

Influences of the Digest Classification System:

What Can We Know?

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Robert C. Berring has called West Publishing Company's American Digest System "the key aspect of the new form of legal literature" that West and other publishers developed in the last quarter of the nineteenth century. Berring argued that West's digests provided practicing lawyers not only the means for locating precedential cases, but a "paradigm for thinking about the law itself" that influenced American lawyers until the development of online legal research systems in the 1970s. This article discusses questions raised by Berring's scholarship, and examines the late nineteenth and early twentieth century legal environment in which the West digests were created and became essential research tools for American lawyers.

I. Introduction

[W]hile a digest is a device of somewhat higher order than an index, it is after all only a labor-saving device. It is a mere tool for digging the precious metals from the mines of judicial reports, and is in no sense a medium for the inculcation of legal principles, and logical methods in the application thereof.

Benjamin Tradwell, *Suggestions for a Practical Digest*, 3 Am. Law. 337, 337 (1895).

Sometimes we are least aware of that which most affects us. So it seems with respect to legal categories. . . . They inhibit our imagination of what is acceptable, indeed, of what is possible. They take on a quality of givenness and thereby disempower us.

Gregory S. Alexander, *The Transformation of Trusts as a Legal Category, 1800–1914*, 5 Law & Hist. Rev. 303, 303 (1987).

Steven Lastres's 2013 paper, "Rebooting Legal Research in a Digital Age"¹ could be a wake-up call for academic law librarians involved in legal research instruction. Reporting the results of a LexisNexis-funded survey, the paper covers the amount of research newer associates in large and small law firms are required to perform, the extent to which they rely on electronic sources, and how little training they receive from their employers. At a time when law schools are placing

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¹ Steven A. Lastres, *Rebooting Legal Research in a Digital Age* (2013).

renewed emphasis on graduating students with practice-ready skills, the paper provides arguments for including legal research training in those efforts, and is worth distributing to law students skeptical of the value of legal research courses.

Lastres reports briefly on the research processes of the newer associates.² The survey results show heavy reliance on online research sources, which aligns with the data reported annually in the American Bar Association Legal Technology Resource Center's survey of legal research practices.³ The paper includes a section under the heading: "A legal classification is rarely followed," discussing how infrequently newer lawyers use classification systems. A short discussion suggests both that very few begin case law research by consulting a legal classification system and that "a third of respondents admit typically not accessing a legal classification system at all when conducting case law research."⁴

This result seems neither very surprising nor perhaps worthy of the space it occupies in a short paper.⁵ Its prominence may be understandable, however, in light of the continuing impact of the scholarship of Bob Berring and others regarding the influences of West Publishing Company's digest system on legal research and American law itself.⁶

In the first of a series of articles published mostly between 1986 and 2000, Berring called the digests "the key aspect of the new form of legal literature" that West developed in the last quarter of the nineteenth century.⁷ Not only did the West digests provide the means for locating precedential cases, a practicing lawyer's primary concern, but they also created "a paradigm for thinking about the law itself."⁸ Once exposed to West's Key Number System, "[l]awyers began to think according to the West categories."⁹ For Berring, by creating a classification system with a location "for every possible legal issue . . . [West's] subject arrangement lent its structure to American law."¹⁰

Berring was not the first to consider the possible influences of the digest and other forms of legal publication on lawyers' thinking. In the 1923 first edition of his classic textbook on legal research, Frederick C. Hicks anticipated Berring in the statement that: "With the multiplicity of

² *Id.* at 5.

³ The 2013 data show, for example, that only 10.7 percent of surveyed lawyers begin their research with print materials. 5 American Bar Association Legal Technology Resource Center Survey Report: Online Research V-22 (2013).

⁴ Lastres, *supra* note 1 at 5.

⁵ In correspondence with the author, Lastres suggests that one of the objectives of the study "was to uncover how newer attorneys (digital natives) conduct case law and statutory legal research.... [R]egarding legal classification systems, the thought was that the question might prove insightful for those schools that continue teach a more traditional research curriculum where classification systems are strongly emphasized." Email from Steven A. Lastres to Richard Danner (Aug. 28, 2013, 15:50 EDT).

⁶ For a review of Berring's writings and those of his contemporaries, see Richard A. Danner, *Legal Information and the Development of American Law: Writings on the Form and Structure of the Published Law*, 99 *Law Libr. J.* 193 (2007) [hereinafter, Danner, *Development of American Law*], reprinted in Richard A. Danner & Frank G. Houdek, eds., *Legal Information and the Development of American Law* 6 (2008) (with bibliography).

⁷ Berring, Robert C., *Full-Text Databases and Legal Research: Backing into the Future*, 1 *High Tech. L. J.* 27, 31 (1986). [hereinafter, Berring, *Full-Text Databases*].

⁸ *Id.* at 32–33.

⁹ *Id.* at 33.

¹⁰ Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 *Cal. L. Rev.* 15, 25 (1987) [hereinafter, Berring, *Form Molds Substance*].

decided cases the whole fabric of the common law would long ago have broken down were it not for the digest.”¹¹ Hicks acknowledged the troubling pace at which the amount of published law was growing, yet he wrote during a period of relative stability in the forms and formats of published legal information. The material was still all in one format—print—and accessible in law libraries through the digests, bulky and cumbersome as they might be.

Berring, on the other hand, wrote at a time of great ferment and change in the ways that legal information was published, accessed, and used. Since the mid-1970s, Lexis and Westlaw, the two primary American legal databases, had vastly expanded their offerings of both legal and non-legal sources. Each service also offered search capabilities that allowed and encouraged lawyers to construct searches outside the structures of pre-coordinated indexes and digest topics.¹² By the turn of the century, the Internet would emerge as an important alternative for research in law. Berring wondered what impacts comprehensive full-text electronic research systems providing both the texts of the law and new means to find them would have on lawyers accustomed to relying on legal materials in print and print tools like digests? What might be lost as free-text electronic tools replaced indexed tools in print formats?

This article begins in Section II with a history of the early development of the West digests, followed by in section III by a review of Berring’s ideas about the influences of the West digests on how American lawyers think about the law. Section IV discusses the questions raised by Berring’s scholarship, and how his work challenges later writers to consider more precisely how the forms of legal information might influence lawyers’ thinking. Section V then examines the historical context in which the West digests were created and first became essential research tools for American lawyers. This section looks at three aspects of the late nineteenth and early twentieth century legal environment to see how lawyers of that period might have used digests and classification systems in that period in ways that that influenced their thinking about the law: (1) concerns within the legal profession about increasing numbers of so-called “case lawyers;” (2) the profession’s general interests in the benefits of projects to classify the law; and (3) how West’s own publications presented and characterized the digests during the latter part of the period. Section VI offers final thoughts on the possible influences of the West digest.

¹¹ Frederick C. Hicks, *Materials and Methods of Legal Research with Bibliographical Manual* 251 (1923) [hereinafter Hicks, *Materials and Methods*]. Later, in his *Concise History of the Common Law*, T.F.T. Plucknett wrote:

When faced with a difficult case, the advocates and the judges have to undertake research in order to find what law will govern it. The method which they pursue, the character of the books and sources which they use, and the attitude of mind with which they approach them, all have their influence upon the shaping of the law, and upon their conception of law itself.

Theodore F.T. Plucknett, *A Concise History of the Common Law* 253 (5th ed. 1956).

For another perspective, see Morris L. Cohen, *Research Habits of Lawyers*, 9 *Jurimetrics J.* 183, 188 (1969) [hereinafter Cohen, *Research Habits*] (“[T]he nature of legal bibliography is determined in many ways by the nature of the law itself, and, in turn, the nature of legal research is determined, in part at least, by the bibliography on which it works”).

¹² By 2002, Berring would tell new law students: “The odds of your actually using a paper digest anywhere in the real world are increasingly slim.” Robert C. Berring & Elizabeth A. Edinger, *Legal Research Survival Manual* 57 (2002).

II. A Brief History of the West Reporter System and Digests

A. Rapidly Expanding Case Law and the West Reporters

Common law lawyers have complained about the burdens of having to search through too many court decisions to locate precedential cases and worried over the impacts of the masses of cases on the common law system since long before the West digests appeared in the last quarter of the nineteenth century. As Allan Hanson put it, “The threat [of cases overwhelming the system] has recurred with almost monotonous regularity throughout the history of the common law.”¹³ Until the mid-nineteenth century, however, the volume of American reports remained small enough that many practitioners could still read and retain what was necessary for them to practice,¹⁴ while continuing to complain about the growing numbers of law books. During the period of post-Civil War industrialization and geographic expansion, the number of decided cases in state and federal courts increased dramatically. Soon, the established systems for publishing decisions, based largely on official reporters appointed in each state, were no longer adequate for individual jurisdictions or on a national basis. Along with other entrepreneurial publishers, the West Publishing Company entered the growing market for published reports and succeeded in meeting lawyers’ demands for better reporting and access by developing standardized products notable for their accuracy, comprehensiveness, and timeliness.¹⁵

Morris Cohen viewed West’s publications as part of “a series of bibliographic innovations which were to shape legal research for at least the next hundred years [and] enabled the bench and bar to retain orderly access to a legal literature which was growing so fast as to render research difficult and time-consuming.”¹⁶ From modest beginnings in 1876 as a publisher of excerpted Minnesota court decisions in newspaper format,¹⁷ West soon became the major contributor to the

¹³ F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 Law Libr. J. 563, 565 (2002). Hanson also noted that lawyers are unusual among the disciplines in complaining about too much literature. Other fields tend to view a growing body of literature as a sign of progress and developing knowledge. He suggests that part of the explanation for this difference “may be that the past is easier to set aside in certain other disciplines.... [L]awyers’ objectives differ from those of other professionals in ways that emphasize the past.” *Id.*

¹⁴ Berring, *Form Molds Substance*, *supra* note 10 at 19. In 1836, David Hoffman complained that “[t]he increase in this portion of our literature within the last thirty years, has no parallel in the judicial history of any other country. More than four hundred and fifty volumes of American law reports now load our shelves!” David Hoffman, 2 *A Course of Legal Study Addressed to Students and the Profession Generally* 83 (2d ed. 1836). Charles Warren estimated that there were 800 volumes of American law reports in 1848. Charles Warren, *A History of the American Bar* 557 (1911).

¹⁵ Berring, *Form Molds Substance*, *supra* note 10 at 21. George Grossman suggests that a factor in West’s success was eliminating arguments of counsel from its reports. George S. Grossman, *Legal Research: Historical Foundations of the Electronic Age* 77 (1994).

¹⁶ Morris L Cohen, *An Historical Overview of American Law Publishing*, 31 Int’l J. Legal Info. 168, 175 (2003). Cohen found it “noteworthy that such research aids came largely from the imagination and commercial enterprise of individuals like John West and Frank Shepard, and not from scholars, academic organizations, or government agencies.” *Id.* at 175.

¹⁷ William W. Marvin, *West Publishing Co.: Origin, Growth, Leadership* 35 (1969). In addition to Marvin’s company history, sources for the history of West include: Ross E. Davies, *How West Law Was Made: the Company, its Products, and its Promotions*, 6 Charleston L. Rev. 231 (2012); W.E. Butler, *John Briggs West and the Transformation of American Law Reports*, in *The Syllabi: Genesis of the National Reporter System* iii (2011); Robert M. Jarvis, *John B. West: Founder of the West Publishing Company*, 50 Am. J. Legal Hist. 1 (2008–2010); Joe Morehead, *All Cases Great and Small: the West Publishing Company Saga*, Serials Lib’n., (1/2) 1988 at 3;

increased volume of published American case law through its series of unofficial reporters of court decisions, the National Reporter System. Some of West's competitors attempted to follow the English practice of selective publication of court opinions, but West's comprehensive case reporting system prevailed in the marketplace and contributed to a "gigantic growth in published cases" during the last quarter of the nineteenth century.¹⁸ Grant Gilmore wrote in *The Ages of American Law*:

After ten or fifteen years of life with the National Reporter System, the American legal profession found itself in a situation of unprecedented difficulty. There were simply too many cases, and each year added its frightening harvest to the appalling glut. A precedent-based, largely non-statutory system could not long continue to operate under such pressures.¹⁹

B. The Development of the West Digest

In 1887, West began annual publication of the *American Digest*, a comprehensive national scheme designed to facilitate access to the rapidly growing body of reports. If West's system for reporting opinions had exacerbated the problem of too many cases, the company's digests were intended to provide a solution for lawyers struggling to locate precedents. The *American Digest* was not the first comprehensive digest of American court opinions;²⁰ but was established as a continuation to the *U.S. Digest*, which included both retrospective coverage of cases "from earliest days to 1870" and annual volumes for cases decided after 1871.²¹ After purchasing the *U.S. Digest*

Thomas A. Woxland, "Forever Associated with the Practice of Law": *The Early Years of West Publishing Company*, Legal Reference Services Q., Spring 1985 at 115.

¹⁸ Berring, *Form Molds Substance*, *supra* note 10 at 22. According to Warren, the number of volumes of published reports had grown to nearly 3,800 by 1885. Warren, *supra* note 14 at 557.

