

# Cases and Case-Lawyers\*

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In the nineteenth century, the term “case-lawyer” was used as a label for lawyers who seemed to care more about locating precedents applicable to their current cases than understanding the principles behind the reported case law. Criticisms of case-lawyers appeared in English journals in the late 1820s, then in the United States, usually from those who believed that every lawyer needed to know and understand the unchanging principles of the common law in order to resolve issues not found in the reported cases. After the Civil War, expressions of concern about case-lawyers increased with the significant growth in the amount of published law after private companies entered the legal publishing market. By the turn of the twentieth century, it was generally acknowledged the number of cases had made it impossible for attorneys to not focus on locating precedents. In the twentieth century most references to case-lawyers were historical, even as the amount of published law facing lawyers continued to grow.

## I. Introduction: “A Mere Case Lawyer Can Never be a Great One”<sup>1</sup>

“If I were judge and wore the wig,  
Into merits I'd try to dig,  
And reason and right would govern my course,  
Instead of demanding a case on all fours;  
For I'd decide the cause on principle just,  
Instead of on precedent covered with dust,  
And the case lawyer'd get it right in the neck,  
If I were judge, and on the deck.”

G. P. Nevitt, *If I Were a Judge*, 27 LAW NOTES (Edward Thompson Co.) 20, 20 (1923)

The final stanza of G.P. Nevitt’s poem captures the essence of a debate familiar to American and British lawyers of the nineteenth and early twentieth centuries. The term “case-lawyer” was used through much of the nineteenth century to disparage lawyers who apparently cared more about locating direct precedents to resolve their current cases than understanding the legal principles behind the reported case law. Criticisms of case-lawyers appeared in English journals in the late 1820s, then in American periodicals as barriers to entering legal practice in the United States were lowered, the number of lawyers increased, and the issues they faced grew more complex. The criticisms came mostly from those who believed that all lawyers needed to know

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<sup>1</sup> JESSE BLEDSOE, INTRODUCTORY LECTURE ON LAW 9 (1827)

and understand the unchanging principles of the common law in order to resolve issues not found in the reported cases. By mid-century, regular criticisms of the “mere case-lawyer” could be found in American legal periodicals. After the Civil War (1861-1865), expressions of concern about case-lawyers increased with the significant growth in the amount of published law that followed the entrance of private companies into the legal publishing market. Some suggested that the introduction of the case method of instruction at Harvard Law School in the 1870s and elsewhere later in the century also encouraged the development of case lawyers.

By the turn of the twentieth century, more writers acknowledged that the ever-growing body of published case law had made it impossible for attorneys not to focus on locating precedents. During the twentieth century references to case-lawyers became less common, even as the amount of published law grew in print, and then in digital formats in the last quarter of the century. This article examines legal periodicals and other sources to explore the connection between the growth in the number of published cases and reporters, and the hostility toward case-lawyers in the nineteenth and early twentieth centuries.

## II. The Nineteenth Century Growth in Published Decisions

### A. England

In the early nineteenth century, English courts appointed “authorized” reporters, whose reports of cases were supposed to be the only versions allowed to be cited in arguments.<sup>2</sup> By at least 1832, however, cases published in other reports could be cited if certified by a barrister as his account of the case. These unauthorized collections often (but not always) appeared more quickly than the authorized reports and were less expensive, but their publication created problems of duplication, variations in text, inclusion of unnecessary material and greater expense for the bar. An 1849 report by a committee of the Society for Promoting the Amendment of the Law argued that a new evil had arisen in the number of unauthorized versions of the reports being published.<sup>3</sup> As the report put it: “Competition, ordinarily productive of so much good, in this instance adds to the evil.”<sup>4</sup> One later commentator described the situation by the mid-1860s as “intolerable.”<sup>5</sup>

What were perhaps the first published criticisms of the case-lawyer appeared in several articles in the English *Law Magazine* in 1828-1829. An article in the magazine’s first issue found that “the mere case-lawyer will be liable to continual error from trusting to fancied and incorrect

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<sup>2</sup> The earlier history of English law reporting is aptly presented in FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 92-104 (1923).

<sup>3</sup> The report provides a detailed discussion of the “evils” of the system at mid-century. See *Report of a Special Committee on the Law Reporting System* (1849) in W. T. S. DANIEL, THE HISTORY AND ORIGIN OF THE LAW REPORTS 4-15 (1884) (including lists of past and present reports in law and equity). Briefer accounts are: WILLIAM S. HOLDSWORTH, LAW REPORTING IN THE NINETEENTH AND TWENTIETH CENTURIES 1-2 (1941) (N.Y.U. School of Law Anglo-American Legal History Series); JOHN P. DAWSON, THE ORACLES OF THE LAW 80-82 (1968); Jon Davies, *Aspects of Nineteenth Century Legal Literature*, 29 CAMBRIAN L. REV. 22, 26-27 (1998); AYELET BEN-YISHAI, COMMON PRECEDENTS: THE PRESENTNESS OF THE PAST IN VICTORIAN LAW AND FICTION 62-64 (2013) (arguing in part that the “personal, insular relationship” between judges and reporters often led the reporters to believe that they were participating in creating law).

<sup>4</sup> *Report of a Special Committee*, *supra* note 3, at 7.

