

From the Editor: Books about Statutes

Books on the law can be classified according to the audiences at whom they are addressed. If we put aside the various categories of texts aimed at a student audience, one easy distinction is between books written primarily for the use of practicing attorneys and those written primarily for purposes of scholarship. In the nineteenth century, legal treatises developed into “the typical form of legal writing,”¹ and became important research sources for attorneys. The overall importance of legal treatises may have declined in the twentieth century as the materials of the law grew in volume and research methods changed.² Yet, even though their subject matter may have become more specialized, today’s treatises still play an important role in meeting lawyers’ research needs,³ through textual exposition and through reference to primary authority.

The practical importance of the scholarly monograph, on the other hand, is rumored to be inferior to that of today’s practice-oriented treatises. James J. White wrote in the 1983 book review issue of the *Michigan Law Review* of his skepticism regarding the influence of scholarly writing on the actual practice of law.⁴ White’s concern was with tracing the progress from idea to act, an admittedly difficult process to measure. He did not discuss the role scholarly books and other writings play in the development of knowledge and theory in a subject area of the law.

The actual roles played by these types of books are interesting to consider. We tend to classify law books by form, but form can be misleading. Books couched in the classic form of the practitioner’s treatise can be critical and analytic and can make a considerable contribution to theory building. Books published as scholarly works can have direct impact on the thinking and approaches of practicing attorneys. I recently had the occasion to examine the treatise and monographic literature on legislation and statutory interpretation, and have been struck by the extent to which the traditional lines of demarcation distinguishing practical and scholarly works tend to blur (at least in that subject area).

1. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 633, 662-74 (1981).

2. *Id.* at 676-78. Further implications of changes in form of publication on approaches to legal research are explored in Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15 (1987).

3. Whipple, *Selection of Treatises in Academic Law Libraries*, 78 LAW LIBR. J. 219, 222 (1986).

4. White, *Scholarly Books: What, To Whom and Why*, 81 MICH. L. REV. 723 (1983).

Legislation is an area of specialty in the law where academic writers call for greater attention to scholarship and where the traditional treatise literature has been too practice-oriented to aid in the development of theory. Julius Cohen, for one, has lamented the failure of American jurisprudence to devote the same energy to studying the legislative side of the legal order (what he calls "legisprudence") as it has to the judicial side.⁵ Cohen noted particularly the need for greater scholarly attention to the "vexing and pervasive" problems of statutory interpretation.⁶ Others, too, have commented on the continuing reluctance of academic lawyers to study legislation and its interpretation in a rigorous manner or to channel their efforts toward theory building.⁷

Most of the important scholarly work on the subject is in article format,⁸ but there is a fairly extensive historical body of English and American treatise literature, extending back at least to the seventeenth century.⁹ Some current titles developed during the growth of treatise writing in the last century and have been published in multiple editions since that time. Much of this literature was reviewed as part of a 1950 *Vanderbilt Law Review* symposium on statutory interpretation.¹⁰ None of it was characterized as having an abundance of critical analysis and commentary. For this essay, I have tried to look at the current field of books on statutes in light of the usual distinctions drawn between treatises and scholarly monographs.¹¹ The review indicates that, in this area

5. Cohen, *Legisprudence: Problems and Agenda*, 11 HOFSTRA L. REV. 1163 (1983) [hereinafter Cohen I]. Cohen first used the term "legisprudence" in an earlier article. See Cohen, *Towards Realism in Legisprudence*, 59 YALE L. J. 886 (1950). He has suggested the term "judicativeprudence" to describe jurisprudential study of judicial aspects of the law. Cohen I, *supra*, at 1163.

6. Cohen I, *supra* note 5, at 1168-72.

7. See, e.g., Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 800-02 (1983). See generally Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 PITT. L. REV. 691 (1987). This is not to say that the field is completely lacking in works of substance and importance, or that fresh ideas are not being introduced to its study. The large body of work by Reed Dickerson is an impressive contribution. See Pauwels, *The Works of Reed Dickerson: A Bibliography*, 55 IND. L.J. 434 (1980) (Dickerson continues to publish regularly). The widespread current attention paid to philosophical problems in legal interpretation also enlivens discussions of the interpretation of statutes. See, e.g., *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985). Additionally, the recent comments on statutory interpretation in Ronald Dworkin's *Law's Empire* have been called "perhaps the finest treatment of this subject in the legal literature." Grey, *Advice for 'Judge and Company'*, N.Y. REV. BOOKS, Mar. 12, 1987, at 32, 34.

8. The literature is cataloged retrospectively in 4 J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* 261-90 (D. Sands 4th ed. 1975) [hereinafter SUTHERLAND]. The list is not brought up-to-date in the current supplement, however. See also COMMONWEALTH SECRETARIAT, *BIBLIOGRAPHY OF MATERIALS ON LEGISLATIVE AND OTHER LEGAL DRAFTING AND THE INTERPRETATION OF STATUTES* (3d rev. ed. 1985).