¹⁹ Grant Gilmore, *The Ages of American Law* 59 (1977). Noting that "[a]fter the '70s the printed sources of law became a flood," Willard Hurst concluded that a common law legal system based on precedent, with numerous separate jurisdictions "was inherently costly to work with. It required time-taking search for authorities. It called for expensive law libraries." James Willard Hurst, *The Growth of American Law: The Law Makers* 308 (1950). Hanson wrote that "The phenomenal volume of American reports was due less to a principled intention to arm lawyers with a rich field to mine for potential precedent than to the ambition to make some money." Hanson, *supra* note 13 at 566.

²⁰ In 1882, J.L. High noted "the large and rapidly increasing number of digests, indispensable in the use of this otherwise chaotic mass of reports, . . . forming a large and imposing library in themselves." J. L. High, *What Shall be Done with the Reports*, 16 Am. L. Rev. 429, 434 (1882). For a brief early history of the West digests (from a company perspective), see Frederick G. Stutz, *Marking an Epoch*, 2 Am. L. School Rev. 171 (1908).

²¹ Marvin, *supra* note 17 at 68. In 1889, West purchased the rights to the *U.S. Digest* from its publisher and compiler and developed the *U.S. Digest* classification system into its own. Hicks, *Materials and Methods*, *supra* note 11 at 203. The principles of the *U.S. Digest* system were described by its creator in 1880. *Uniform Indexes*, 22 Alb. L.J. 179 (1880) (Letter to the Editor from Benjamin Vaughn Abbott, Aug. 18, 1880). West always acknowledged the role of Abbott's system as the forerunner to its own. See, e.g., *Preface*, 1 Century Edition of the *American Digest* iv (1897) [hereinafter, Century Edition] (noting the roots of the *Century Edition* classification system in the *U.S. Digest*); Marvin, *supra* note 17 at 68 (noting that the *American Digest* was "planned as a direct continuation of the *U.S. Digest*.").

Hicks notes that the *American Digest* was also known initially as the third series of the *U.S. Digest*. Hicks, *Materials and Methods*, *supra* note 11 at 271. The *Complete Digest* (1887–1889) combined with the *American Digest* in 1890. Lawyer's Co-op's *General Digest* (1890–1907) was published after 1899 "in conjunction" with the *American Digest*. Note, *Consolidation of the American Digest and the General Digest*, 34 Am. L. Rev. 243, 243 (1900). See also John Doyle, *WESTLAW and the American Digest Classification Scheme*, 84 Law. Libr. J. 229, 231–32 (1992).

and another competing publication, the *Complete Digest*,²² in 1897 West began publishing the *Century Edition of the American Digest*, billed in its subtitle as “A Complete Digest of all Reported American Cases from the Earliest Times to 1896.”²³ The 50 volume set was completed in 1904, after which West continued to issue annual volumes of the *American Digest*, then decennial cumulations. The *First Decennial Digest*, covering cases from 1897–1906, incorporated the West key number classification system,²⁴ which provided the framework for organizing and finding the cases indexed in the company’s later digests. Eventually West published digests corresponding to its regional reporters of state decisions, as well as digests for individual states, the federal courts, and the U.S. Supreme Court.

West’s first annual *American Digest* volumes did not include indexes to either the classification system or the cases it digested. Starting in 1887, the annual cumulations were organized alphabetically by topic with an alphabetical table of contents indicating the numbers of digest paragraphs listed under each main head. Starting in 1890, the tables of contents included a note pointing out that, in addition to the main heads, the *Digest* included “thousands of SPECIFIC cross-references, carrying the researcher DIRECTLY TO THE PARAGRAPHS for which he is seeking.”²⁵

In 1897, West issued the first of the 50 volumes that would make up the *Century Edition of the American Digest*, completing the set in 1904.²⁶ The spine of each volume of the *Century Edition* notes the range of topics or titles included in that volume: the spine of volume 26, for example, indicates that it includes titles from Homicide through Imprisonment. The volume also includes an alphabetical list of the titles it includes.²⁷ Two of those titles: Homicide, and Husband and Wife are main heads; the others are cross-reference heads which refer the researcher to main heads throughout the set. The main heads have scope notes and are analyzed with detailed outlines leading to section numbers with references to cases and summaries. The scope note for Homicide defines what is covered and provides the titles of main heads for related topics that it doesn’t cover: Suicide, Conspiracy, Bail, and Death.²⁸ There is also a list of cross-references to other topics. The individual volumes of the *Century Edition* do not include an outline of the full classification system or an alphabetical list of all main heads.²⁹ Volume 50 includes a comprehensive index of the main heads and cross-reference heads for the entire set with references to specific sections of main heads.³⁰

²² In addition to purchasing the *Complete Digest*, West also hired its editor, John A. Mallory, who is credited as the creator of the classification system used in the *Century Edition* and the key number system introduced in the *First Decennial Digest*. Marvin *supra* note 17 at 70.

²³ 1 *Century Edition*, *supra* note 21 at [i] (1897).

²⁴ Marvin, *supra* note 17 at 79.

²⁵ See, e.g., 1 *Am. Digest* vii (1890).

²⁶ The set in the Goodson Law Library at Duke appears to be an original edition.

²⁷ 26 *Century Edition*, *supra* note 21 at iii (1904).

²⁸ *Id.* at 1–2.

²⁹ Beginning in 1897, West did publish several editions of a guide to the classification system for indexers. See, e.g., *American Digest Classification Scheme: A Logical Analysis of the Law for the Use of Indexers and Digest Makers* (1897). The guides included an explanation of the classification scheme, the digest headings, and scope notes. A similar guide was published in the first edition of *Brief Making and the Use of Law Books*. See Nathan Abbott, ed., *Brief Making and the Use of Law Books* 189 (1906)[hereinafter *Brief Making* (1906)].

³⁰ 50 *Century Edition*, *supra* note 21 at 1865–66.

The researcher could therefore enter the *Century Edition* by choosing a volume likely to include main heads or cross-reference heads for the topic being researched, or (after it was published in 1904) by consulting the comprehensive index. Either approach would lead to cases relevant to the research topic, but neither provided much context for what was found. Placed alphabetically with the other main heads, Homicide reveals little about its relationship to the other heads classified under the broader topic: Crime. If the researcher were interested in something as specific as claims of self-defense, the comprehensive index refers directly to sections 138–176 under Homicide, each of which covers a specific aspect of self-defense, such as section 170 (“Duty to retreat when attack is on one’s own premises”), but it bypasses the scope note and analysis for Homicide.

In either situation, the researcher could broaden the inquiry and learn more about the law of homicide or, with a bit more effort, learn how the topic Homicide fit into the overall classification scheme, but there is no way we can know whether or how often this happened. Would the lawyers of the late nineteenth century and early twentieth century have seen much value in such exercises after the digest had already taken them directly to cases on point for their research?

In 1904, West included a 450 page index to all fifty volumes in the final volume of the *Century Edition of the American Digest*. The index entries were made up of the *Century Edition*’s “Main Heads, and Cross-Reference Heads with the references thereunder.”³¹ In contrast, upon completion of the first Decennial Digest in 1912, the company published a 2,000 page Descriptive Word Index to the Decennial. An early advertisement for the new index noted that it included “words and terms descriptive of the persons, places and things, as well as of the crimes, torts, contracts and remedies which have been the subject of litigation.”³² The descriptive word indexes thereby allowed lawyers to search for cases using factual terms and others beyond those that were elements of the digest classification, and to go directly to specific key numbers listing cases useful to their research. Although the advertisement described the classification system as “simplicity itself,” it pointed out that the Descriptive Word Index would aid searchers who asked “[h]ow do I find the Key-Number for the proposition which I am investigating?” but were “not familiar with [the system’s] logical and scientific arrangement.”³³ How would these lawyers be influenced by the classification system if they followed an approach that allowed or perhaps encouraged them to avoid using it to locate cases?

C. Distinguishing Classification Systems and Indexes

In thinking about the possible influences of the West digests on the thinking of individual lawyers, it is helpful to consider the distinctions between classification systems and indexes. As explained by Allan Hanson, a classification system “reflects ideas about meaningful relationships among the parts in the body of information being classified”; an index, on the other hand, is a finding device and “conveys nothing about relationships that may exist among different topics.”³⁴ Hanson saw West’s system as a “classified index,” which served both the classification and indexing functions. As a result, “the taxonomic classifications built into print research tools

³¹ 50 *Century Edition*, *supra* note 21 at 1866–67.

³² *Advertisement: Editorial by the Advertising Manager*, 1 Docket (West) [n.p.] (Sept. 1912). The title page of the Index itself described it as “A means of finding the authorities in point through the words descriptive of the legal principles or of the facts in the case.”

³³ *Id.*

³⁴ Hanson, *supra* note 13 at 574.

promote a view of the law as a hierarchically organized system based on general principles.”³⁵ This view applies generally accepted ideas about the influences of categories and classifications to the digests. It also supports Berring’s arguments regarding the digest’s influences.³⁶

In the nineteenth century, American lawyers had to rely on the “classified indexes” of digest classification systems to locate cases relevant to the problems they were researching. Although some pre-West digests included separate alphabetical lists of headings that could take the researcher directly to a useful topic in the classification system, they were not considered primary means of entrance into the system. The Abbott brothers’ 1877 digest of New York state cases, for example, included a comprehensive index to the entire five volume set, but the compilers advised its users that “[f]or the most part, *the book is its own Index*. For a clue to the place where any topic is treated at length, the reader must resort, in the first instance, to the body of the work [and] its alphabetical arrangement....” The index was to be used for the limited purposes of locating “kindred points” or “matters that belong to no one title of the law.”³⁷

Until other publishers started to adopt West’s classification system in the late nineteenth century,³⁸ digests were arranged according to the individual and perhaps idiosyncratic systems of each editor, creating problems of inconsistency that became more apparent as the amount of case law continued to grow. In 1896, the ABA Committee on Law Reporting and Digesting, which was generally favorable to the efforts of commercial law book publishers, criticized the available digests and indexes for problems of inconsistency and poor arrangement:

Each digester and every reporter seems to have adopted a plan which seemed best and most convenient to him, without much regard to the views of others engaged in the same work, and in many cases with but little attention to the convenience of those for whose use the work is intended.³⁹

In 1898 the ABA Committee’s report again emphasized the importance of consistency and noted that “[i]t does not matter so much what plan of classification is adopted as that we shall know clearly what the plan is, and that the same plan is always followed.” The report then pointed out that the digest’s purpose “is to enable any lawyer to find any point in any decision, and the most essential feature of all is a full index in addition to this alphabetical order of topics.”⁴⁰

³⁵ *Id.*

³⁶ See, e.g., Gregory S. Alexander, *The Transformation of Trusts as a Legal Category, 1800–1914*, 5 *Law & Hist. Rev.* 303 (1987); Geoffrey C. Bowker & Susan Leigh Star, *Sorting Things Out: Classification and its Consequences* (1999). Berring relied on Bowker and Star in arguing that, as a classification system matures, initial decisions made regarding its construction tend to be forgotten, and the system is seen as authoritative and “simply describ[ing] the universe.” Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 *J. App. Prac. & Process* 305, 310 (2000) [hereinafter, Berring, *Thinkable Thoughts*], citing Bowker & Star, *supra* at 33.

³⁷ 6 Benjamin Vaughan Abbott & Austin Abbott, *A Digest of New York Statutes and Reports, from the Earliest Period* 669 (new ed. 1877).

³⁸ See *Report of the Committee on Law Reporting and Digesting*, 23 *Ann. Rep. A.B.A.* 376, 376–77 (1900) (describing increasing use of West’s classification system by other publishers).

³⁹ *Report of Committee on Law Reporting and Digesting*, 19 *Ann. Rep. A.B.A.* 398, 401(1896). The Committee found only one attempt to create a system that could be used as the basis for a common system: a “Table of Subjects and Cross References for Legal Indexes” prepared by the reporter of the New York Supreme Court, Marcus Hun. *Id.* at 401.

⁴⁰ *Report of the Committee on Law Reporting and Digesting*, 21 *Ann. Rep. A.B.A.* 437, 449 (1898).

III. Berring's Ideas on the Influence of the West Digest

Berring argued that, because American lawyers relied on West's digests to locate the information they needed for their daily work, they came to think about the law through the concepts embodied in the digest classification system. In 1986, he pointed out that the system "not only enabled lawyers to research cases by subject, it also allowed and encouraged lawyers to fit every legal issue into a certain conceptual framework."⁴¹ "The location of issues and cases in the digests provided "a substantive context, a setting that told the searcher the meaning of the case as much as did the opinion itself."⁴² In terms of the system's long-term impacts on American law:

Over the 110 years of the West era, the West System became so embedded in legal thought that it became invisible. We thought in West terms, we discussed law in West categories. . . . Without realizing it, we all depended on West for giving us ways to think coherently about the hundreds of thousands of cases that were stuffed into the reporters.⁴³

Over time, the system "became staggeringly complex and soon was understandable only to its makers,"⁴⁴ but "[t]he beautiful part was that they did not have to fully understand how it worked The categories established by the Digest system were deeply ingrained."⁴⁵ As a result, "Generations of lawyers learned to conceptualize legal problems using the categories of the Topics and Key Numbers of the American Digest System."⁴⁶ Although only a few "ever truly mastered

In 1901, the *Harvard Law Review* published a short review of recent advance sheets of Lawyers' Co-op's *General Digest* and West's *American Digest*, finding them to fail in "furnishing an index of current case law." *Book Review, General Digest, American and English, BiMonthly Advance Sheets (June 1901); American Digest, Advance Sheets (June 1901)*, 15 Harv. L. Rev. 245, 245 (1901). The reviewer's harshest criticisms regarded the digests' arrangement:

Nor is the arrangement of these works well adapted to an index. In an orderly statement of legal principles the number of main divisions is comparatively few. An index of this kind, however, aiming not to state principles but to afford access to scattered cases and discussions, for its different purpose requires a different arrangement. One consults it to find material in the volumes indexed bearing upon some particular point. He thinks of that point by its special name, and not by the name of that large division of the law under which it may belong in a scientific classification.