<sup>5</sup> Nathaniel Lindley, *The History of the Law Reports*, 1 LAW Q. REV. 137, 137 (1885). See also Nathan Abbott, *The “Law Reports,”* 1 MICH. L. REV. 93 (1892).

analogies. In short, no sound lawyer ever was or ever will be made by the mere study of particulars. The only way to know accurately, is to make sure of the principle . . .”<sup>6</sup> A later article characterized a recent appointee to high office as “a good case lawyer [who] troubles himself very little about principles[,] is well acquainted with laws as they are, and neither knows nor cares about their origin.”<sup>7</sup> Another asked whether a lawyer who understood rules was “necessarily an abler practitioner, considered even as a case lawyer, than one whose memory is unaided by principles, and who, when an index has supplied him a precedent, can merely state the strict letter of the law.”<sup>8</sup> An 1838 note in the *Legal Observer* reported on a recent lecture at the end of which the speaker acknowledged that he had “been frequent in references to decided cases--not that I by any means think that what is called ‘a case lawyer,’ is even practically the best.”<sup>9</sup> A few years later, however, the *Observer* commented in a memorial: “It is sometimes the fashion to sneer at what are called case-lawyers; but this is only because very few men indeed have the qualifications necessary to become such.”<sup>10</sup>

Early comments on case-lawyers appeared in articles focused on legal education. In 1845, a short article in the *Law Students’ Magazine* noted young lawyers’ difficulties appreciating that “the law of England is grounded on principles, the study whereof will make the sure and scientific, if not the ‘case’ lawyer. . . . Too much reliance upon case law, is apt to make a superficial lawyer, who becomes by habit, a mere index hunter.”<sup>11</sup> Commenting on the state of English and Irish legal education, Henry Joy wrote that the main objective should be to ground students in the knowledge of principles; not to train “mere mechanical collector[s] of cases.”<sup>12</sup> Joy found that found that case-lawyers were increasingly common in England and Ireland because the courts overly encouraged the citation of cases and because of “the amazing number of reports.”<sup>13</sup> The multiplicity of reports made it impossible for lawyers to get back to first principles, “mak[ing] the profession one of technicalities, to be acquired by the exercise of the power of memory rather than a philosophy to be acquired by the developement [sic] of the reasoning powers.”<sup>14</sup>

A lengthy period of agitation and study resulted in the 1865 establishment of a Council of Law Reporting, with responsibility for appointing each court’s reporters and supervising publication of the reports.<sup>15</sup> Publication of the newly authorized Law Reports began publication almost

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<sup>6</sup> *Mercantile Law No. 1*, 1 LAW MAG. L.Q. JURIS. 45, 50 (1828).

<sup>7</sup> *Events of the Quarter*, 1 LAW MAG. Q. REV. JURIS. 178, 179 (1828) (“[I]t is the boast of the gentleman we are speaking of, that, since he left school, he has never read any but law books.”).

<sup>8</sup> *Practice of the English Courts of Common Law*, 1 LAW MAG. Q. REV. JURIS. 453, 460 (1829).

<sup>9</sup> *Legal Education—Law Lectures*, 15 LEGAL OBSERVER J. JURIS. 276, 276 (1838).

<sup>10</sup> *A Memoir of the Late Mr. Baron Bayley*, 23 LEGAL OBSERVER J. JURIS. 177, 177 (1842) (“a great practical lawyer . . . having mastered the whole contents of his library, must be able to wield them at will, and bring them to bear at any given moment on any particular case. Such men, such case-lawyers, are rare.” *Id.*)

<sup>11</sup> *The Principles of the Law*, 1 LAW STUDENTS’ MAG. 182, 182-83 (1845). The article also criticized English treatises of the time finding them to be “destitute of principles, being for the most part made up of a collection of marginal notes,” while noting that “even the lawyers of the United States, who at one time looked upon an English Law Book as the ne plus ultra of a learned treatise, are now in the habit of depreciating [sic] those same books, and prefer those by their own more scientific writers.” *Id.* at 182.

<sup>12</sup> HENRY HOLMES JOY, LETTERS ON THE PRESENT STATE OF LEGAL EDUCATION IN ENGLAND AND IRELAND 12 (1847).

<sup>13</sup> *Id.* at 13-14.

<sup>14</sup> *Id.* at 15-16, quoting “Mr. Maconochie, a member of the Scottish bar.”

<sup>15</sup> See generally DANIEL, *supra* note 3, at 3-27. See also HOLDSWORTH, *supra* note 3, at 2-3; DAWSON, *supra* note 3, at 81-82; DAVIES, *supra* note 3, at 27

immediately, initially in eleven series, then in six after 1873 and in four since 1881.<sup>16</sup> The new system did not end publication of other reports. Looking back in 1884, W.T.S. Daniel wrote: “It may be a matter of regret with many that the successful establishment of “The Law Reports” has not had the effect of relieving the Profession from what is thought to be the incubus of so many contemporaneous Reports.”<sup>17</sup>

## B. United States

At the time of the American Revolution few published court reports were available to domestic lawyers. Only half of the approximately 150 volumes of reports published in England had been imported, and “no more than thirty were in familiar use on this side of the Atlantic.”<sup>18</sup> Roscoe Pound later observed that the repositories of law available to domestic lawyers were limited largely to Coke’s *Second Institute* and Blackstone’s *Commentaries*.<sup>19</sup> One early commentator noted that “[a]t the close of the revolutionary war, and for full ten years afterwards, a book of American reports was scarcely to be met with in any one of the states.”<sup>20</sup> Another noted that before 1800, “[t]he best library of American reports that could be summoned by money or magic ... might have been borne [in] the circuits in a portfolio.”<sup>21</sup>

Early court reporters noted the difficulties posed by the lack of American reports.<sup>22</sup> Not only were domestic reports important to the daily work of the practicing bar, they were necessary to promote uniform administration of justice and to distinguish American common law from that of England.<sup>23</sup> Twenty-five years after the start of the American Revolution most American jurisdictions still depended largely on the available English law reports.<sup>24</sup> Fred Hicks counted but five volumes of American reports in 1801 and eighteen in 1810, and lists only sixteen “more

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<sup>16</sup> GLANVILLE WILLIAMS, *LEARNING THE LAW* 37 (12<sup>th</sup> ed. 2002).

<sup>17</sup> DANIEL, *supra* note 3, at 324.

<sup>18</sup> HICKS (1923) *supra* note 2, at 111.

<sup>19</sup> ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 9 (1938). See also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 59 (3d. ed. 2005). (“In one sense, colonial legal literature is quickly disposed of: no such thing worthy of the name existed before 1776.”). See generally M.H. HOEFLICH, *LEGAL PUBLISHING IN ANTEBELLUM AMERICA* 14 (2010).