9. See A. DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES (S. Thorne ed. 1942).

10. Sanders & Wade, *Legal Writings on Statutory Construction*, 50 VANDERBILT L. REV. 569 (1950).

11. A useful typology is in Whipple, *supra* note 3, at 221.

at least, books are written in hope of being influential both on the practical and on the scholarly levels.¹²

The primary United States work remains Sutherland's *Statutes and Statutory Construction*. The 1972 fourth edition, edited by C. Dallas Sands, was revised in 1984-86 and continues to be updated by Norman Singer. Now in seven physical volumes, Sutherland includes comprehensive coverage of legislative powers, organization and procedure, forms of legislation, and interpretation. The approach is encyclopedic, with usually brief topical paragraphs supported by citations to state and federal authorities. In its arrangement, the current Sutherland follows a typical pattern for legal treatises, as have its own predecessor editions and most of the other standard works in the field.¹³ The result is similar to the most recent edition of the English treatise, *Maxwell on the Interpretation of Statutes*.¹⁴ The editor of that work acknowledges that the encyclopedic approach to citing authority has created a "practitioners' armoury," which he hopes will allow "counsel putting forward diverse interpretations of some statutory provision . . . each [to] be able to find in *Maxwell* dicta and illustrations in support of his case."¹⁵ While this approach may be appropriate for a practitioners' treatise, it clearly is not an approach likely to add much to the body of legislation scholarship. Sutherland is much more wide-ranging in its coverage than Maxwell, however, and in some areas does provide useful syntheses of existing case law and academic commentary.¹⁶ Both treatises are oriented toward practitioners.¹⁷

Other recent works, while organized like the classic treatises and set up to provide copious references to the case law of interpretation, also manage to take a more critical and analytic approach to their subjects. Foremost among English treatises in this group is Francis Bennion's 1984 *Statutory Interpretation*. Drawing on ideas from his earlier work, Bennion provides a code, structured to describe modern common law interpretive practices, and including descriptions of principle and critical commentary. In an apparent riposte to Maxwell's approach, Bennion announces his intention that "the Code should

12. As in the earlier Sanders and Wade review, I have included both United States and English works, and I have added Canadian titles. Statutory interpretation is an area that benefits greatly from comparative study, not only of common and civil law approaches, but among the different approaches in common law jurisdictions. An understanding of practices in other common law jurisdictions illuminates the background of current U.S. practices. U.S. attorneys also would do well to acquaint themselves with Canadian and British practices regarding appropriate uses for legislative history and other extrinsic sources in the interpretive process, and the rationales for excluding most extrinsic materials from the process.

13. Sutherland, however, also contains a healthy selection of the literature of statutory interpretation, reprinted from journals and other sources.

14. MAXWELL ON THE INTERPRETATION OF STATUTES (P. Langan ed. 1969).

15. *Id.* at v.

16. See, e.g., the sections on criteria of interpretation. 2A SUTHERLAND, *supra* note 8, at § 45.01-45.15.

17. So is the other standard English treatise. See CRAIES ON STATUTE LAW (S. Edgar 7th ed. 1971).

be self-consistent. Contradictory utterances cannot both be right, and so cannot both be law." He continues, "A book on statutory interpretation that sets out to be a mere pottage of dicta is, like any other law book so planned, of little use."¹⁸ Bennion does provide numerous citations to case law and statutes, and is by far the most up-to-date textual source of British authorities on points of interpretation. Despite this, however, at least one reviewer has questioned the book's usefulness for the practitioner because of the author's choices regarding subject coverage and depth of treatment.¹⁹

Two recent Canadian works also take a scholarly approach to their subjects while providing practitioners with sufficient references to cover the range of pertinent authority on particular points of interpretation. It is noted by Pierre Côté, the author of one of these volumes, that a text on this subject is "destined to be consulted by lawyers and judges both as a guide and as a source of arguments."²⁰ Côté's book, entitled *The Interpretation of Legislation in Canada*, was originally published in French as *Interprétation des Lois* in 1982. The other work is the second edition of the late E.A. Driedger's *Construction of Statutes*,²¹ published a year before Côté's work was available in translation. A comparison of the reviews of these books shows some of the difficulties faced by contemporary writers on this subject in composing works that are both of scholarly value and of use to the practitioner seeking aid in working with statutes. A 1985 review of Côté's book praised its practical value as a reference work with the character of a standard legal text, while noting that Driedger's work was limited in usefulness, since it was "really an attempt to develop a theory of the judicial interpretation of statutes."²² Yet, a later review praised Côté for moving "beyond a catalogue of rules to set forth general principles which recognize that language is a means of communication and not a precise science," and presenting the reader with "new ideas and a holistic approach to the interpretation process."²³ Driedger was criticized, in an earlier review, for lacking "a sense of purpose or the presence of a cohesive philosophy."²⁴ A reading of the two books makes clear that both are substantial contributions to the study of legislation and interpretation: Driedger provides an artful exposition of the three traditional British and Canadian rules on interpretation (the literal, golden, and mischief rules) while arguing that each is but an aspect of a single process;²⁵ Côté