Id. at 245–46.

⁴¹ Berring, *Full-Text Databases*, *supra* note 7 at 32.

⁴² *Id.* at 54.

⁴³ Robert C. Berring, *Ring Dang Doo*, 1 Green Bag 2d 3, 3 (1997). Berring noted that the "confluence" of Blackstone's scientific structure of the law, the curriculum of modern legal education that developed in the last quarter of the nineteenth century at Harvard, and the West Digest System all contributed to what came to be seen as an inevitable way to classify legal concepts. The conceptual universe "present[ed] itself as the law." Berring, *Thinkable Thoughts*, *supra* note 36 at 311. *See also* Hanson, *supra* note 13 at 570 (noting that "[t]he basic first-year law school curriculum . . . was designed according to the same basic categories of law that informed the West digest.").

At about the same, Gregory Alexander expressed similar ideas regarding the general power of categorical systems: "By 'making sense' of the vast content of the legal system, they direct our attention and shape our perception of legal norms. . . . The order that they impose on legal concepts reflects what we can loosely call a world-view, i.e., a coherent bundles [sic] of beliefs about the legal system and society in general." Alexander, *supra* note 36 at 314.

⁴⁴ Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 Cal. L. Rev. 1673, 1693 (2000) [hereinafter Berring, *Cognitive Authority*].

⁴⁵ *Id.* at 1694.

⁴⁶ *Id.* at 1693.

the Digest System... [t]he average practitioner learned how to work with parts of the system. She discovered how to use the available Key Number tags in a rudimentary way, and it was fine.”⁴⁷

Berring’s thoughts about the influences of the digest system on the thinking of American lawyers were echoed in the work of other writers exploring how free-text online systems such as Lexis and Westlaw would impact lawyers’ research practices. Together with works by contemporaries Ethan Katsh, Dan Dabney, Richard Delgado and Jean Stefancic, Steve Barkan, and others, Berring’s writings form a core body of literature that must be considered by anyone hoping to write seriously about the history and role of legal information in the United States.⁴⁸

His ideas have also continued to resonate in the works of many later writers, some of whom have described the extent of the digest’s influences in categorical terms.⁴⁹ In 1993, the first Research Agenda of the American Association of Law Libraries included a topic which assumed that print digests had been influential in the development of American law: “What will be the

⁴⁷ *Id.* at 1693, 1694.

⁴⁸ See generally Danner, *Development of American Law*, *supra* note 6.

⁴⁹ Barbara Bintliff, *From Creativity to Computerese: Thinking Like a Lawyer in the Computer Age*, 88 *Law Libr. J.* 338, 341 (1996) ([hereinafter, Bintliff, *Creativity*]) (“The classification scheme used by West has organized the law, and guided our thinking, since 1896.”); Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift*, 93 *Law Libr. J.* 285, 287 (2001) (“the digest classification scheme is learned by successive generations of law school students; this comprehensive classification of the law underlies the attorney’s approach to the law.”); Sabrina Sondhi, *Should We Care If the Case Digest Disappears?: A Retrospective Analysis and the Future of Legal Research Instruction*, *Legal Reference Services Q.* 263, 265 (2009) (“Because law students and practitioners used the West key number digests to parse and understand legal precedent, the West organizational structure shaped their general thinking about law itself [and] helped shape the law by virtue of being the conceptual framework by which lawyers and judges thought about issues.”).

See also Patti Ogden, *Mastering the Lawless Science of Our Law: A Story of Legal Citation Indexes*, 85 *Law Libr. J.* 1, 44 (1993) (“The creaky West Digest system ... is grounded in the notion that there is an underlying structure of American law. Some argue that there is no structure other than that imposed over the years by the West editors.”)(citing Berring); Jill Anne Farmer, *A Poststructuralist Analysis of the Legal Research Process*, 85 *Law Libr. J.* 391, 397 (1993) (West’s “process has had an enormous impact on legal scholarship, so much so that ‘the National Digest system [sic] has molded and narrowed the way we conceptualize law.’”) (quoting Berring & Kathleen Vanden Heuvel); George S. Grossman, *supra* note 15 at 79 (“The systematization involved in the West key-number system may be largely responsible for rendering the common law manageable enough to survive in the United States.”)(citing Berring); David G. Post, *Plugging In, The Law is Where You Find It*, *American Lawyer*, Mar. 1996, available at <http://www.temple.edu/lawschool/dpost/Where.html> (the West digest system “was far more than just a convenient way to find the law; in many ways it was the law.... [U]nlike most maps it actually helped to shape the very features of the landscape that it was supposedly mapping.”)(citing Berring); Samuel E. Trosow, *The Database and the Fields of Law: Are There New Divisions of Labor*, 96 *Law Libr. J.* 63, 66 (2004) (“Berring argues that the impact of databases like LexisNexis and Westlaw is much deeper in that it involves a change in the structure of the legal literature.”); Spencer L. Simons, *Navigating through the Fog: Teaching Legal Research and Writing Students to Master Indeterminacy through Structure and Process*, 56 *J. Legal Educ.* 356, 360 (2006) (“Robert Berring argued that the hierarchical taxonomy of the Digest System had actually become the American lawyer’s mental model of the law....”); Barbara Bintliff, *Context and Legal Research*, 99 *Law Libr. J.* 251 (2007) (“Bob Berring writes of how the grand hierarchical scheme imposed on American law by the digest system developed by the West Publishing Company structured the research and analysis processes of generations of lawyers and actually shaped the substantive law over time.”); Hanson, *supra* note 13 at 570 (“The key number system in particular, Berring argues, enjoyed a significance extending far beyond mere case retrieval.”); Matthew C. Cordon, *Task Mastery in Legal Research Instruction*, 103 *Law Libr. J.* 403 (2011) (“Berring commented in 1994 that digital information would cause the legal research universe to collapse. Most of this universe was based on the West Digest System, which created the hierarchical structure that not only established the basic means of organization of case law, but also ‘remade the structure of legal thinking....’”).

effects of increased reliance on electronic research on the development of the law, once researchers are no longer tied to the structures of the digest and other indexing systems?”⁵⁰

IV. The Challenges of Berring’s Ideas

A. *The Influences of Electronic Research Tools*

Berring’s thesis regarding the influences of the digest and other forms of legal publication on the law and American lawyers is appealing and well-grounded in his extensive knowledge of nineteenth and early twentieth century legal history. But did he prove his thesis? In 2004 Jim Milles wrote that “Berring has exhaustively demonstrated the influence of print-based classification schemes, particularly the West digest system ... on American law....”⁵¹ Yet, Berring wrote little about how practicing lawyers used West digests, or how those uses served to influence their thinking. How does one show what influences research tools might have on lawyers’ thinking about the law at any time, either at the start of the West era or during the late twentieth century when print digests began to be bypassed in favor of electronic tools?

Some contemporary commentators questioned whether print research tools could have had the degree of influence Berring and others suggested. In 1994, Nazareth Pantaloni observed the growing consensus about the importance of legal research tools in the development of the law and warned against attributing too much power to the roles of indexes and digests in molding the law.⁵² After examining how indexes are used in other disciplines, Pantaloni concluded that “perceptions of the influence of indexes on the law suffers [sic] from the same notion of technological determinism that plagues the writing about legal databases. While legal indexes may have influenced the conceptual coherence of the law, they are as much a product as a progenitor of that conceptual structure.”⁵³

Responding to concerns about the impacts of free text electronic searching, Pantaloni cautioned that “[t]o suggest that the absence of indexes will undermine the structural coherence of the law ascribes too much significance to indexes and fails to recognize other normalizing practices in the law.”⁵⁴

In 2002, Richard Ross expressed similar cautions regarding claims about the impacts of print on past development of the law and predictions about the possible effects of electronic media on its future.⁵⁵ Although Ross did not discuss Berring’s work, his review of other scholarship is important to discussion of Berring’s ideas. Reviewing works by Ethan Katsh and by K.L. Collins and David Skover, Ross placed those authors within “a particular theoretical tradition” which

⁵⁰ Nancy C. Carter, *AALL Research Agenda and Grants Program*, 25 AALL Newsl. 92, 92 (1993).

⁵¹ James G. Milles, *Leaky Boundaries and the Decline of the Autonomous Law School Library*, 96 Law Libr. J. 387, 410 n.139 (2004).

⁵² Nazareth A. M. Pantaloni, III, *Legal Databases, Legal Epistemology, and the Legal Order*, 86 Law Libr. J. 679, 682 (1994).

⁵³ *Id.* at 698–99.

⁵⁴ *Id.* at 700 (citing Lloyd A. Fallers, *Law without Precedent* 35 (1969)).

⁵⁵ Richard J. Ross, *Communications Revolutions and Legal Culture: An Elusive Relationship*, 27 Law & Soc. Inquiry 637 (2002) (reviewing M. Ethan Katsh, *The Electronic Media and the Transformation of Law* (1989); M. Ethan Katsh, *Law in a Digital World* (1995); Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 Stan. L. Rev. 509 (1992)).

assumed that computers and the Internet will have relatively direct, linear, powerful, and unmediated effects on legal thought and practice.”⁵⁶ For Ross, scholars writing in this tradition tended to isolate “the medium as an independent variable that produces identifiable effects,” and failed to recognize that “[t]he effects of a medium prove difficult to extricate from the attributes and processes of the society in which is embedded.”⁵⁷ A medium’s influences on society are “fully” a product of how the system is used in the society.⁵⁸

In 1995, anticipating the possible impacts of hypertext on legal research, Eugene Volokh suggested that technological change might not change the research process as much as some anticipated. With hypertext: “You’ll end up reading little about some things—the things you know already or the things that aren’t relevant to your problem—and a lot about other topics in which you’re more interested. Your experience will be tailored to your particular problem....” Would this be a change? Volokh thought not, adding:

[P]eople—especially lawyers doing research—have always read books this way. Lawyers don’t read treatises cover to cover. They find the chapter they need, maybe read some material at the beginning of the chapter, and then go to the subsection that’s relevant to them. Even when reading cases, they often skip over some issues and go directly to others.⁵⁹

Volokh did not discuss case law research specifically, but his comments would seem to apply to lawyers’ use of digests as well as other print resources.

B. How Do Lawyers Use Digests?

No one questions the power of the West classification system for locating cases or its importance as an indexing and organizing tool, especially for late nineteenth century lawyers faced with the burgeoning numbers of reported cases issued by growing numbers of American courts. Yet, it would seem that an argument claiming that the digest also influences lawyers’ thinking about the law should demonstrate how their use of the digest in conducting research influences them.

In 1986, Berring succinctly described the now familiar West classification system:

The Digest classified all areas of law into seven broad categories. These categories were then subdivided into some four hundred and thirty topics. Each topic was then further subdivided into subsections called “Key Numbers” (a trademarked term). These Key Numbers allowed the topic to be broken into as many subdivisions as were necessary to completely cover that area of the law. Eventually, a structure of subject headings was created which provided for every possible legal issue.⁶⁰

⁵⁶ *Id.* at 639.

⁵⁷ *Id.* at 647.

⁵⁸ *Id.* at 661.

⁵⁹ Eugene Volokh, *Technology and the Future of Law*, 47 *Stan. L. Rev.* 1375, 1392–93 (1995). “[E]ven briefs usually have tables of contents and of authorities, precisely so readers may focus on the issues they find most important.” *Id.* at 1393 n.109.

⁶⁰ Berring, *Full-Text Databases*, *supra* note 7 at 31–32.

In 2000 he wrote that the average practitioner had not mastered the classification system, but knew how to use parts of it.⁶¹ But for the digest to influence a lawyer's thinking, would not that lawyer need to be exposed to more of its classification structure than the parts needed to solve an immediate problem ?

In 1996, Barbara Bintliff explained how the process of using the digest might influence a researcher: First, “[u]sing a combination of legal terminology and major ‘fact words,’ we located the key number suggested by the facts of our situation. Then, by sorting through brief descriptions of the many other cases included under that same point of law, we were able to identify the rule (or rules) which were applicable to our situation.” To be effective, however, the researcher would then examine cases classified under related key numbers in order to gain “a better understanding of the context and nature of the rules.”⁶² In line with Berring's thinking, Bintliff wrote: “To use the digest, you have to think in terms that match its organization; you have to think of rules and hierarchies. The digest's organization follows the same pattern as our legal reasoning process, and has almost come to be the physical manifestation of ‘thinking like a lawyer.’”⁶³

For Bintliff, the research process changed with the advent of computer-based legal research systems, which encouraged researchers to limit their research to the sorts of fact-based inquiries for which computers are best suited and discouraged them from looking beyond individual cases to see the context provided in the print digests: “It's as if we completely forget our traditional legal reasoning training Once we have our list of fact-based case citations, we begin the task of harmonizing the rules they suggest, in effect devising a framework of facts. We never seem to consider locating the larger, existing framework of rules.”⁶⁴

In 1990 Peter Schanck had questioned whether practicing lawyers actually used the digest in the way Bintliff later described.⁶⁵ Steve Barkan had cited Berring and others in an article discussing the applications of Critical Legal Studies to legal research for “solid claims that West helped shape the nature of American law” and suggested the need to examine more closely the relationships between legal information resources and the substantive development of the law.⁶⁶ In reply, Schanck argued that Barkan's (and Berring's) positions regarding the impacts of digests and other tools were based on mistaken ideas about how attorneys actually conduct research.⁶⁷ Schanck

⁶¹ Berring, *Cognitive Authority*, *supra* note 44 at 1693, 1694.