<sup>20</sup> [Richard Rush], *American Jurisprudence*, 2 CAROLINA L. REPOSITORY 347, 347 (1816)

<sup>21</sup> [Nathaniel Haven], *Greenleaf’s Reports*, 22 NORTH AM. REV. 27, 29 (1826).

<sup>22</sup> See *Preface*, 1 Cranch (5 U.S.) iii, iii (1804) (“Much of that *uncertainty of the law*, which is so frequently, and perhaps so justly, the subject of complaint in this country, may be attributed to the want of American reports.”). See also *Preface*, EPHRAIM KIRBY, *REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT* iii, iii-iv (1789) (describing the need for publication of domestic opinions).

<sup>23</sup> Denis P. Duffey, Jr., *Genre and Authority: The Rise of Case Reporting in the Early United States*, 74 CHI.-KENT L. REV. 263, 264 (1998). See also Thomas J. Young, Jr., *A Look at American Law Reporting in the 19<sup>th</sup> Century*, 68 LAW LIBR. J. 294, 296 (1975); William E. Nelson has emphasized that because of the “different origins of their founders, there were “tremendous differences ... among the legal systems of the early colonies” and that “[o]nly after 1800, if not by 1776, ... it became possible to speak of American law ... as a set of organizing principles” for treatise writing, legal education, and deciding cases. WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA* 6 (2008).

<sup>24</sup> John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 572-74 (1993). See also Francis R. Aumann, *American Reports: Yesterday and Today* 4 OHIO ST. U.L.J. 331, 332-335 (1938) (noting the level of public sentiment against the use of English precedents in American courts); HOEFLICH, *supra* note 19, at 6-7 (“This was a period of extensive legal syncretism of American and English law. English law was neither wholly rejected nor wholly accepted....”).

important volumes” of American reports published between 1789 and 1803.<sup>25</sup> As the states began appointing official reporters, reports were published more frequently. Published reports facilitated access to out-of-state decisions and gave the legal profession a shared literature, making possible the idea of a national common law.<sup>26</sup> New volumes were often reviewed and critiqued in journals of general interest, then later in specialized legal periodicals.<sup>27</sup> In an 1821 address, Joseph Story found that “[t]he best of our reports scarcely shrink from a comparison with those of England in the corresponding period; and even those of a more provincial cast exhibit researches of no mean extent, and presage future excellence.”<sup>28</sup>

Although they praised the quality of the new reports, Story and other antebellum lawyers were wary of the effects of the increasing numbers of published cases on lawyers’ ability to know the law.<sup>29</sup> Story estimated that by 1821 “[m]ore than one hundred and fifty volumes of reports are already published” and warned not only of being “overwhelmed with their number and variety,”<sup>30</sup> but being “buried alive, not in the catacombs but in the labyrinths of the law.”<sup>31</sup> An 1824 review of several recent volumes of reports counted 198 volumes of American reports, then asked: “Whither is this rapid increase in reports to lead us, and what are to be the ends and consequences of it? . . . [W]hat mind will be adequate to the task of storing up the infinite multiplicity of decided cases?”<sup>32</sup> In the first volume of *Commentaries on American Law*, James Kent bemoaned “the number of books which beset and encumber the path of the student,” arguing that “[t]he evils resulting from an indigestible heap of laws and authorities are great and manifest. They destroy the certainty of the law, and promote litigation, delay, and subtlety [sic].”<sup>33</sup>

Others emphasized the practical costs of dealing with so many published reports. The 1836 edition of *Hoffman’s Legal Study* complained: “The increase in this portion of our literature within the last thirty years, has no parallel in the juridical history of any other country. More than four

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<sup>25</sup> HICKS (1923) *supra* note 2, at 111, 115-16 (1923). The count of 18 volumes in 1810 seems to come from CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 557 (1911). Warren does not cite a source for his number.

<sup>26</sup> Duffey, *supra* note 23, at 272-73. See also FRIEDMAN (2005), *supra* note 19, at 243-44. (“The ultimate influence of the reports can hardly be measured. . . . Judges felt that the common law was a single great language of law.”); Anton-Hermann Chroust, *The Dilemma of the American Lawyer in the Post-Revolutionary Era*, 35 NOTRE DAME LAW. 44, 75 (1959) (“One of the most remarkable phenomena of the post-revolutionary period . . . was the publication of American law reports.”).

<sup>27</sup> See generally Richard A. Danner, More than Decisions: Reviews of American Law Reports in the Pre-West Era (2015), [http://scholarship.law.duke.edu/faculty\\_scholarship/3480/](http://scholarship.law.duke.edu/faculty_scholarship/3480/); Duffey, *supra* note 23, at 263 (“Contemporary attitudes about the place of the reports in the changing legal landscape were articulated in prefaces to volumes of reports and in reviews of reports published in periodicals of the day.”). Duffey suggests that “The serial form of reports may have contributed to the impression of the common law as a flexible, participatory enterprise . . . . As serials, the reports could function not just as a topic but also as a participant in this kind of perpetual civic discourse.” *Id.* at 267-68.

<sup>28</sup> Joseph Story, *An Address Delivered before the Members of the Suffolk Bar, at their Anniversary, on the Fourth of September, 1821, at Boston*, 1 AM. JURIST & L. MAG. 1, 13 (1829).

<sup>29</sup> MacGill and Newmyer described the growth in printed American decisions as “exponential.” Hugh C. MacGill & R. Kent Newmyer, *Legal Education and Legal Thought*, in 2 CAMBRIDGE HISTORY OF LAW IN AMERICA 36, 42 (Michael Grossberg & Christopher Tomlins, eds., 2008).

<sup>30</sup> Story, *supra* note 28, at 13.

<sup>31</sup> *Id.* at 31.

