WARREN, *supra* note 65, at 551–62).

80. Miller, *supra* note 75, at 165.

To Pound, the early twentieth-century works of Wigmore, Williston, and Beale represented a revival in treatise writing, which “put the matured nineteenth-century law in form to be used in a new era of growth.”<sup>81</sup> By the 1930s, he saw the need for doctrinal writing to organize and shape the law to be as great as in the “formative era,” not because “the courts had little to go on,” but because they had “too much” and “increasingly less time for thorough first-hand work upon the vast mass of available material.”<sup>82</sup> He foresaw a new generation of great treatises coming from the law schools: “[N]o one who has followed the history of American law can doubt that the jurists and law writers who are to do this will be law teachers.”<sup>83</sup>

Simpson believed that the American treatise tradition culminated in the early twentieth-century “ultimate treatises” of Wigmore, Williston, Corbin, and Scott.<sup>84</sup> The revival Pound forecasted had not occurred.<sup>85</sup> He conceded that there were still some works being produced that could arguably be called treatises, but that they generally fell outside the classic definitions of the form.<sup>86</sup> He suggested several reasons for the decline, including the existence of multiple jurisdictions in the United States and the “rising bulk of legal material, particularly law reports.”<sup>87</sup> Although hardly new concerns, they remained significant obstacles: “[H]ow could the systematic writer reconcile his presentation of the law as a coherent set of principles with the shambles accumulating in the law libraries?”<sup>88</sup> Primarily, Simpson attributed the decline of the American treatise-writing tradition to the influence of legal realism, which, because it minimized the importance of doctrine, was unlikely to view the law as a principled science.<sup>89</sup> Morton Horwitz reached similar conclusions, describing a “loss of faith in the possibilities of logical consistency of legal doctrine.”<sup>90</sup>

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81. POUND, *supra* note 21, at 165 (discussing JOSEPH HENRY BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1916), JOHN HENRY WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (1904), and SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920)).

82. POUND, *supra* note 21, at 164. The 1930s were a period of renewed concern over the amount of published law. Pound himself chaired an American Bar Association committee charged with examining solutions to the problem. See Richard A. Danner, *The ABA, the AALL, the AALS, and the “Duplication of Legal Publications”*, 104 *LAW LIBR. J.* 485, 506–08 (2012).

83. POUND, *supra* note 21, at 165.

84. Simpson, *supra* note 15, at 674.

85. *Id.* at 676 (“[I]n America, where the common law treatise reached perhaps its ultimate point of development, the genre has by now declined rather markedly from its preeminence.”).

86. *Id.* at 678 n.318.

87. *Id.* at 676.

88. *Id.*

89. *Id.* at 677–78.

90. Horwitz, *supra* note 15, at 460.

## III. A FARRAGO OF INFORMATION

The rapid growth of published U.S. case law in the early nineteenth century helped inspire early treatise writers to create the works that both Pound and Simpson would characterize as high points in the development and influence of the treatise form.<sup>91</sup> The new American treatises educated lawyers and law students. By providing statements of principles and references to precedents supporting those principles, the treatises helped harried lawyers do their work. By the end of the nineteenth century, however, lawyers felt overwhelmed by the sheer number of published cases available and became seekers of precedents rather than principles, relying on digests to locate cases on point rather than on treatises.<sup>92</sup> Many treatises were seen as hack work—produced by publishers for commercial gain, not by knowledgeable scholars devoted to their subjects.<sup>93</sup> Pound suggested that, during this period, there was perhaps less need for the doctrinal analysis provided by the great treatises.<sup>94</sup> The first half of the twentieth century saw occasional publication of major treatises on core subjects; later writers, recognizing the complexity of twentieth-century law, contributed works on more highly specialized topics.<sup>95</sup>

Simpson linked the treatise's "fall" from prominence in the United States to the influences of legal realism and the sense that judicial opinions were not expressions of a rational set of principles but material to justify arguments reached on other grounds.<sup>96</sup> As legal information moved from print to digital formats in the last quarter of the century, print digests were supplanted by the powerful search engines of full-text legal research systems. For Simpson, it seemed that lawyers now needed no more than ready access to the opinions provided by "on-line computer systems such as LEXIS and WESTLAW."<sup>97</sup>

Simpson started his 1981 article by articulating his interest in "the close relation between the forms of legal literature and lawyers' ideas of what they are doing, and of the appropriate way for jurists to behave."<sup>98</sup> This approach anticipated the mid-1980s works of Ethan Katsh, Bob Berring, and others who undertook serious forays into the ways that both the content and the forms of legal information affect how lawyers think and how the law

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91. See POUND, *supra* note 21, at 140–41; Simpson, *supra* note 15, at 669–71.

92. FRIEDMAN (2005), *supra* note 16, at 475.

93. Miller, *supra* note 75, at 165–66.

94. POUND, *supra* note 21, at 141.

95. See, e.g., JAMES D. COX & THOMAS LEE HAZEN, COX AND HAZEN ON CORPORATIONS (2d ed. 2003); PAUL MARCUS, THE ENTRAPMENT DEFENSE (4th ed. 2009); PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS (1978).