⁶² Bintliff, *Creativity*, *supra* note 49 at 342.

⁶³ *Id.* at 343. Comparing the print West digests to Westlaw in 1992, John Doyle described the tools available to the print digest user: “a topical arrangement (including topical cross-references), a scope note for each topic showing subject inclusions and related topics, a subdivision analysis for each topic, translation tables between reclassified topics, and a word index.” Doyle *supra* note 21 at 256. Bast and Pyle saw this process as time-consuming: because the key number system is so deeply layered, “a researcher looking for a case first must locate the correct topic and then follow through all the layers in the outline before locating the case on point.” Bast & Pyle, *supra* note 49 at 290.

⁶⁴ Bintliff, *Creativity*, *supra* note 49 at 348.

⁶⁵ Peter C. Schanck, *Taking Up Barkan's Challenge: Looking at the Judicial Process and Legal Research*, 82 *Law Libr. J.* 19 (1990).

⁶⁶ Steven M. Barkan, *Deconstructing Legal Research: A Law Librarian's Commentary on Critical Legal Studies* 79 *Law Libr. J.* 617, 633 (1987) (citing Gilmore, *supra* note 21 at 58–59; Martin Mayer, *The Lawyers* 431 (1967); Robert B. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, at 132–33 (1983); Berring, *Full-Text Databases*, *supra* note 7, at 32–34, 36).

⁶⁷ Barkan later suggested that Schanck's disagreement might be with Berring's writings on the role of the West digests, rather than with Barkan himself. Steven M. Barkan, *Response to Schanck: On the Need for Critical Law*

listed several reasons why “key numbers, headnotes, indexes, and so forth have had little or no impact on either the content of our law or our understanding of the legal system”:

First, when conducting their research, attorneys tend to use more than one system, and often use several.... This approach tends to ... to expose the researcher to a variety of nondigest classifications....

Second, I have met a number of lawyers who, for various reasons, claim never to use digests....

Third, lawyers tend to concentrate more on the facts of their cases than on abstract doctrines. In so doing, they prefer searching descriptive word indexes over topical analyses, and they search the indexes as much for factual terms as for legal concepts.⁶⁸

Fourth, my impression is that key number classifications have minimal influence over the way lawyers perceive the law, even in instances when they use digests exclusively. They will tend to scan all or most of the cases under several key numbers and, in the process, pay little attention to the designations assigned to the categories. They then organize the precedents according to the particularities of their own cases and develop arguments based on those precedents. By this final stage, the West structure is long forgotten and its effects negligible.⁶⁹

Schanck admitted that his claims were based largely on his own experiences. He also failed to consider other scholarship which suggested that lawyers and others might not always be conscious of the influences of their tools.⁷⁰ Yet, his alternative view to those of Berring and later Bintliff regarding how lawyers used digests in practice made it harder to see how digests might influence lawyers’ thinking. Schanck also underlined the need to better understand how lawyers use those tools before drawing conclusions about their influences. Barkan himself had pointed out that “[r]emarkably little...has been written about these subjects,”⁷¹ a comment which echoed Morris Cohen’s broader 1969 statement “that we know a great deal about the materials of legal research, ... but almost nothing about the actual procedures used by lawyers in their search into the law.”⁷²

In fact, much of the published literature on legal research has focused less on efforts to understand how lawyers conduct research in practice than on collecting the opinions of law

Librarianship, or Are We All Legal Realists Now? 82 Law Libr. J. 23, 30 n.35 (1990) [hereinafter, Barkan, *Response*].

⁶⁸ See also Post, *supra* note 49:

[W]e all now [sic] that the most useful piece of information we can find is information on how the legal system has dealt with analogous constellations of facts in the past. That's the golden nugget, the case "on all fours" with the facts of our client's current situation from which we can make reasonably reliable predictions about what a court will do when faced with those facts. *But, of course, that's precisely the kind of information that was virtually inaccessible under previously-existing retrieval systems.* The indexers didn't index facts, they indexed propositions of law.

⁶⁹ Schanck, *supra* note 65 at 17–19.

⁷⁰ See e.g., Alexander, *supra* note 36 at 303.

⁷¹ Barkan, *Response*, *supra* note 67 at 633.

⁷² Cohen, *Research Habits*, *supra* note 11 at 183. See also Stephanie Davidson, *Way Beyond Legal Research: Understanding the Research Habits of Legal Scholars*, 102 Law Libr. J. 561, 564 (2010) (“Law librarians have not yet fully explored how attorneys or legal scholars conduct legal research.”) See *id.* at n.11 for similar observations.

librarians, attorneys, and judges about which research skills are most important and whether or not newer attorneys possess them.⁷³ Although some newer empirical studies indicate that we will know more about lawyers' research practices going forward,⁷⁴ there is nothing comparable for the past.

V. The Legal Environment of the Late Nineteenth and Early Twentieth Century

It is difficult to do more than speculate about how lawyers used print digests and what influences the digest classification system might have had on their thinking about the law. This is particularly true for the long-ago period in which the American Digest and the West classification system were introduced to American lawyers. Yet, placing the question in historical perspective lends some insight into how lawyers of the time approached case law research. Three aspects of the late nineteenth century legal environment are particularly instructive: (1) contemporary concerns regarding the phenomenon known as the “case lawyer”; (2) the bar’s discussions about the purposes of classification of the law; and (3) what West’s own representatives said about how to use its digests. An examination of each suggests that the bar was interested mostly in locating cases specifically on point to support their arguments in the problem at hand.

A. *The Cases and The Facts*

Some sense of how nineteenth century print-era lawyers approached their research might be gained by looking briefly at the history of the term “case-lawyer,” which appeared in Anglo-American legal journals throughout the nineteenth century and into the twentieth. Occasionally,

⁷³ The literature is well-reviewed in Patrick Meyer, *Law Firm Legal Research Requirements for New Attorneys*, 101 *Law Libr. J.* 297, 302–10 (2009); see also Paul Douglas Callister, *Beyond Training: Law Librarianship's Quest for the Pedagogy of Legal Research Education*, 95 *Law Libr. J.* 7, 9–11 (2003). For a list of papers applying empirical research into legal research and other law-related information behavior, see Robert Richards, *Legal Information Systems and Legal Information Resources: Information Behavior (Selected)*, <http://www.personal.psu.edu/rcr5122/InformationBehavior.html> (last visited Nov. 20, 2013). Richards' list suggests that the surveys reported by Cohen in 1969 are perhaps the earliest empirical studies of how lawyers conduct research.

⁷⁴ In 2009 Judith Lihosit published a suggestive discussion of present research practices, based on interviews with a small group of San Diego attorneys. Judith Lihosit, *Research in the Wild: CALR and the Role of Informal Apprenticeship in Attorney Training*, 101 *Law Libr. J.* 157 (2009). Lihosit's interviewees did not use print digests and only “loosely” used their online equivalents, leading her to conclude that the digest did not play “an important role in helping attorneys determine the controlling legal concepts and principles in the cases they handle.... attorneys develop their knowledge base from distributed social networks, ... the present-day manifestation of the apprenticeship system, rather than from any individual and controlled textual source such as the digest.” *Id.* at 258. In 2010, Joe Custer published the results of a survey of Kansas lawyers and law faculty, intended to test Schanck's arguments. Although Custer viewed the results as supporting Schanck's contention that the digest was less influential than some had claimed, he also noted shortcomings in his methodology. Joseph A. Custer, *The Universe of Thinkable Thoughts versus the Facts of Empirical Research*, 102 *Law Libr. J.* 251, 264–65 (2010). Lee Peoples has tested law students' effectiveness in locating legal rules and cases using print digests and electronic tools. Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What is the Modern Researcher to Do*, 97 *Law Libr. J.* 661 (2005). Michelle Wu and Leslie Lee have reported on which sources law students consult first to locate particular types of information. Michelle M. Wu & Leslie A. Lee, *An Empirical Study on the Research and Critical Evaluation Skills of Law Students*, 31 *Legal Reference Services Q.* 205, 212 (2012). The 2012 survey reported by Lastres suggested that digests were little used by younger associates in law firms of small and large size. Lastres, *supra* note 1 at 5. The ABA Legal Technology Resource Center's annual survey, *supra* note 3, provides regular updates on lawyers' approaches to their research.

it was used to praise individual lawyers or judges and their approaches to practice. The good case lawyer not only knew the cases, but also how to apply them; he was “capable, first, of cracking the judicial nut itself, and, then, of using its contents effectively.”⁷⁵ In 1869, Justice Samuel Miller advised new law school graduates not to allow “fear of being called a case lawyer” to deter them “from the fullest investigation of every thing bearing on the case in hand.”⁷⁶

By the time Justice Miller spoke, however, the term was being used more often in disparagement than as praise. Journal articles published in 1851 pointed out that a “mere case lawyer” would neither be interested in a book describing the state of the law at an earlier time,⁷⁷ nor in journals that were “not confined strictly to what the mere plodding case lawyer would denominate legal Subjects.”⁷⁸ Another defined “case lawyer” as “a synonym for a narrow-minded, short-sighted pettifogger,” whose “practice of reasoning *from cases* instead of *from principles* ... degrades the profession, and fills the law with absurdities and injustice.”⁷⁹

Robert Ferguson has suggested that, as the amount of case law began to accumulate in mid-century, American lawyers were forced to shift from reliance on general principles to what Ferguson called “textbook law,” and to change how they approached their work:

The early lawyer searched for a declaration derived from common usage and consistent with nature. His successor, the reader of case reports, thought in terms of the specific commands that society had placed upon itself. Each had a particular approach to the printed page. The first looked for connections and resemblance; the second, for distinction and precision.⁸⁰

For Ferguson, lawyers who began practice in the 1840s and after “began to accept the overriding complexity of the law as an intellectual norm. ... It was enough to find the detail and application of the law without worrying about comprehensiveness and theoretical compatibilities.”⁸¹

After the Civil War, case lawyers were frequently criticized for their dedication to locating precedents directly on point with their cases without understanding the principles behind the decisions well enough to apply them to sets of facts not covered by direct precedents. Commenting later on the decline of the legal profession, John Dos Passos said of the case lawyer:

He knows little of elementary law, but he carries, as a soldier would a knapsack, a memory filled with sections of codes and adjudicated cases. A legal combat now consists of hurling provisions of the Code and "pat" precedents at each other. Hence the modern advocate's nose is always to be found in a digest, “case”-law accumulating so fast that he must have

⁷⁵ *The Civil Code of the State of New York, No. II*, 2 Alb. L.J. 408, 409 (1870).

⁷⁶ *The Study and Practice of the Law*, 2 Chi. Legal News 82, 82 (1869) (Address of Hon. Samuel F. Miller to the Graduates of the Law Department of Iowa University, 1869).

⁷⁷ *Notes*, 13 Monthly L. Rep. 322, 322 (1850–1851).

⁷⁸ *Jurisdiction of the Law*, 10 Am. L.J. 424, 424 (1851).

⁷⁹ *Nature and Method of Legal Studies*, 3 U.S. Monthly L. Mag. 491, 511 (1851).

⁸⁰ Robert A. Ferguson, *Law And Letters in American Culture* 200 (1984).

⁸¹ *Id.* at 287.

indices to search for his precedents. Poor soul! if he cannot find a precedent, he is in a terrible sweat.⁸²

From West Publishing Company's perspective, the primary value of comprehensive publication of judicial opinions and digests was that it enabled lawyers to find all cases on point to their research. As part of an 1889 *American Law Review* symposium of law publishers, John B. West said that when lawyers ask: "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 arises."⁸³ He continued: "I believe it is the principal business of American law publishers, to enable the legal profession to examine the American case law on any given subject, as easily, exhaustively, and economically as possible."⁸⁴ In 1892 the president of the ABA, Emlin McClain, stated his agreement, noting that the "practical lawyer" looks especially "to find the adjudications involving facts similar to those of his case...."⁸⁵ To locate those adjudications, "the constant business of the lawyer is to search text-books, digests and indexes."⁸⁶

John West believed that the problems involved in those searches had been minimized by the National Reporter System and its accompanying digests: "[t]he profession have now the immense advantage of being able to turn to a single set of reports and digests, and be sure of finding *everything* which the courts have said on any given subject up to the last decision just rendered."⁸⁷

Prominent lawyers voiced regrets over the changes they saw in the practice of American law as lawyers tried to deal with the ever-growing numbers of published decisions. Nineteenth century case lawyers (and "case judges")⁸⁸ were seen not only as placing more emphasis on precedent than principle, but also as being more concerned with the facts of earlier cases than on the law they expressed. In 1892, McClain noted that:

It is undoubtedly true that the practical lawyer is likely to attach too much importance to superficial similarity of facts in seeking cases which shall serve his purpose.... But after all, he does properly seek cases "on all fours" and value them more highly than those having only three points in common, involving, therefore, an argument as to whether the fourth is material. Three legs, it is well-known, furnish a less reliable support than four.⁸⁹

McClain's point was illustrated in an 1888 review of a new digest which suggested that case lawyers would be better called "fact lawyers" because of their obsession with finding precedential

⁸² John R. Dos Passos, *The American Lawyer As He Was—As He Is—As He Can Be* 13–14 (1907). In a 1914 memoir, New York lawyer Theron G. Strong noted that "the large number of adjudged cases contained in the reports has virtually transformed the profession from a class of lawyers able to practice without law books to a class almost entirely dependent on the adjudged cases." Theron G. Strong, *Landmarks of a Lawyer's Lifetime* 427 (1914).