<sup>32</sup> [Caleb Cushing], *Book Review* [Recent Reports] 18 N. AM. REV. 371, 377 (1824).

<sup>33</sup> JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 441-442 (1826).

hundred and fifty volumes of American law reports now load our shelves!”<sup>34</sup> An 1839 article in the *American Jurist & Law Magazine* counted 536 volumes and estimated that 30 volumes were added each year.<sup>35</sup> In 1840, a commentator in *The American Jurist* feared that “there are many young lawyers who find themselves in the dilemma of . . . [Erasmus], called upon to select between law-books and clothes.”<sup>36</sup> In 1844, David Dudley Field observed that those lawyers “who have the best practice, are tasked almost beyond endurance. The multiplication of law-books, and, above all, the multiplication of courts, have quadrupled their efforts.”<sup>37</sup> By 1848, there were an estimated 800 volumes of reports.<sup>38</sup>

### III. Precedent and Principle

The importance of knowing the principles of law was emphasized in both Great Britain and the United States even though approaches to precedent in the two countries had already begun to differ by the time of the American Revolution. In the nineteenth century, while Americans continued to view precedents “as embodiments of reason and experience” and avoided “too rigid a doctrine of *stare decisis* in particular cases, British common law grew more rigid.<sup>39</sup> A report on English law in 1853 commented: “Judicial precedents are . . . to use the language of Bentham, Judge-made laws, and, when long acted upon, become of equal force with the express enactments of the Legislature.”<sup>40</sup> In the United States, lawyers of the founding generation recognized the importance of stability and certainty, but also believed that “a declaratory understanding of the common law [permitted] some form of reexamination of the merits of a prior decision.”<sup>41</sup> By 1876, Benjamin Abbott saw “less subordination” to precedent than earlier, but also found that “the extent, variety, and complexity of the questions brought before the courts” had resulted in judges’

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<sup>34</sup> DAVID HOFFMAN, 2 A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 657 (2d ed., enl. 1836). In the first edition of his work, published in 1817, Hoffman noted that reports of American decisions had been published for only a short period, but that the number “has been increasing almost monthly.” DAVID HOFFMAN, A COURSE OF LEGAL STUDY: RESPECTFULLY ADDRESSED TO THE STUDENTS OF LAW IN THE UNITED STATES 147(1817).

<sup>35</sup> G.G., *American Reports and Reporters*, 22 AM. JURIST & L. MAG.108, 141 (1839).

<sup>36</sup> *Review of Peters’ Digest of Cases*, 23 AM. JURIST 243, 244 (1840).

<sup>37</sup> David Dudley Field, *The Study and Practice of Law*, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 484, 485 (1884) (unsigned article published in the *Democratic Review*, 1844).

<sup>38</sup> See HICKS (1923) *supra* note 2, at 111.

<sup>39</sup> Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, in PRECEDENT AND THE LAW 111, 116 (Ewoud Hondius, ed., 2007) (“The British command theory pushed English common law towards viewing precedent as a form of judicial legislation, while American judges continued to feel themselves constrained to discover and respect the common law through reason and judicial precedent, rather than to make it themselves.” *Id.* at 114.). For discussion of the relationships between precedent and English positivism, and the timing of changes in the English approach, see NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 14-19 (2008) (“By the middle of the nineteenth century . . . the doctrine of binding precedent was clearly in the making.” *Id.* at 18.). See generally *Id.* at 37-48. See also Jim Evans, *Changes in the Doctrine of Precedent in the Nineteenth Century*, in LAURENCE GOLDSTEIN, ED., PRECEDENT IN LAW 36-72 (1987). Ben-Yishai notes that in the nineteenth century, although the “commonality” of English common law “had become too large, too diffuse, and to diverse to be held in common . . . the growing uncertainty in the law provoked a demand for a greater authority of decisions.” BEN-YISHAI, *supra* note 3, at 6-7.

<sup>40</sup> *Law Reporting Reform* (1853) in DANIEL, *supra* note 3, at 15, 16.

<sup>41</sup> Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 666 (1999).

“growing inclination to be advised by past decisions, as well as “more hesitation to decide a question until what has been adjudicated upon it has been reviewed.”<sup>42</sup>

G. Edward White writes that early American lawyers viewed the common law “as a source of timeless principles, consistent with natural justice, founded in reason, conforming to custom, and influenced by divine revelation.”<sup>43</sup> Joseph Story characterized American law as “a body of fixed rules, themselves declarations of pre-existing rights or manifestations of universal principles,” declared by the judiciary and embodied in judicial decisions.<sup>44</sup> In 1835 Francis Hilliard wrote that “in law, as in other sciences, there are certain broad and fixed principles, which ...remain unchanged amidst the fluctuations of successive ages.”<sup>45</sup> In an 1851 lecture, Daniel Lord said “[t]here are no new principles of jurisprudence to be discovered...its highest triumphs have been in the application of old principles and not in the invention of new.”<sup>46</sup> Story, Kent, John Marshall, and their contemporaries believed that lawyers should be knowledgeable enough about the foundational principles to apply them to new problems without relying on earlier decisions. The importance of understanding those principles appeared both in expressions of concern about the growing amount of published case law and in discussions of case-lawyers, who were seen as willing to ignore broader propositions of law in the search for directly precedential cases.

The early nineteenth century emphasis on principles was part of a legal culture that Robert Ferguson described as “a remarkable symbiosis between law and literary aspiration”<sup>47</sup> which impacted the training of lawyers and the early bar’s image of who the lawyer should aspire to be.<sup>48</sup> In 1829, Story urged Harvard law students to “addict [themselves] to the study of philosophy, of rhetoric, of history, and of human nature,” assuming they already were in “full possession of the general literature of ancient and modern times.”<sup>49</sup> The emphasis on breadth of knowledge was

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<sup>42</sup> Benjamin Vaughn Abbott, *American Jurisprudence*, in THE FIRST CENTURY OF THE REPUBLIC 434, 435 (Theodore D. Woolsey, ed., 1876).