18. F. BENNION, *STATUTORY INTERPRETATION* xxviii (1984).

19. Wilson, Book Review, 1986 *STAT. L. REV.* 60, 63-64.

20. P. CÔTÉ, *THE INTERPRETATION OF LEGISLATION IN CANADA* XVII (1984).

21. E. DRIEDGER, *CONSTRUCTION OF STATUTES* (2d ed. 1983).

22. Kerr, Book Review, 5 *WINDSOR Y.B. ACCESS TO JUST.* 422, 424 (1985).

23. McCallum, Book Review, 64 *CAN. BAR REV.* 433, 433 (1986).

24. *Id.* (quoting Parker, Book Review, 63 *CAN. BAR REV.* 662, 663 (1985)).

25. E. DRIEDGER, *supra* note 21, at 81-87.

is significant for bringing into the discussion not only Quebec cases and approaches, but the insights of continental writers as well.

In addition to these works, there are a number of important monographs in the field, many of which are written with the practicing attorney as well as the scholar in mind. Such works are written to reach practitioners, but do not set forth propositions of black letter law and citations to support them.

British works falling into this category include: Sir Rupert Cross's *Statutory Interpretation* (1976); David R. Miers and Alan C. Page's *Legislation* (1982); William Twining and David Miers's *How to Do Things With Rules* (2d ed. 1982); and Francis Bennion's *Statute Law* (2d. ed. 1983). Although their intended audiences differ somewhat, each book is written more to stimulate thought on the issues of legislation and statutory interpretation than to answer questions on particular points of interpretation. Like Driedger, Cross attempts to bring together the three classic rules of interpretation; debate over these rules has characterized British writing on statutory interpretation much as debate over the actual existence of legislative intent has been a recurrent theme in much United States writing. Miers and Page's book is written as a text, but is useful for its comprehensive treatment of all aspects of legislation in England, ranging from the preparation of legislation, through the legislative process, to interpretation and the impact of statutory law. Twining and Miers's book, subtitled "A Primer of Interpretation," is a discursive treatment of interpretation principles, applicable to statutory and other situations as well. Bennion's *Statute Law* outlines much of the the same argument that underlies his *Statutory Interpretation*, without the detailed case citations.

The two major American scholarly works differ greatly in what they cover and how they approach their subjects. Yet, each is accessible and has practical value for attorneys working with statutes. Reed Dickerson's *The Interpretation and Application of Statutes* (1975) in many ways culminates the author's past writings on legislative drafting and interpretation. The book presents a coherent theory of statutory interpretation based on the actual practices of courts and theories of communication that emphasize the role of the receiver of the message. Dickerson's later writings continue to develop those themes, but this book remains an essential part of his work and a major contribution to the body of scholarly writing on statutory interpretation. Willard Hurst's *Dealing with Statutes* (1982) is a work of a different sort, consisting of three essays on the legislative process, statutory interpretation, and the constitutionality of statutes. The essays, based on lectures given at Columbia, bring together Hurst's thoughts on those topics as developed in a popular legislation course at the University of Wisconsin Law School and in his writings on American legal history. Densely packed, as is much of Hurst's work, the essays (especially that on interpretation) are worthy of close reading for their insights and conceptualization of legislation as a process involving the legislature, the statutory text, and the courts.

Today's books on statutes differ from those surveyed in 1950. The only current treatise in classic format is Sutherland; the standard English treatises reviewed in 1950 have not been kept up-to-date. Most recent books, whether in treatise or monographic form, have had a scholarly bent and have aimed to provide more than case citations in a practitioner's armoury. Julius Cohen might ask whether such works contribute to the development of legisprudential studies. One would think so, at least to the degree that they have analyzed the traditional rules and approaches in light of what has been learned in other disciplines about legislative procedure and behavior, and in consideration of modern theories of communication and interpretation.

How great an impact have these books had on the actual practice of law? White noted that such influences are not easy to measure.²⁶ In the field of legislation, however, it is clear at least that modern writers are aware of the need to bridge the gap between practice and theory. Dickerson, Driedger, and Bennion, among others, developed their theoretical perspectives on interpretation from experiences in the highly practical field of legislative drafting. This background is reflected in their works and those of other writers, whose books merge attempts at theory building with workable guidance for lawyers working with statutes on a daily basis. This is a tricky endeavor, and clearly some writers are more successful at it than others. Yet, such attempts to merge the theoretical with the practical, the treatise with the scholarly monograph, are significant, not only for the development and dissemination of academic writing on topics of legislation, but also for the continued vitality of the literature of the law.

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26. White, *supra* note 4, at 723-24.