⁸³ *Symposium of Law Publishers*, 23 Am. L. Rev. 396, 400 (1889) (written comments of George Soule, John B. West, and James E. Briggs).

⁸⁴ *Id.* at 401.

⁸⁵ Emlin McClain, *Classification of the Law for Lawyers*, 26 Am. L. Rev. 223, 223 (1892).

⁸⁶ *Id.* at 224.

⁸⁷ *Symposium*, *supra* note 83 at 403.

⁸⁸ See *Case Dependence in Judicial Opinions*, 18 Law Notes 182 (1915) ("We have heard much about the case lawyer. Shall we be guilty of lese-majesty if we say there are also case judges?").

⁸⁹ McClain, *supra* note 85 at 223–24.

cases with facts similar (or preferably identical) to their own cases. The reviewer found that the new digest would allow a lawyer to “fish in this ocean of decisions for what the hoosiers call ‘hog cases,’—cases which decide the same facts as the case in which he is counsel, and in a way favorable to his client.”⁹⁰ In 1898, a review of a collection of negligence cases pointed out the benefits of one feature: a table of cases classified by type of accident that “will delight the purely case lawyer.” The review elaborated on the hog case example, relating the story of “a country lawyer in Indiana at an early day,” who represented the plaintiff in an action of replevin for a hog. His opponent read “a case on all fours with the case at bar.” When he had finished, the plaintiff’s lawyer argued:

“This case is of no authority for the decision of the case before the court. This was a lawsuit about a cow. The case before the court is a lawsuit about a hog.” Then, turning to the defendant’s lawyer with a sneer, he said: “Bring us a Hog case.” The learned justice ruled that the point was well taken and gave judgment for the defendant [sic]. The moral of this is that, to the case lawyer and the case judge it is not enough to satisfy the doctrine of stare decisis that two cases are “on all fours with each other;” they must both be “hog cases.” The object of this classified table of cases is to give the strictly case lawyer a “hog case.”⁹¹

Whether accurately reported or not, the hog case stories clearly indicate the importance of fact-based research for lawyers of the period. In 1907, New York State Law Librarian Frank B. Gilbert noted that the lawyer of the time knew the facts of the case and in “this immense maze of reported judicial determinations he may well think there is a case with facts like his which, if found, will be conclusive upon the tribunal which he seeks to convince.”⁹²

Although many commentators decried the case lawyer, others recognized that, faced with the ever-increasing number of published cases, attorneys had no choice but to become case lawyers for fear that their opponents would find unfamiliar precedents that they could not counter. J.J. Willett told the Alabama Bar Association in 1893 that he had once viewed the lawyer who needed “a case to fit a case,” to be an “inferior lawyer.” However, experience had taught him that “the case lawyer is the most successful lawyer we have, and our most successful lawyers are getting to be nothing more than case lawyers.”⁹³ Arkansas judge U.M. Rose noted in an 1896 talk before the Virginia State Bar Association that, while “case lawyer” was once a term of reproach,

⁹⁰ *Book Review: The Complete Digest 1887, Part 1*, 22 Am. L. Rev. 952, 953 (1888).

⁹¹ *Book Review, American Negligence Cases; American Negligence Reports: Current Series*, 32 Am. L. Rev. 479, 480 (1898). (The story makes more sense if judgment had been entered for the plaintiff.) In similar fashion, a dissenting Louisiana judge explained why the lawyers in an unnamed “Western state” referred to precedential cases not as “on all fours,” but as “goose” cases:

The expression arose from the perplexity of a so-called ‘case lawyer,’ who was unprepared to advise his client whether he was liable in damages because his geese had trespassed on his neighbor’s lawn. The lawyer said he had found several cases where the owners were held liable because their horses, cows, sheep, goats, or dogs had committed acts of trespass; but he could not find a “goose case.” The distinction which he observed was that his “goose case” was not “on all fours.”

O’Neill, J., dissenting, *Taylor v. Allen*, 151 La. 82, 118, 91 So. 635, 648 (1921).

⁹² Frank B. Gilbert, *The Law Library: Address at a Joint Session [of AALL] with the American Library Association*, 1 Index to Legal Periodicals and Law Libr. J. 6, 9 (1908).

⁹³ J.J. Willett, *The Case Lawyer*, 1 Am. Law. 36, 36 (1893) (Transactions of the Sixteenth Annual Meeting of the Ala. Bar Ass’n).

now we are all either case lawyers, or are not lawyers at all. ... Our legal arguments are for the most part a mere casino-like matching and unmatching of cases, involving little or no intellectual effort. The law is ceasing to be a question of principles, and is becoming a mere question of patterns.⁹⁴

Rose's remarks would be echoed in Barbara Bintliff's later comments on the effects of computer-based systems on the research process.⁹⁵

The case lawyer's situation was perhaps best captured in an 1916 address by Solicitor General John W. Davis. Speaking before the Judicial Section of the ABA,⁹⁶ Davis quoted from a recent opinion that described the current bar as "an industrious, painstaking, far-reaching army of sleuths of the type of Sherlock Holmes, hunting some precedent in some case, confidently assured that if the search be long enough and far enough some apparently parallel case may be found to justify even the most absurd and ridiculous contention."⁹⁷

But Davis justified the lawyers' need to consider all published cases because of the courts' reliance on the binding force of judicial precedents: As a result, "the case lawyer ... is not wholly a self-made man.... He is rather the product of an environment and of circumstances which he is powerless of his own motion to change or greatly modify."⁹⁸ Davis summarized the case lawyer's dilemma:

Does not the case for the case lawyer come to this: that so long as the law is based upon precedents, so long as judges multiply them, and so long as printing presses issue them, just so long will the case lawyer spend his time in their collection, and just so long will he belabor the courts with the fagots he has thus industriously bound?⁹⁹

Faced with an increase from fewer than 1,000 volumes of published reports in 1850 to 11,500 by the time Davis spoke in 1916, how could lawyers not focus their research on finding cases directly on point to their problems, as efficiently as possible?

Expressions of nineteenth century concerns about the case lawyer suggest that American lawyers have long concentrated their research on locating cases on point to an immediate problem, rather than developing knowledge regarding the principles behind the cases.

⁹⁴ U.M. Rose, *The Present State of the Law*, 2 Va. L. Reg. 651, 656 (1897).

⁹⁵ See Bintliff, *Creativity*, *supra* note 49 at 348.

⁹⁶ John W. Davis, *The Case for the Case Lawyer*, 39 Ann. Rep. A.B.A. 757 (1916), reprinted at 3 Mass. L.Q. 99 (1918).

⁹⁷ State v. Rose, 106 N.E. 50, 52 (Ohio 1914), *quoted in id.* at 758.

⁹⁸ Davis, *supra* note 96 at 759.

⁹⁹ *Id.* at 761. Speaking to an audience of judges, Davis suggested that the judiciary write fewer full opinions, write shorter opinions, publish them more selectively, and cite fewer cases in their opinions. *Id.* at 767-68. He concluded with the admonishment: "the problem I am suggesting is yours and not another's. The remedy for these complaints, if there be one, must be one of your own devising." *Id.* at 768.

Speaking as president of the ABA in 1923, Davis hailed the creation of the American Law Institute, noting that escape from the "Serbonian bog" of the published law could likely be found "only in a frequent reversion to general principles, stated with the utmost simplicity and invested with all the authority that can be attained short of statutory enactment." John W. Davis, *Address of the President*, 46 Ann. Rep. A.B.A. 193, 196 (1923).

B. Classification and the ABA

Discussions about classification and arrangement of law were common among American lawyers from the last decades of the nineteenth century into the twentieth.¹⁰⁰ Gregory Alexander argues that the interest in classification during this period stemmed from several factors: the sense that the common law lacked a workable organization, which was more apparent after the procedural reforms of the mid-nineteenth century; the thought that classification of the law could be the means for law reform; and the notion that classifications attempted by late century treatise writers were inadequate.¹⁰¹ Legal academics provided much of the leadership in these discussions,¹⁰² but the organized bar also brought its concerns about the burgeoning number of published decisions into play.¹⁰³

At the second meeting of the American Bar Association in 1879, Edward J. Phelps used an address on the career of John Marshall to point out that: “[p]erplexed as the law has become with infinite legislation, confused and distracted with a multitude of incongruous and inconsistent precedents that no man can number, it is a different system now, although still the same in name, from that which Marshall dealt with.”¹⁰⁴ An 1884 address by John Dillon on American Institutions

¹⁰⁰ See Alexander, *supra* note 36 at 304, 306 (noting discussions in contemporary treatises, and among academics and elite lawyers). Alexander refers to 1870–1920 as the “classical” period, defining the term to include “all legal writers who contributed to the classification enterprise.” *Id.* at 304 n.5. See also Jay M. Feinman, *The Jurisprudence of Classification*, 41 *Stan. L. Rev.* 661, 663 n.4 (1989) (summarizing the legal classification literature).

¹⁰¹ Alexander *supra* note 36 at 310–13 (drawing on Thomas Grey, *Langdell’s Orthodoxy*, 45 *U. Pitt. L. Rev.* 1, 47–50 (1983)). On the effects of nineteenth century procedural reforms, see Joseph Lavitt, *Leaving Contemporary Legal Taxonomy*, 90 *Denver U. L. Rev.* 213, 240–55 (2012).

In 1888, Justice Miller found that “[m]ost of these modern treatises . . . 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.” Samuel F. Miller, *The Use and Value of Authorities*, 23 *Am. L. Rev.* 165, 165 (1889). Roscoe Pound found that the change from the doctrinally rich early nineteenth century treatises to books providing “mere key[s] to the cases” made the post-Civil War period “the nadir of American law book writing.” Roscoe Pound, *The Formative Era of American Law* 157 (1938).

Late nineteenth and early twentieth century writings on legal classification include: McClain, *supra* note 85; Russell H. Curtis, *Classification of Law*, *Annals of the American Academy of Political and Social Science*, Mar. 1894, at 42; Charles C. Lester, *Subject Classification of Reported Cases*, 20 *Yale L.J.* 372 (1911); Henry T. Terry, *Arrangement of the Law*, 15 *Ill. L. Rev.* 61 (1920); Arthur L. Corbin, *Terminology and Classification in Fundamental Jural Relations*, 4 *Am. L. Sch. Rev.* 607 (1921); Roscoe Pound, *Classification of Law*, 5 *Am. L. Sch. Rev.* 269 (1924) (address at the 21st annual meeting of the Association of American Law Schools; a discussion of the address appears in *Meeting of the American Association of Law Schools—1923*, 5 *Am. L. Sch. Rev.* 299, 321–23 (1924)); Roscoe Pound, *Classification of Law*, 37 *Harv. L. Rev.* 933 (1924); Albert Kocourek, *Classification of Law*, 11 *N.Y.U. L.Q. Rev.* 319 (1934); Albert Kocourek, *Code and Digest*, 18 *Ill. L. Rev.* 1024 (1934); Charles C. Ulrich, *Proposed Plan of Classification for the Law*, 4 *Mich. L. Rev.* 226 (1935); Urban A. Lavery, *Finding the Law: Legal Classification in America—1880–1940*, 25 *A.B.A. J.* 383 (1939); Jerome Hall, *Some Basic Questions Regarding Legal Classification for Professional and Scientific Purposes*, 5 *J. Legal Educ.* 329 (1953); Feinman, *supra* note 100. For an insightful discussion of classification as applied to law books, see the chapter: “Arrangement of Material in Law Books,” in Hicks, *Materials and Methods*, *supra* note 11 at 190.

¹⁰² Alexander *supra* note 36 at 308 (listing prominent legal academics interested in questions of classification).

¹⁰³ See *Report of the Committee on Jurisprudence and Law Reform*, 2 *Ann. Rep. A.B.A.* 193, 203–04 (1879). The bar’s concerns with the number of published reports would be discussed in speeches and other forums of the ABA and state bar associations for the next forty years. For a summary of the ABA’s activities regarding this matter, see Richard A. Danner, *The ABA, the AALL, and the AALS, and the “Duplication of Legal Publications,”* 104 *Law Libr. J.* 489–92 (2012).