<sup>43</sup> G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, 129 (2010) (3-4 History of the Supreme Court of the United States). See *Id.* at 118 for a list of the “shifting meanings” of the term “common law.”

<sup>44</sup> *Id.* at 152, citing Joseph Story, *Law, Legislation, and Codes*, 7 ENCYCLOPEDIA AMERICANA 576, 582 (Francis Lieber ed. 1831). In 1821, despite his pride in the development of American jurisprudence to that point, Story had worried that many lawyers had but “imperfect knowledge” of “those general principles, which constitute the foundation of actions.” Story, *supra* note 28, at 27. Perry Miller suggested that because of his opinions about the extent of their knowledge, Story was “cordially hated by the majority of practitioners.” PERRY MILLER, THE LIFE OF THE MIND IN AMERICA 136 (1965).

<sup>45</sup> FRANCIS HILLIARD, THE ELEMENTS OF LAW v (1835). As Marshall Bloomfield put it: “Since law was a rational science . . . its basic principles could be grasped by all men.” MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 at 145 (1976).

<sup>46</sup> DANIEL LORD, ON THE EXTRA-PROFESSIONAL INFLUENCE OF THE PULPIT AND THE BAR 16 (1851).

<sup>47</sup> ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 25 (1984). See also *id.* at 66-72.

<sup>48</sup> *Id.* at 5. On the importance of classics-based education in the early Republic, see Timothy G. Kearley, *From Rome to the Restatement: S.P. Scott, Fred Blume, Clyde Pharr, and Roman Law in Early Twentieth-Century America*, 108 LAW LIBR. J. 55, 56-60 (2016).

<sup>49</sup> Joseph Story, *Value and Importance of Legal Studies Literature and Jurisprudence*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 527, 528-29 (William W. Story ed. 1852) (quoted in FERGUSON, *supra* note 47 at 26). Gilman Ostrander found that “[t]he best of America’s lawyers were seen to be delving through the civilizations of Greece, Rome, and medieval and modern Europe as well as England in the service of legal wisdom.” GILMAN M. OSTRANDER, REPUBLIC OF LETTERS: THE AMERICAN INTELLECTUAL COMMUNITY, 1776-1865 at 104 (1999). Bryan Waterman argues that James Kent and his associate, New York Supreme Court Reporter William Johnson, believed that knowledge of the law “depended on the ‘root’ of broad classical learning, including familiarity with belles lettres.” BRYAN WATERMAN, REPUBLIC OF INTELLECT: THE FRIENDLY CLUB OF NEW YORK CITY AND THE MAKING OF AMERICAN LITERATURE 148 (2007).

reinforced by legal commentators, treatise-writers and others who were developing the new American legal system.<sup>50</sup>

As the connections between law and letters faded during the Jacksonian period, so did many lawyers' sense of the importance of the kind of education Story favored. Barriers to entry into legal practice weakened,<sup>51</sup> and the profession grew larger and more heterogeneous.<sup>52</sup> The number of reported decisions increased as well, and the established bar became more concerned about newer lawyers who were less interested in understanding principles than in finding decisions they could apply directly to problems at hand. Established practitioners and judges reminded students and younger lawyers that to be successful, they needed to understand the principles of the law. Jesse Bledsoe told an audience of Nashville law students that "[a] mere case lawyer, can never be a great one." If the facts of the reported cases differed only slightly from those of the case at hand and did not "vary the principle, he is at a loss for the proper decision."<sup>53</sup> In 1851, a lengthy disquisition on the nature and method of legal studies detailed the disappointments awaiting the lawyer who "did not begin the study of his profession with a thorough inquiry into its principles."<sup>54</sup> In an 1854 lecture to Tulane law students, Christian Roselius acknowledged the value of the well-considered judicial opinion but emphasized that some opinions disregarded basic principles, making the "mere case lawyer . . . like a third rate player, who repeats the words of others, without troubling himself whether he is uttering sense or nonsense."<sup>55</sup> Alfred Conkling told the graduating class of law students at the University of Albany that, if you ask a question of a case-lawyer, "if he happens to remember a reported case exactly *in point*, he will tell you how [the case] *has been decided*," but not the principle applied. Without that case he would be unable to offer an opinion.<sup>56</sup>

In his study of nineteenth century legal thought, Perry Miller observed that by mid-century lawyers of "the majestic era of John Marshall . . . were simply bewildered at [the] rising insistence on practicality."<sup>57</sup> Miller was himself "struck with how plaintive became the laments of the periodicals that the profession has been subverted by lawyers who regard the law as a mere aggregation of arbitrary provisions."<sup>58</sup>

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<sup>50</sup> FERGUSON, *supra* note 47 at 27. For examples see, MILLER, *supra* note 44, at 136-37, 140, 146.

<sup>51</sup> See FRIEDMAN (2005), *supra* note 19, at 236-37. See also Alfred S. Konefsky, *The Legal Profession: From the Revolution to the Civil War* in 2 CAMBRIDGE HISTORY OF LAW IN AMERICA 68, 77 (2008) ("Inevitably the bar's claims to elite status became caught up in the maelstrom of Jacksonian democracy."); BLOOMFIELD, *supra* note 45, at 85 (describing legislative and judicial efforts to reduce requirements for practice).

<sup>52</sup> Konefsky, *supra* note 51, at 84-86. Konefsky found few reliable numbers on the size of the legal profession prior to 1850, but concluded that "by 1850 many more men were entering the legal profession, and the relative number of lawyers in proportion to the general population had increased significantly." *Id.* at 85.

<sup>53</sup> BLEDSOE, *supra* note 1, at 9 ("Principle, like the pillar of fire by night . . . will be a light to his path, and a lamp to his feet." *Id.*).

<sup>54</sup> *Nature and Method of Legal Studies*, 3 U.S. MONTHLY L. MAG. 379, 383 (1851) ("For the want of any sufficient knowledge of general principles, all becomes uncertainty and confusion.").