96. Simpson, *supra* note 15, at 677–78.

97. *Id.* at 678.

98. *Id.* at 633. It is debatable whether he accomplished his aim of showing "that certain literary forms are closely tied to theories about the nature of law itself, and that this is particularly true of the treatise." *Id.*

develops.<sup>99</sup> Katsh focused on lawyers' increasing use of electronic media, noting that their growing reliance on legal research databases not only made more cases available but also created a demand both for new cases to be available immediately and for access to the rapidly increasing amounts of legal and nonlegal information accessible via the internet.<sup>100</sup> Berring's interest in the effects of the new media on legal research led him to examine the influences of West's digest system on nineteenth-century lawyers. As lawyers lost faith in abiding legal principles, Berring saw the digest-classification system as a "conceptual universe" that helped attorneys make sense of the law created by the ever-growing amount of published material in the late nineteenth century.<sup>101</sup> But he also recognized that a tool of the print era could not be expected to continue its role in an online legal research environment.<sup>102</sup> Katsh and Berring both foresaw a situation that Plucknett might have called a "farrago" of legal-information electronic sources: costly and free, official and commercial, verified and questionable, and defiant of any scheme of arrangement.<sup>103</sup> Seeing no obvious replacement for the digest, Berring called out for someone to provide the sort of structure to the new environment that Blackstone provided in eighteenth-century England and the digest provided in nineteenth-century America.<sup>104</sup>

#### CONCLUSION

Common law lawyers have always sought relief from the masses of disorganized materials with which they have to work. Presumably, Judge Edwards saw treatises as the paradigm of practical legal scholarship, not because he was fond of multivolume sets of books with pocket-part updates, but because knowledgeable treatise writers like Story and Williston had helped harried lawyers make sense of the raw materials. Although their quality varied, in the nineteenth century and in much of the twentieth, treatises provided context and structure to the flood of published cases. They created what Edwards termed "an interpretive framework": categorizing authorities, interpreting authoritative texts within the categories, demonstrating what the law requires, and highlighting gaps. Today's lawyers have ready access not only to cases and other forms of legal authority, but also to

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99. See generally Richard A. Danner, *Legal Information and the Development of American Law: Writings on the Form and Structure of the Published Law*, in LEGAL INFORMATION AND THE DEVELOPMENT OF AMERICAN LAW 6 (Richard A. Danner & Frank G. Houdek eds., 2008).

100. M. Ethan Katsh, *Communications Revolutions and Legal Revolutions: The New Media and the Future of Law*, 8 NOVA L.J. 631, 660 (1984).

101. Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 311 (2000).

102. *Id.*

103. Plucknett described the history of English law as being mostly "a farrago of detailed instances which defied any scheme of arrangement, save perhaps the alphabetical." PLUCKNETT, *supra* note 26, at 19.

104. Berring, *supra* note 101, at 315–16.

masses of other information, legal and law-related, generated each day and competing for their attention. Is not the lawyer's need for context and structure more urgent now than when the first great treatises were written and commentators were worried about how quickly the courts had generated the first few hundred published volumes of American reports?

Fernandez and Dubber's collection of essays on the historical place of the treatise suggests that no one in the twenty-first-century United States "feel[s] the need to bury their noses in heavy tomes of treatise learning."<sup>105</sup> Solutions for information-inundated lawyers and judges are unlikely to be found in new print tomes (or even in their digitized equivalents). Where will lawyers and judges find new forms of interpretive frameworks? Electronic search engines, despite their power and sophistication at aggregating data, are less successful at providing structure and context for information<sup>106</sup> and continue to rely on the research skills of searchers and the knowledge they bring to the task.<sup>107</sup>

Do we need a new Blackstone? Do we need new writers of grand treatises like Story and Williston? In the twenty-first century, American lawyers could benefit most from authoritative works on specialized subjects by knowledgeable scholars who are not only able to provide interpretive frameworks for tackling new questions but also conversant with the technologies that lawyers employ for seeking and working with legal information. Twenty-first-century Blackstones will be technologically literate legal scholars who understand the relationships between form, content, and structure, and who possess the skills to present legal information in innovative ways appropriate to the formats in which information is now published, identified, and delivered.

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105. Fernandez & Dubber, *supra* note 19, at 20.

106. See Tom Foremski, *Curation and the Human Web*, ZDNET (Nov. 17, 2010, 10:52 AM), <http://www.zdnet.com/blog/foremski/curation-and-the-human-web/1581> ("[W]e are reaching the limits of what can be achieved through algorithms and machines in organizing and navigating the Internet [and there is growing need for] 'curation,' [defined as] choosing and presenting a collection of things related to a specific topic and context.").

107. See generally Susan Nevelow Mart & Jeffrey Luftig, *The Case for Curation: The Relevance of Digest and Citor Results in Westlaw and Lexis* (July 18, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2112574](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2112574).