¹⁰⁴ E.J. Phelps, *Annual Address*, 2 *Ann. Rep. A.B.A.* 173, 175 (1879).

and Laws sparked the Association's nascent interest in the impacts on American lawyers of what he termed the "multitudinous mass of decisions,"¹⁰⁵ by articulating his fear that the growing burden of too many cases would cause the common law system to "break down under its own ever-increasing and insupportable weight," eliminate the doctrine of precedent from American law and substitute the continental system, superseding the law reports by codification.¹⁰⁶ In 1886, Dillon delivered a paper requested by the Committee on Judicial Administration on "Law Reports and Law Reporting," in which he noted that "[t]here is no reason to doubt that the judicial reports will continue to increase as rapidly as ever, adding to the bulk and, to some extent, to the uncertainty of the law, and this will go on and on until the effect becomes at length insupportable."¹⁰⁷

In 1888, the ABA received a letter from Henry T. Terry, a New York lawyer and author, calling for an authoritative "complete scientific arrangement of the whole body of the law."¹⁰⁸ Terry argued that a classification project prepared under the authority of the ABA would both have practical benefits for the practicing bar and provide a frame-work to guide the future development of the law in a principled manner, while keeping it manageable and knowable.¹⁰⁹ For Terry, the practical end of making the law easier to find could not be accomplished unless "the arrangement possesses those characteristics which make it what, for lack of a better word, we may call philosophical."¹¹⁰ He argued that a scientific arrangement would "[e]specially ... be of service in providing a sufficient, uniform and easily understood arrangement for the digests and indexes upon which we are more and more compelled to rely in preparing cases."¹¹¹ At present, effective use of available digests was frustrated by each compiler's "use of his own peculiar scheme of arrangement," and the practice of "taking as heads of classification some of the names of catchwords that have become at all familiar to lawyers and arranging them alphabetically."¹¹² As a result, it was "inevitable that, as we now are, a digest must be arranged largely on the ground of superficial resemblances between the external circumstances of cases or proximate or derivative rules, rather than ultimate principles, since the ultimate principles themselves are often not clearly recognized."¹¹³

Terry proposed that the ABA appoint a committee to solicit and consider various plans of arrangement. Once adopted, the best plan would be published as an institutional work which "would take its place by the side of such books as Blackstone's or Kent's Commentaries, or rather would largely supersede them."¹¹⁴

¹⁰⁵ John F. Dillon, *Annual Address: American Institutions and Laws*, 7 Ann. Rep. A.B.A. 203, 227 (1884).

¹⁰⁶ *Id.* at 226.

¹⁰⁷ John F. Dillon, *Law Reports and Law Reporting*, 9 Ann. Rep. A.B.A. 257, 261 (1886).

¹⁰⁸ The letter was published in the following year's proceedings with the report of the Special Committee. See *Letter from Henry T. Terry to the American Bar Association, Aug. 1888*, 12 Ann. Rep. A.B.A. 327 (1889).

¹⁰⁹ *Id.* at 330.

¹¹⁰ *Id.* at 332. In 1870 Holmes had written: "Law is not a science, but is essentially empirical. Hence, although the general arrangement should be philosophical, even at the expense of disturbing prejudices, compromises with practical convenience are highly proper." [Oliver Wendell Holmes, Jr.], *Codes, and the Arrangement of the Law*, 5 Am. L. Rev. 1, 4 (1870).

¹¹¹ Terry, *supra* note 107 at 328.

¹¹² *Id.* at 328–29.

¹¹³ *Id.* at 330.

¹¹⁴ *Id.* at 338.

Terry's letter and questions regarding "the arrangement of the law" were referred to a new Special Committee on the Classification of the Law.¹¹⁵ In 1891, the Special Committee reported on Terry's proposal¹¹⁶ and the question of whether "an institutional work setting out the whole private and substantive law in some detail could be prepared under the direction of the Association."¹¹⁷

The Special Committee identified two primary purposes for classifying the law: one, to provide an orderly arrangement that would allow it to be comprehended as a whole; the other, to provide a convenient cataloging of the principle topics to collect authorities and allow precedents to be located. Significantly, however, the Committee saw those purposes as "not necessarily consistent," and concluded that "it will be found that they are not practically so."¹¹⁸ The theoretical divisions of the law found in scientific classifications "are too general for practical use and...the practical arrangement of topics for encyclopedias, digests and indexes [sic] is too limited for the purposes of the jurist."¹¹⁹ As a result, two classifications were needed and the practical classification consisting of "a well-defined list of topics or heads under which points decided by the courts may be arranged for convenient reference, is of the more general importance."¹²⁰

The Committee thus rejected the connection that Terry had drawn between the scientific and practical benefits of classifying the law. It devoted the rest of its report to possible divisions for a theoretical classification of the law, which might be used to develop a more detailed scheme in the future.¹²¹

¹¹⁵ *Transactions of the Eleventh Annual Meeting of the American Bar Association*, 11 Ann. Rep. A.B.A. 9, 22 (1888). Beyond requesting that the letter be published and to be continued, the new special committee took no actions in 1889. A draft report was circulated at that year's meeting of the ABA, but not finished because of the death of the committee chair. A new committee was appointed in 1890. *Transactions of the Thirteenth Annual Meeting of the American Bar Association*, 13 Ann. Rep. A.B.A. 3, 40–41 (1890).

¹¹⁶ *Transactions of the Fourteenth Annual Meeting of the American Bar Association*, 14 Ann. Rep. A.B.A. 55 (1891).

¹¹⁷ *Report of the Committee on Classification of the Law*, 14 Ann. Rep. A.B.A. 379, 380 (1891)(hereinafter *Report of the Committee on Classification of the Law* (1891)).

¹¹⁸ *Id.* at 383.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 384. For similar perspectives, see Frederick Pollock, *Divisions of Law*, 8 Harv. L. Rev. 187, 187 (1894) ("Practising lawyers do not concern themselves much with divisions of a high order of generality. They have to think, in the first place, of speedy and convenient reference, and the working arrangements of professional literature are made accordingly."); Benjamin Tradwell, *Suggestions for a Practical Digest*, 3 Am. Law. 337, 338 (1895) (describing the "philosophical" and "practical" modes of arrangement, and arguing that the best scheme brings the researcher "most speedily to the precise point in issue ... the philosophical arrangement, counts for naught unless it accomplishes this."); McClain, *supra* note 85 at 223 ("the practical lawyer needs an arrangement of the law for a wholly different purpose and he is likely to ignore the theoretical classification as of no use to him whatever."). *But see* Seymour D. Thompson, *Common Errors and Deficiencies in Law Reporting*, 1 Green Bag 436, 441 (1889)("we need a more scientific system of legal classification, which must be made as the preliminary to a better system of legal indexing.").

Dan Dabney describes these approaches to classification as the *rational* view, which has the goal of making the law intelligible, and the *instrumental* view, which has the goal of making the body of case law tractable. Email from Dan Dabney to Richard Danner (Nov. 5, 2013, 10:26 EST)(on file with author).

¹²¹ *Report of the Committee on Classification of the Law* (1891), *supra* note 117 at 402–08.

In 1894, the ABA created a Special Committee on Law Reporting “to ascertain the condition of law reporting throughout the Union.”¹²² The following year, the new special committee initiated what would be an ongoing Committee interest in how and whether the available commercial digests helped lawyers confront the growing body of case law. The report stated optimistically that: “the condition of affairs as to the multiplication of reported decisions, although discouraging, is very far from desperate [because d]igests ... have made it comparatively easy, considering the mass of decisions, to make an exhaustive investigation of any question.”¹²³

In 1895, the Special Committee on Law Reporting became a standing committee covering both reporting and digesting.¹²⁴ By including digesting within the jurisdiction of the new standing committee, rather than that of the then-quiet Special Committee on Classification, the ABA institutionalized the distinction between scientific or philosophical classification of the law on the one hand, and the more practical role of digest classifications on the other.¹²⁵ The discussion closed with a motion that Austin Abbott, co-compiler with his late brother Benjamin Vaughan Abbott of the *United States Digest*, and “the man most competent in the United States for that purpose” be requested to work with the committee.¹²⁶

The new Committee on Law Reporting and Digesting offered its next report in 1896. Although it was now “more than ever impressed with the difficulties arising from the number of reported cases, and particularly from the evils resulting from the duplication of reports of the same opinions,” the Committee acknowledged that it had not made satisfactory progress toward their solution, in part because of Austin Abbott’s death.¹²⁷ The report criticized current digests and indexes for inconsistency and poor arrangement,¹²⁸ and argued that “a thorough and carefully-compiled digest” was necessary.¹²⁹ Although the existing digests “tend to uniformity,” a uniform

¹²² *Transactions of the Seventeenth Annual Meeting of the American Bar Association*, 17 Ann. Rep. A.B.A. 72–73 (1894).

¹²³ *Report of the Committee on Law Reporting*, 18 Ann. Rep. A.B.A. 343, 356 (1895).

¹²⁴ *Transactions of the Eighteenth Annual Meeting of the American Bar Association*, 18 Ann. Rep. A.B.A. 30–31 (1895). In proposing the change, Simeon Baldwin said:

The importance of the subject of law reporting and law digesting, both to the bar and bench, cannot of course be over-estimated, and a standing committee reporting annually, if they saw occasion, could make recommendations for action from a higher and better vantage ground, and with a broader view of the subject than any special committee.

Id. at 30.

The ABA constitution approved in 1878 had provided for five standing committees; the Committee on Law Reporting and Digesting was the first additional standing committee. Edson R. Sunderland, *History of the American Bar Association and Its Work* 21–22 (1953).

¹²⁵ The following year, Emlin McClain, chair of the Classification Committee, who was absent in 1895 commented:

I fancy that the functions of the two committees will not be found to conflict with each other for the reason that the Committee on law Reporting must necessarily have in mind rather indexing and digesting, while this Committee did not have that in mind as its fundamental or important subject, but rather the determination of the general headings under which particular subjects would be discussed.

Transactions of the Nineteenth Annual Meeting of the American Bar Association, 19 Ann. Rep. A.B.A. 3, 17–18 (1896).

¹²⁶ *Id.* at 43–44. On the Abbotts, see Hicks, *Materials and Methods*, *supra* note 11 at 201–03. Hicks gave the brothers “first credit for originating and developing the scheme of classification and the method of alphabetical arrangement now widely used in American encyclopedias and digests.” *Id.* at 202.

¹²⁷ *Report of Committee on Law Reporting and Digesting* (1896), *supra* note 39 at 398.

¹²⁸ *Id.* at 400–02.

¹²⁹ *Id.* at 402.

official index could not be created “through private effort or enterprise,” but would require either the concerted action of the body of court reporters, perhaps brought together by the ABA, or a commission created by the federal government.¹³⁰

In 1898, after revisiting what it had said in 1895 and 1896, the Committee report stated that published reports “should be summarized and indexed under a common plan and so as to be readily accessible to all,”¹³¹ then discussed whether commercial publishers were meeting this need. No individual publishers were named, but West Publishing Company was clearly referenced as “[t]he agency...by which the demand for a multiplicity of decisions has been increased, [and which] has in itself provided some remedy for the difficulties which have been created.” Turning from the more critical positions of its earlier reports, the Committee then stated: “we [now] have uniform systems of reporting and digesting common to all, and a basis, at least, of a common system which shall be satisfactory to all.” As a result, there was no need for the bar or any official authority to be directly involved in the digesting of decisions. Rather, “it is better [for lawyers] to avail themselves of the labors of private publishers who make it their business to ascertain and satisfy the needs of the profession.”¹³²

The bar’s role, then, would be to advise the publishers on improving methods of making reports and digests, encourage uniformity, and find ways to reduce the growth in published opinions.¹³³ For the Committee, “the hope of uniformity lies in the two series of digests of the reports of the whole country by which the bar of the whole country is now made acquainted with the decisions of all the courts alike.”¹³⁴ Striking a blow for practicality, the Committee argued that:

Whether these common plans are the best or not, it is by conforming to them, that we can the most easily reach uniformity, and if there are improvements to be suggested they should be directed towards the perfecting of these plans, and then we shall have a model to which all the local digests may readily conform.¹³⁵

The arrangement of the digest should be based not on “theoretical considerations,” but on “the habits of thought and the actual wants of the men who are to use it,”¹³⁶ a position completely opposite to that expressed by Henry Terry in his 1888 letter to the ABA. For the Committee on Law Reporting and Digesting, because “[t]he purpose of a digest is to enable us to find the law contained in the reports ... [i]t does not matter so much what plan of classification is adopted as that we shall know clearly what the plan is, and that the same plan is always followed.”¹³⁷ In 1900, the Committee repeated its suggestion that “the system with which we are all equally familiar” be

¹³⁰ *Id.* at 402–03.

¹³¹ *Report of Committee on Law Reporting and Digesting*, 21 Ann. Rep. A.B.A. 437, 440 (1898).

¹³² *Id.* at 441.

¹³³ *Id.*

¹³⁴ *Id.* at 448 (referring to West’s *American Digest* and Lawyers’ Cooperative’s *General Digest*, each of which used the West classification system).

¹³⁵ *Id.* The West Company viewed the Committee’s recognition as a formal endorsement by the ABA. The company history tells how in 1897, John B. West had rushed a copy of the first volume of the *Century Edition* to the ABA meeting, where it “was the sensation of the meeting. The American Bar Association at its next annual meeting, 1898, formally endorsed the American Classification Plan as the model for modern digesting.” Marvin, *supra* note 17 at 73–74.

¹³⁶ *Report of the Committee on Law Reporting and Digesting* (1898), *supra* note 131 at 448.