<sup>55</sup> Mitchell Franklin, *Introductory Lecture of Christian Roselius on November 13, 1854*, 32 TULANE. L. REV. 573, 590 (1958).

<sup>56</sup> ALFRED CONKLING, LEGAL REFORM 11 (1856) (address to the graduating class of the University of Albany Law School, March 27, 1856).

<sup>57</sup> MILLER, *supra* note 44, at 184, citing an 1846 address before the Law Academy of Philadelphia which argued that the public would "infinitely sooner entrust business to mere men of practice, of whose learning they know nothing, than to those whom they have every reason to believe most firmly grounded in the principles of their professions, but of whose practical ability they have no good evidence."

<sup>58</sup> *Id.*

As legal practice became more complex in the last decades before the Civil War and the amount of published law continued to increase, “[n]o lawyer could grasp the whole of the legal system because the system simply became too big.”<sup>59</sup> Consequently many lawyers felt obliged to master particular areas of practice and partnerships started to emerge, prompting what Alfred Konefsky called “a subtle move toward specialization... along the lines of specific areas of law... technical, complex, and narrow.”<sup>60</sup> As put by Ferguson, “[t]echnical competence triumphed over general learning and philosophical discourse.” The shift to what he called “textbook law” changed the ways that lawyers 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 place upon itself. ... The first looked for connections and resemblance; the second, for distinction and precision.”<sup>61</sup> In an 1852 review of the seventh edition of Kent’s *Commentaries*. Theophilus Parsons noted that “[a]lready, in many of our law schools, provision is made for those who enter them, not to become lawyers, but to study commercial law.”<sup>62</sup> Perry Miller later took the comment to represent two opinions within the American bar: “one held that its various departments were so extended that each scholar must specialize, the other held to the position . . . that the law, like all true sciences, springs from a few simple principles which can readily be acquired.”<sup>63</sup>

For lawyers faced with the growing complexity of the law in the reports, it became enough “to find the detail and application of the law without worrying about comprehensiveness and theoretical compatibilities.”<sup>64</sup> Bloomfield suggests that Jacksonian and Civil War era practitioners “were even more likely than their predecessors to cherish a narrow vocational outlook toward their work and to insist on a technical competence that set them apart from their fellow men....”<sup>65</sup> Already in 1832, after noting French lawyers’ “loose and endless citation of decisions upon every question,”<sup>66</sup> a review of a French legal treatise found that in the U.S. “a want of correct ideas as to the real object and true value of reported decisions, has more than any thing [sic] else, led to this unfortunate habit of encumbering [American] Reports with unnecessary and perplexing references.”<sup>67</sup> An 1840 discussion of legal practice in Maine remembered when: “A good voice, a fluent utterance, and a discussion of general principles answered every demand, instead of the heavy, ponderous arguments of the present time, larded all over with authorities from all quarters of this and foreign lands, and often an endless variety of legal points and distinctions without differences.”<sup>68</sup>

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<sup>59</sup> Lawrence M. Friedman, *Heart Against Head: Perry Miller and the Legal Mind*, 77 YALE L.J. 1244, 1249 (1968) (book review).

<sup>60</sup> Konefsky, *supra* note 51, at 90-91 (“Typically a partnership was composed of two attorneys who ... divided their responsibilities between litigation and office practices ....” *Id.* at 90).

<sup>61</sup> FERGUSON, *supra* note 47 at 200. See also *Id.* at 230-31 (using the example of Daniel Webster to show how “the old-style generalist in law was retreating before a more formally trained expert.”)

<sup>62</sup> [Theophilus Parsons], *Book Review: Kent’s Commentaries on American Law*, 74 N. AM. REV. 108, 117 (1852).

<sup>63</sup> MILLER, *supra* note 44, at 142.

<sup>64</sup> FERGUSON, *supra* note 47 at 287.

<sup>65</sup> BLOOMFIELD, *supra* note 45, at 137.

<sup>66</sup> Anon., *The Citing of Authorities*, 8 AM. JURIST & L. MAG. 111, 111 (1832), reviewing A. M. J. I. DUPIN, DE LA JURISPRUDENCE DES ARRÊTS (1825).

<sup>67</sup> *Id.* at 113.

<sup>68</sup> W., *Notes on the Early Jurisprudence of Maine. Number Three*, 3 L. REP. 121, 126 (1840).

Case-lawyers were criticized for lacking breadth and interest in matters beyond the technicalities of law.<sup>69</sup> In 1864, Richard F. Fuller opened an essay on “Literary Lawyers” by reporting a notion “that the range of a successful lawyer’s mind must be strictly limited to his calling. To know law, nothing else, it is supposed, must be known. . . . We recognize this common impression in the sneer of the case lawyer at literary accomplishments.”<sup>70</sup> Fuller asked rhetorically whether Scottish jurist Henry Brougham would have been as accomplished “had he neglected the liberal influence of literature, had he kept in ignorance of public affairs, had he left his heart awaste [sic], had he been, in short, a merely technical lawyer, or, worst of all, least of all, a mere case lawyer?”<sup>71</sup> The case lawyer would neither read a book preface describing the state of the law at an earlier time,<sup>72</sup> nor peruse articles in a journal not confined to legal subjects.<sup>73</sup> In contrast to the images of early nineteenth century lawyers presented by Ferguson, in mid-century the “*mere case lawyer*” was seen as “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.”<sup>74</sup> An 1870 memorial contrasted a lawyer with “a philosophic mind, enlarged by extensive reading” with “the mere legal martinet—the case lawyer or empiric, who uses legal precedent as the mason uses a brick or stone, the carpenter a stick of lumber . . .”<sup>75</sup> Looking back on the period, however, Bloomfield asked whether late antebellum practitioners could be expected “to waste time on frivolous cultural pursuits when it took constant effort just to keep abreast of the increasing volume of new court decisions”<sup>76</sup>

#### IV. Case Lawyers in the Later Nineteenth Century

##### A. *The Legal Culture*

In 1937, Wright characterized English law in the 1880s as “still the days of the case-lawyer,” who used digests and precedent books to “find the cases you wanted by turning up the appropriate heading (as you would find a train in the A B C).”<sup>77</sup> At the time, E.S. Roscoe noted that, after cases become too numerous, the case-lawyer was no longer “the good lawyer” of the past, “when a knowledge of cases was synonymous with a knowledge of main legal principles with an apt example of their application.”<sup>78</sup> Charles Scott Dickson wrote: “We are every day becoming more and more mere case lawyers, and the rapidity with which decisions accumulate nowadays will tend to make us still more so. There are, indeed, now few cases in a session which are argued on principle alone, apart from the authority of decisions.”<sup>79</sup>

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<sup>69</sup>See generally FERGUSON, *supra* note 47 at 66-72.

<sup>70</sup>Richard F. Fuller, *Literary Lawyers*, 26 MONTHLY L. REP. 177, 177 (1864).

<sup>71</sup>*Id.* at 186.

<sup>72</sup>*Book Review*, 13 MONTHLY L. REP. 322, 322 (1850).

<sup>73</sup>*Jurisdiction of the Law*, 10 AM. L.J. 424, 424 (1851) (“It is well known that this Journal is not confined strictly to what the mere plodding case lawyer would denominate *legal subjects*.”)

<sup>74</sup>*Nature and Method of Legal Studies*, 3 U.S. MONTHLY L. MAG. 491, 511 (1851).

<sup>75</sup>Henry K. Smith, in L. B. (LUCIEN BROCK) PROCTOR, *THE BENCH AND BAR OF NEW-YORK* 112, 112 (1870).

<sup>76</sup>BLOOMFIELD, *supra* note 45, at 151

<sup>77</sup>Wright, *The Study of Law*, 54 L. Q. REV. 185, 185 (1938) (address delivered to the University of London Law Society, at University College, on October 24, 1937).

<sup>78</sup>E. S. Roscoe, *Position and Prospects of the Legal Profession*, 1 L. Q. REV. 314, 323 (1885)

<sup>79</sup>Charles Scott Dickson, *Pleading*, 9 JURID. REV. 14, 33 (1897).

Still, an 1892 review of two new books on the civil law suggested that “[t]he mere case lawyer . . . is being superseded by lawyers who . . . have the advantage of some acquaintance with the historic study of the development of law, and of being able, to some extent at least, to compare their own system with that of other countries.”<sup>80</sup> In 1899, an article in the *Scottish Law Review* remarked that study of Roman law was “invaluable,- delivering the practitioner from the intangible abstractions of the mere philosopher, and saving him, at the same time, from the misleading analogies and confusions of the uneducated case-lawyer.”<sup>81</sup>

In the United States, the remnants of the legal culture nurtured by Kent, Story, and others disappeared after the Civil War, but many writers continued to resist the idea that knowledge of legal principles had become less important. In an 1876 review of the past century in American jurisprudence, Benjamin Abbott wrote that, even though their applications had changed over time, “the great fundamental principles underlying both the rules and the methods of the science were recognized and obeyed then substantially as they are now.”<sup>82</sup> Oliver Wendell Holmes Jr.’s generally positive review of Christopher Langdell’s first contracts casebook noted that “[t]he popular prejudice that a case lawyer is apt to want breadth, has something in it...”<sup>83</sup>

By 1886, however, although Holmes continued to emphasize the importance of principles in a speech to the Harvard Law Association, he also pointed out that Story’s “simple philosophizing has ceased to satisfy men’s minds.”<sup>84</sup> It was no longer enough for law teachers “to send forth students with nothing but a rag-bag full of general principles—a throng of glittering generalities.”<sup>85</sup> To make a principle worth anything, instructors must show how it would be applied in practice. Ferguson writes that Holmes’s emphasis on specialization and expertise, along with his suggestion that words conveying legal ideas should be “uncolored by anything outside the law” would not have been understood by any early American lawyer.<sup>86</sup>

## ***B. Educating Lawyers***

Throughout the latter part of the century there was discussion of what author John Glover termed the “much mooted question” of whether young lawyers should focus on principles or precedents.<sup>87</sup> In 1873, the *Albany Law Journal* argued that the law school’s “proper function” was “to teach general jurisprudence - law as a science, not a science of precedents, but a broad and liberal science of principles.” The law’s “application to the business of life” could be learned in practice.<sup>88</sup> Harvard professor Joel Parker emphasized the student’s need “to learn that that the law, as a whole, is, necessarily, a mass of principles and rules.”<sup>89</sup> Richard Harrington urged an audience

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<sup>80</sup> *Book Review*, 4 JURID. REV. 262, 262 (1892)

<sup>81</sup> *Legal Education*, 5 SCOT. L. REV. & SHERIFF CT. REP. 125, 127 (1889).

<sup>82</sup> Benjamin Vaughan Abbott, *supra* note 42, at 436.

<sup>83</sup> [Oliver Wendell Holmes, Jr.], *Book Notice*, 6 AM. L. REV. 353, 354 (1871).

<sup>84</sup> *The Use of Law Schools* [1886], in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 34, 40 (Mark De Wolfe Howe, comp. 1962), cited in FERGUSON, *supra* note 47 at 288.

<sup>85</sup> *Id.* at 41. Responding in 1877 to criticisms that Story’s commentaries lacked practical value, the *Central Law Journal* had argued that “only the case-lawyer with his narrow range of vision . . . objects to the copious learning with which [Story] enriches his pages....” *Book Notices*, 4 CENT. L.J. 337, 355 (1877).

<sup>86</sup> FERGUSON, *supra* note 47 at 289-90, citing O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 459, 464 (1897).

<sup>87</sup> John M. Glover, *How to Find the Law*, 1 COUNSELLOR 128, 128 (1892)

<sup>88</sup> *Where to Begin the Study of Law*, 8 ALB. L.J. 49, 49 (1873).