¹³⁷ *Id.* at 449.

adopted in the states as the basis for “standard to which all the digests should substantially conform.”¹³⁸

The Special Committee on Classification of the Law languished for ten years after its 1891 response to Terry’s proposal.¹³⁹ It became more active briefly after the 1901 appointment to the committee of James DeWitt Andrews, who would be a prominent voice on questions of classification of law within and outside the ABA for the next twenty years.¹⁴⁰ In 1902, his committee offered a fifty page report on “The Vocation of Legal Classification,” which Andrews described as suggesting “the salient features and controlling points of what must ultimately constitute the scheme of legal classification,” and proposed to submit a plan of classification to the Association the following year.¹⁴¹ In 1903, however, he reported that the Committee had been unable to meet and had no report to offer.¹⁴²

No report was offered again in 1904, but Andrews offered an oral report in 1905. Noting the Committee’s beginning as a response to Terry’s letter, he concluded that in sixteen years it had accomplished little.¹⁴³ Not only did the ABA not have the resources to carry out a classification project, but neither the bar nor the teachers of law had shown active interest in legal classification:

I think it may be said that they do not fully perceive the intimate relations between classification of law and the primary, paramount object of this Association, namely the promotion of jurisprudence; ... for until we have a systematic body of law systematized we cannot have a jurisprudence.¹⁴⁴

¹³⁸ *Report of the Committee on Law Reporting and Digesting*, 23 Ann. Rep. A.B.A. 376, 377 (1900).

¹³⁹ The Special Committee on Classification of the Law had failed to report again until 1896. That year’s short report was a largely a gloss on the Committee’s intentions for the classification system it proposed in 1891, noting “that such a classification would not be found itself of much practical value, but that it would form a foundation on which an arrangement of subjects for practical purposes might be based.” *Report of Committee on Expression and Classification of the Law*, 19 Ann. Rep. A.B.A. 405, 405 (1896). The Committee expressed hope that it could make at least a partial report on its continuing work by the next ABA meeting. *Id.* at 406. In 1898, the only committee member present at the ABA meeting told the assembly that he had “no report to make and the law will have to remain unclassified for another year.” *Transactions of the Twenty-First Annual Meeting of the American Bar Association*, 21 Ann. Rep. A.B.A. 3, 31 (1898). No written reports were offered 1897–1900.

¹⁴⁰ Andrews was a law teacher and writer, whose works included a lengthy elementary treatise on American jurisprudence: James DeWitt Andrews, *American Law: A Commentary on the Jurisprudence, Constitution and Laws of the United States* (1900).

¹⁴¹ *Transactions of the Twenty-Fifth Annual Meeting of the American Bar Association*, 25 Ann. Rep. A.B.A. 3, 22–23 (1902). The purposes of classification should be:

1. To bring to the surface the fundamental principles of our law and organize them into a system.
2. To make the law more easily ascertainable (knowable).
3. To make it more certain and clearly stated.
4. To introduce a tendency toward uniformity which will ultimately result in practical uniformity.
5. A condensation and reduction in the bulk of expressed law.
6. To reduce the mass of statutes, decisions, constitutional rules and principles to a tangible, organized, manageable body.

Report of Committee on the Classification of the Law, 25 Ann. Rep. A.B.A.425, 426 (1902).

¹⁴² *Transactions of the Twenty-Sixth Annual Meeting of the American Bar Association*, 26 Ann. Rep. A.B.A. 3, 94 (1903).

¹⁴³ *Transactions of the Twenty-Eighth Annual Meeting of the American Bar Association*, 28 Ann. Rep. A.B.A. 3, 85 (1905).

¹⁴⁴ *Id.*

Previewing the themes he would develop a few years later outside the ABA in the American Corpus Juris project,¹⁴⁵ Andrews showed little interest in the practical concerns that animated the Committee on Law Reporting and Digesting. Rather, he argued that “classification is one of the essentials, if not the essential element of a highly developed jurisprudence,” and proposed that the matter of classification be referred to a joint committee of the Special Committee on Classification and the standing Committee on Jurisprudence and Law Reform. His motion was adopted,¹⁴⁶ but apparently received with little enthusiasm by the Committee on Jurisprudence. In 1906, that committee’s report said simply that because classification was a matter “peculiarly appropriate to the Committee on Classification of the Law [it] will be reported by that committee.”¹⁴⁷ The Classification Committee itself had no report to offer.¹⁴⁸ By 1908 it had disappeared from the list of ABA Committees.¹⁴⁹

The ABA discussions involving classification of the law indicate that, after rejecting Henry Terry’s proposal for a single classification system to serve both the practical needs of the bar and develop a scientific or philosophical structure for American law, the bar’s primary interest was in the usefulness of classification systems to aid in the location of cases. The classification itself need not be perfect as long as it worked. As put by Benjamin Tradwell, “a digest ... is after all only a labor-saving device.”¹⁵⁰ The ABA’s favored approach to classification indicates that late nineteenth century practitioners had little interest in digest classification systems or the principles they embodied, other than as finding tools.

¹⁴⁵ Readers of the February 1910 issue of *The Green Bag* found a 30 page article (plus appendix) by Philadelphia attorney Lucian Alexander on the need for what he labeled an American Corpus Juris, “a complete and comprehensive statement in adequate perspective of the entire body of American law.” Lucien Hugh Alexander, *Memorandum in re Corpus Juris*, 22 *Green Bag* 59, 59 (1910). Alexander noted that the memorandum was a joint product with James DeWitt Andrews and George W. Kirchwey of the Columbia Law School. For a brief history of the Corpus Juris project, see William P. LaPiana, “*A Task of No Common Magnitude*”: *The Founding of the American Law Institute*, 11 *Nova L. Rev.* 1085, 1107–09 (1987).

¹⁴⁶ *Transactions* (1905), *supra* note 192 at 87.

¹⁴⁷ *Report of the Committee on Jurisprudence and Law Reform*, 29 *Ann. Rep. A.B.A.* 481, 481 (1906).

¹⁴⁸ *Transactions of the Twenty-Ninth Annual Meeting of the American Bar Association*, 29 *Ann. Rep. A.B.A.* 3, 32 (1906) (Statement of James D. Andrews).

¹⁴⁹ The issue would be raised again in 1916, when ABA President Elihu Root expressed concern about “[t]he vast and continually growing mass of reported decisions which afford authorities on almost every side of almost every question” He proposed that the Association “adopt the simple and natural course of avoiding confusion by classification, system, the understanding and application of generally recognized and accepted legal principles. Elihu Root, *Address of the President: Public Service by the Bar*, 39 *Ann. Rep. A.B.A.* 355, 364–65 (1916). Root thus drew a connection between the lawyer’s practical problems maneuvering through the mass of precedent and classification of the law. Classification would help the bar “to see through the precedents and the incidents to the controlling principles.” *Id.* at 365.

A Special Committee to Consider Classification and Restatement of the Law was appointed in 1917. By 1923, after reporting on the organization and initial activities that year of the American Law Institute, it concluded that the ALI “seems in the way of accomplishing the reclassification and restatement of the law which this Association and this committee have long been working toward.” *Report of the Special Committee on the Classification and Restatement of the Law*, 46 *Ann. Rep. A.B.A.* 364, 365 (1923). By 1925, the Special Committee had gone out of existence.

¹⁵⁰ Tradwell, *supra* note 120 at 337.

C. West's Perspectives on How to Use the Digests

In the early 1900s West Publishing Co. began to take an active role in educating law students and practitioners about effective use of its publications.¹⁵¹ West representatives began to visit law schools, and where allowed, offered lectures on topics of legal bibliography.¹⁵² What is probably the first legal research and writing text, *Brief Making and the Use of Law Books*,¹⁵³ edited by the dean of the Stanford Law School, was issued in 1906. Around the same time, two long-running West journals began publication. The *American Law School Review* (1902–1947) was published as “An Intercollegiate Law Journal” while *West Publishing Company's Docket* (1909–1944) was aimed at a broader professional audience.¹⁵⁴

In 1903 and 1904 John Mallory published three articles in the *American Law School Review* describing the features and importance of the classification system that he developed for West.¹⁵⁵ Each article emphasized the importance of understanding the system in order to use the digests effectively. In “The Use of Law Books,” Mallory pointed out that “[t]he great obstacle to a ready and successful use of digests is lack of practical knowledge of their arrangement and structure.... [O]ne needs to know the titles or headings under which he should look, the scope of each as compared with related topics, the methods of subdivision, the use of cross-references, etc.... Direct and systematic instruction in this practical part of his work would greatly aid the student.”¹⁵⁶ In “Philosophical Classification of Law,” Mallory noted the importance of knowing “the terms in common use as main headings of the law and their subdivisions, ... the scope and contents of each and the lines of discrimination between them as so used, and ... the relations between their various subjects.”¹⁵⁷ This knowledge was now easier to obtain because of “[t]he gradual evolution of a uniform classification founded on the principles set forth herein, for the *American Digest* and *General Digest* systems, and the extensive adoption of that classification.”¹⁵⁸ In the final article, which described the classification systems of the *American Digest* and its predecessor the *United States Digest*, Mallory pointed out that “knowledge of the principles applied in such a work is as useful to the reader as to the compiler.”¹⁵⁹

¹⁵¹ See generally Frederick C. Hicks, *The Teaching of Legal Bibliography*, 11 Law Libr. J. 2–4 (1918) [hereinafter Hicks, *Teaching*].

¹⁵² *Id.* at 2–3. The Company also sponsored “brief-making” contests. *Id.* at 2.

¹⁵³ See *Brief Making* (1906), *supra* note 29. The book was regularly reprinted and issued in revised editions into the 1930s. Hicks provides a list of early “books and articles about law books,” but the few titles published before *Brief Making* were bibliographies and did not discuss how to conduct legal research. See *Appendix I: Books and Articles about Law Books*, in Hicks, *Materials and Methods*, *supra* note 11 at 325.

¹⁵⁴ 1 *Docket* (West) 3 (1909). For comments on the content of *American Law School Review*, see John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. Legal Educ. 311, 318–19 (1985).

¹⁵⁵ On Mallory, see Marvin, *supra* note 17 at 70–72; 79–80 (calling Mallory “a brilliant legal editor” whose work “laid the foundation for what many believe to be the most outstanding achievement in modern legal literature ... the Key Number plan....” *Id.* at 79); Daniel Dabney, *The Universe of Thinking Thoughts: Literary Warrant and West's Key Number System*, 99 Law Libr. J. 229, 240 (2007) (“The name John A. Mallory is known to few, but his influence is arguably among the greatest of all American lawyers.”).

¹⁵⁶ John A. Mallory, *The Use of Law Books*, 1 Am. L. Sch. Rev. 113, 118 (1903).

¹⁵⁷ John A. Mallory, *Philosophical Classification of Law*, 1 Am. L. Sch. Rev. 137, 141 (1904).

¹⁵⁸ *Id.* at 142.

¹⁵⁹ John A. Mallory, *The Theory of the American Digest Classification Scheme*, 1 Am. L. Sch. Rev. 184, 186–87 (1904).

Similarly, in 1903, Edward Q. Keasbey, the long-time chair of the ABA Committee on Reporting and Digesting, published an *American Law School Review* article that praised the *American Digest* classification and urged distribution of a West manual explaining the system for use in law school instruction.¹⁶⁰ In 1906, a tongue-in-cheek article published as “An Interview with a Law Student” chastised lawyers who didn’t understand the classification system and law schools for not instructing students in its use.¹⁶¹

In 1907, however, West representative Roger W. Cooley suggested a change in emphasis when he described legal research less in terms of finding and applying principles than as a matter of reducing the problem being researched to its lowest terms:

A general rule or principle of law ... implies nothing certain So a knowledge of the law is to a great degree a knowledge of precedents [T]o find cases showing how the principles have been applied [the lawyer] must use the facts as a guide, because the application arises out of the act, and not vice versa.¹⁶²

The following year, speaking on a panel with West and Andrews at the third annual meeting of the American Association of Law Libraries, Cooley told his audience that, when a lawyer comes to the law library, he should already have worked out the principle to be applied to his problem, and “what he wants now is cases applying that principle to facts on all fours with, or similar to the facts in his case.”¹⁶³ To find those cases, Cooley suggested that the searcher remember that the “cross reference heads and cross references in the digest form an index to the volume. Why not use it as such?”¹⁶⁴

In a 1909 article, Cooley again stressed the importance of relying on the facts of the case to locate precedents.¹⁶⁵ Describing the West’s program of legal research instruction in the law schools (without mentioning West or his own affiliation with the company), Cooley noted that “for obvious reasons” considerable time in those lectures was devoted to digests and other law-finding tools. Yet:

Little or no attempt is made to teach the student any theory of classification of the law. ... In teaching the use of the digest for finding a first case—that is to say, for getting a start in the search for authority—use is made of the descriptive word method. The practical advantage of this method is that it does not presuppose any particular theory or system of classification....¹⁶⁶

With descriptive words from a statement of the facts for the case at issue, the researcher could locate the place in the digest “where the law relating to the particular subject-matter, party, ground

¹⁶⁰ Edward Q. Keasbey, *Instruction in Finding Cases*, 1 Am. L. Sch. Rev. 69, 71 (1903) (The manual “should give clearly and simply the main headings of the law, and their divisions and subdivisions ..., and should show the relations of the various subjects, and where to look in one topic for the limits and modifications of the principles of another.”).

¹⁶¹ General Demurrer, *An Interview with a Law Student*, 2 Am. L. Sch. Rev. 24 (1906).

¹⁶² Roger W. Cooley, *The Purpose of a Digest*, 2 Am. L. School Rev. 77, 77 (1907).

¹⁶³ Roger W. Cooley, *Use of Law Books*, 2 Law Libr. J. 1, 2 (1909).

¹⁶⁴ *Id.* at 3.

¹⁶⁵ Roger W. Cooley, *Manual Training for Lawyers*, 2 Am. L. Sch. Rev. (West) 261 (1909).

¹⁶⁶ *Id.* at 262.

of action, or remedy is to be found.... [I]f one case is found by use of a descriptive word, that case may be used as a key to unlock the whole system of case law on that particular subject.”¹⁶⁷

West’s approach to using the digest seemed to be moving away from Mallory’s emphasis on knowledge of the principles of the classification system to use of the facts of the case at hand to locate precedents more directly. Hicks wrote that, in developing their instructional program for the law schools, Cooley and other West instructors “applied themselves to devising some easy means of finding cases with the result that the ‘descriptive word’ method was formulated.”¹⁶⁸ The change in approach could be seen in the differences between the 1909 second edition of West’s text: *Brief Making and the Use of Law Books* and the first, published in 1906.

In the first edition, the single chapter on “How to Find the Law” dealt exclusively with classification. Having carefully developed a statement of facts for his case, lawyers should be able to identify a general principle of law either from their own knowledge and experience, or from “study of some logical standard of classification,” such as the American Digest system.¹⁶⁹ Students and lawyers “will find that a study of some standard system of classification, prepared upon logical principles and adapted for practical use, will be of inestimable benefit....”¹⁷⁰ The bulk of the chapter consisted of a description of the American Digest System and definitions of its main heads as a means of introducing classification to its intended audience of law students.

The second edition of *Brief Making*, edited by Cooley, devoted significantly more attention than the first to researching the law. The chapter on digests noted that, although some lawyers begin their research from a principle of law and others from the facts of their case, the searches based on principles required conditions that “seldom co-exist: First, that the lawyer knows exactly what principle governs his case; and, second, that he has such a thorough knowledge of the theory of classification on which his digest is based that he can turn to the particular topic where that principle is illustrated.”¹⁷¹ The chapter then described the difficulties of principle-based searching compared to the relative ease of the descriptive word method which does not require the lawyer “to know the theory or rules of classification” and ignores “all considerations of the science and theory of digesting.”¹⁷² The chapter finished by outlining research using “the practical method” of the descriptive word before turning to sections on the classification system.¹⁷³

¹⁶⁷ *Id.*

¹⁶⁸ Hicks, *Teaching*, *supra* note 151 at 3.

¹⁶⁹ James E. Wheeler, *How to Find the Law*, in *Brief Making* (1906), *supra* note 37 at 173–74.

¹⁷⁰ *Id.* at 176.

¹⁷¹ Roger W. Cooley, *How to Find the Law*, in Roger W. Cooley, ed., *Brief Making and the Use of Law Books* 156, 159 (2d ed. 1909).

¹⁷² *Id.*

¹⁷³ In 1914, however, the third edition of *Brief Making* announced that “the analysis of the subject [classification] in former editions was experimental and the arrangement of the book was governed largely by considerations which no longer apply.” Roger W. Cooley & Charles Lesley Ames, eds., *Brief Making and the Use of Law Books* v (3d ed. 1914). While it was unclear what this meant, the new edition did give more prominence than its predecessor to a chapter on the “mechanical features of digests” which now preceded the chapter on the descriptive word method. *Id.* at 107–35. The chapter closed with a caution to the reader that, although its explanation of digest features might have seemed “unnecessarily detailed,... [k]nowledge of these things is essential, if one is to get the maximum benefit from the use of these books.” *Id.* at 135. Similar language appeared in later editions published into the 1930s.

In 1912 West introduced its first Descriptive Word Index as “an index or concordance of words and terms . . . , which have been the subject of litigation.”¹⁷⁴ The first advertisements for the new single volume 2,000 page index noted that it consisted of “words and terms descriptive of the persons, places and things, as well as of the crimes, torts, contracts and remedies which have been the subject of litigation.”¹⁷⁵ Although the classification system was described as “simplicity itself,” the Descriptive Word Index would aid researchers “not familiar with its logical and scientific arrangement,” who asked “How do I find the Key-Number for the proposition which I am investigating.”¹⁷⁶

In a short 1912 *American Law School Review* article called “The Descriptive Word,” R.A. Daly, one of West’s law school instructors, wrote that the aim of legal research in any system “if possible, is to find *that* case, or those cases, where, upon facts similar to the immediate question involved, some court has applied the law.” For Daly: “The search for the law has become a search for facts to which the legal principles have applied, rather than a search for the abstract principles themselves.”¹⁷⁷

Almost apologetically, Daly ended his article noting that for each digest topic “there will be found a long and more or less complicated analysis, requiring close examination to discover just where the specific question could be properly placed.” If the right term were chosen in the index, however, “the specific section or sections of the various topics can be found, and the attention at once directed thereto, thereby saving much time and anxious thought.”¹⁷⁸ In 1914, in a brief article touting the need for practical training in legal research, Daly wrote that, in response to the problems posed by the multiplicity of books, “law book publishers devised what have *seemed to them* helpful methods of use by means of schemes of classification, mechanical and typographic devices, and their combinations. . . .”¹⁷⁹ This was hardly a ringing endorsement, particularly in comparison to the importance placed on the classification system in John Mallory’s articles only ten years earlier.

Over the next decade, Daly published several other articles on legal research. These short pieces consisted mostly of research problems and answers, but occasionally they discussed the context of research for cases. In 1915 Daly argued that the principles of law are “well known to the profession” from law school; to apply principles in practice, however, “the court demands precedents; that is to say, the court asks for cases decided in the past in which the facts were essentially the same.”¹⁸⁰ Precedents are found through analysis of the case at hand using the descriptive word index.¹⁸¹ In 1920 he wrote that, finding principles was not the point of legal research. Rather, “finding the law in active practice means the locating of that adjudicated case

¹⁷⁴ *Presentation Letter Sent to Subscribers to Decennial Digest*, 1 Docket (West) [773] (1912). The 2000 page first edition of the Index was sent without charge to all purchasers of the Decennial Digest. *Id.*

¹⁷⁵ *Advertisement: Editorial by the Advertising Manager*, 1 Docket (West) [n.p.] (Sept. 1912). The title page of the volume itself described it as a “means of finding the authorities in point through the words descriptive of the legal principles or of the facts in the case.”

¹⁷⁶ *Id.*

¹⁷⁷ R.A. Daly, *The Descriptive Word*, 3 Am. L. Sch. Rev. 79, 79 (1912). R.A. (Raleigh) Daly succeeded Cooley as a “traveling lecturer” for West. Hicks, *Teaching*, *supra* note 151 at 4.

¹⁷⁸ Daly, *supra* note 177 at 80.

¹⁷⁹ R.A. Daly, *Legal Bibliography—An Essential in the Law School Curriculum*, 3 Am. L. Sch. Rev. 560, 561 (1914) (emphasis added).

¹⁸⁰ R.A. Daly, *Analysis of Facts: Salient Elements*, 3 Am. L. Sch. Rev. 593 (1915).

¹⁸¹ *Id.* at 602.

where some court, somewhere, at some time, applied the principle to facts on all fours with or closely paralleling the facts of the case at bar.”¹⁸²

The 3,070 page second edition of the *Descriptive Word Index*, which covered both the first and the second decennial digests, was published in 1924. A single introductory page noted that the index included “thousands of catchwords,” as well as the topic titles, Key-Number section lines and editorial reference lines in the Decennials.” As a result, “it can be used as a complete index to these books, *without any reference whatever to the topical analysis in the various volumes.*”¹⁸³

It is not clear why West began to place less emphasis on the usefulness of the classification system for research in the first decade of the twentieth century, nor why it regained prominence in the 1914 and later editions of *Brief Making*, while articles in West journals continued to emphasize the fact-based descriptive word approach. Yet, the specificity of the bulky descriptive word clearly made it easier for lawyers to rely on factual research to find cases on point without seeing more of the classification system than the key number for the subject they needed.

VI. Reassessing the Influences of the Digest

Bob Berring’s arguments about the influences of legal information on lawyers’ thinking are compelling and appealing to anyone interested in the history of legal information. In 2003, I published an article, “Justice Jackson’s Lament: Historical and Comparative Perspectives on the Availability of Legislative History,” with Berring’s ideas in mind.¹⁸⁴ That article examined how, after late nineteenth century changes in the systems for publishing and distributing federal documents, the greater availability of legislative history information might have contributed to federal courts’ increased use of legislative history. For me, it also demonstrated how hard it is to show cause and effect relationships, or influences, in historical research.

From its introduction in 1887, West Publishing Company’s digest and classification system clearly made it easier, and perhaps made it possible in light of the many published cases, for American lawyers to locate precedents to argue their own cases. The classification system, developed from the work of the Abbott brothers, who were renowned for their digesting skills, and by John Mallory and others at West, was comprehensive, sensible, and built with the needs of the practicing lawyer in mind. In the face of the fears of John Dillon and others that the common law itself was threatened by the growing numbers of publication, it is also reasonable to think that, by providing a superior tool to find cases, West’s digests helped allay those concerns.

The West digests functioned as what Allan Hanson called a “classified index.” The classification system both organized information and provided access to it before there were separate fact-specific descriptive word indexes to help lawyers access its contents. Prior to the first Descriptive Word Index in 1912, lawyers presumably entered a West digest at a point

¹⁸² R.A. Daly, *Finding the Law*, 4 Am. L. Sch. Rev. 569, 569 (1920).

¹⁸³ *Important*, *Descriptive-Word Index to the First and Second Decennial Digests* iii (1924)(italics added).

¹⁸⁴ Richard A. Danner, *Justice Jackson’s Lament: Historical and Comparative Perspectives on the Availability of Legislative History*, 13 Duke J. Comp. & Int’l L. 151, 154 (2003) (“Bob Berring has suggested that the forms in which legal information is published and distributed can be influential in the development of legal knowledge. This article tests the possibilities of that idea....”).

determined by their general knowledge of the law, the classification system, or the specific area they needed to research. In the process of seeking precedential cases in the digest, a lawyer had the opportunity to learn more about the classification system and how the topic being researched related to others. If so, the digest might have influenced their thinking about American law and the common law system itself. Yet it is hard to know whether lawyers concentrating on locating cases on specific points of law would take that opportunity, particularly if they found a “hog case” relevant to their problem amidst the masses of cases in the digest.

After 1912, the specificity of the Descriptive Word Index would encourage the tendency to go directly to a relevant key number for precedential cases. Barbara Bintliff eloquently described how the research process might have proceeded, but how can we know how often busy twentieth-century lawyers used the new more sophisticated indexes to do more than fine tune their searches to find the cases they needed? We know what Peter Schanck thought about this, but we have no research to tell us whether Bintliff or Schanck better describes how lawyers used print digests.

Beyond several early articles by John Mallory stressing the importance of understanding the classification system, West’s own instructional publications tended to place greater emphasis on searching for cases using the specific fact situations of a problem than on the classification system, particularly after West established its law school instruction program and introduced the descriptive-word indexes. Although the 1914 and later editions of *Brief Making and the Use of Law Books* continued to describe the classification system, articles in West’s periodicals emphasized fact-based research as the way to find precedential cases.

We know that at least some late nineteenth century American lawyers saw the benefits of better classification as a means to keep the increasingly unwieldy body of the common law from breaking down under the multiplicity of published cases. But those concerns were voiced at meetings of the American Bar Association independently from concerns about the poor performance of available digests in helping lawyers find the cases they need. After 1891, by employing separate committees to deal with practical digest questions and classification, the ABA formally distinguished efforts to improve legal classification from those intended to improve the digests. ABA classification committee reports generally failed to mention digest classification systems, despite the admiration shown for the Abbott brothers and the recognition provided to West’s digest and classification system by other committees concentrating on reporting and digesting.

In 1902, the Special Committee on Classification’s lengthy report on the importance of legal classification failed to note either the virtues or the shortcomings of the schemes devised by the Abbotts and Mallory, which at least look like attempts to provide a scientific classification of American law. Digests were not to be judged on the basis of their classification systems. As Benjamin Tradwell told the West Virginia Bar Association, “a Digest which seeks to cultivate the appreciation of a higher order of tool must necessarily fail to that extent as a labor-saving device....” Furthermore, “one does not resort to the Digest to learn the general principles of law and to observe their relation to each other.”¹⁸⁵ If a digest did serve to remind lawyers of the principles of law and their relationships, it had apparently failed in its primary task, helping them get to the cases.

¹⁸⁵ Tradwell, *supra* note 120 at 337, 338.

Did the American Digest provide needed structure for the increasingly messy and bulky body of published case law spewing forth from federal and state courts in the late nineteenth and early twentieth century? Of course it did. All one needs to do is look at the books, examine the *Century Edition* and the first *Decennial*, to see the multiplicity of cases classified and organized under West's topical analysis. Yet, how the classification systems of the West digests might have influenced the thinking of turn-of-the-century American lawyers and their successors about the law remains a harder question to answer. What is clear is that, faced with the increasing bulk of published case law, the American bar needed all the help it could get.