<sup>89</sup> JOEL PARKER, THE LAW SCHOOL OF HARVARD COLLEGE 22 (1871).

of law graduates to read cases for the reasoning of the court, in order to “acquire the habit of discussing cases from principles and cultivate a keenness of mental vision which will enable you to distinguish between apparently conflicting authorities.”<sup>90</sup> William Vilas criticized the approaches of case lawyers, but pointedly told University of Wisconsin law students that the case lawyer was “apt to be by no means a contemptible adversary. He may not be inventive in strategy, but his ammunition will always be dry.”<sup>91</sup>

In 1870, Christopher C. Langdell introduced the case method of instruction at Harvard, assigning his Contracts students a compilation of cases rather than a text-book.<sup>92</sup> In the *American Law Review*, Holmes questioned Langdell’s “seemingly exclusive belief in the study of cases,” at the expense of “a rapid and continuous view of the principles deduced from them. And this can only be got in the text-books.”<sup>93</sup> Would emphasizing study of cases inevitably encourage the development of case lawyers?

Because it was used initially only at Harvard, the implications of case method engendered little discussion until other law schools began to consider its adoption in the late 1880s.<sup>94</sup> John Chipman Gray noted that the “mere verbal similarity” between the labels “case method” and “case lawyer” made it possible to use the poor reputation of the case lawyer as if it were “a knock-down argument against the method of study by cases,” but pointed out that the method had “no tendency to produce lawyers of this type. ...It uses the cases merely as material from which the student may learn to extract the underlying principles.”<sup>95</sup> Writing in the *Yale Law Journal* in 1892, however, Christopher Tiedeman argued that “the legal tyro is not mentally capable of extracting the principles of the law from adjudicated cases.” Thus, most students exposed only to the case system would “be impressed with the great weight of judicial precedent, and ... become, what is so generally deprecated, a case-lawyer, who thinks the whole business of advocacy consists of persuading the court that the cases he cites in support of his side of the controversy, are to be followed.”<sup>96</sup> For others, such as Langdell’s disciple William Keener, who brought the case system

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<sup>90</sup> RICHARD HARRINGTON, ADDRESS TO THE GRADUATING CLASS OF THE LAW DEPARTMENT OF THE NATIONAL UNIVERSITY 7-8 (1873).

<sup>91</sup> William F. Vilas, *Address before the Law Class at the University of Wisconsin, June 19, 1876*, in SELECTED ADDRESSES AND ORATIONS OF WILLIAM F. VILAS 19, 40 (1912).

<sup>92</sup> He published the first full version of his Contracts casebook in 1871. C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS WITH REFERENCES AND CITATIONS (1871).

<sup>93</sup> [Holmes] (1871), *supra* note 84, at 354. There were no similar comments in an earlier review of the preliminary version of the casebook. See *Book Notice*, 5 AM. L. REV. 539 (1871). An 1872 review of Langdell’s *Sales of Personal Property* casebook noted, however: “We, of course, are not admirers of the mere case lawyer, but this system of inductive teaching has no tendency to create such.” *Book Note*, 6 ALB. L.J. 93, 99 (1872).

<sup>94</sup> See generally, WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 132-47 (1994). The American Bar Association’s standing Committee on Legal Education issued major reports in 1879, and in 1891 and 1892, as more law schools began to use the case method. The ABA Section of Legal Education was formed in 1893 and offered regular papers and reports on university legal education.

<sup>95</sup> J. C. Gray, *Cases and Treatises*, 22 AM. L. REV. 756, 762 (1888). In an address upon the occasion of Langdell’s retirement from the deanship, Harvard president Charles W. Eliot noted that “Misapprehension concerning the method prevailed for a long time. It was not perceived that its keynote was discriminating, orderly selection of the material to be studied.” *President Charles W. Eliot’s Address*, in HARVARD LAW SCHOOL ASSOCIATION, REPORT OF THE NINTH ANNUAL MEETING 69,70 (1895). 1895 Frederick Pollock noted of Langdell that “the study he has inculcated by precept and example is not a mere letter-worship of authority. No man has been more ready than Mr. Langdell to protest against the treatment of conclusions of law as something to be settled by mere enumeration of decided points.” *Sir Frederick Pollack’s Oration*, in *Id.* at 11,17.

<sup>96</sup> Christopher G. Tiedeman, *Methods of Legal Education III*, 1 YALE L. J. 150, 155 (1892).

from Harvard to Columbia, it was “an impossibility for a man to be academically learned in the law as a science, and at the same time to be nothing but a case lawyer. The truth is that one of the great arguments in favor of the case system is that it deals with both the scientific and the practical side of law.”<sup>97</sup>

Despite the clarifications attempted by those who used the case method,<sup>98</sup> concerns about its connections to case-lawyering continued. An 1894 piece in *The Law Student's Helper* discussed whether students would do better to focus their reading on texts or on cases, concluding that: “The text-book, rightly studied, will make him a lawyer; the case, studied as he will study it, can only make him a practitioner...”<sup>99</sup> In an 1896 speech, the *Helper's* editor expressed astonishment that some law schools had “gone so far as to eliminate from their courses the study of Blackstone's *Commentaries*,” resulting in “that pitiable modern product, the ‘case lawyer,’” who without a case on all fours was “compelled to sit down with a ridiculous absence of the power to reason.”<sup>100</sup> William P. Black told the graduates of Union College of Law not to burden their minds with precedents: “Rather let your general study be to acquaint yourself thoroughly with the principles which have been established by, or recognized in the adjudged cases, and to familiarize yourself with the proper methods of applying these principles to the determination of the cases in which you are engaged...”<sup>101</sup> In 1897, Isaac Phillips told the law graduates of Illinois Wesleyan University: “A thorough knowledge of the principles of the common law is the abiding light by which your daily professional walk must be guided.”<sup>102</sup>

In 1892, however, John Glover cautioned: “There are those who will say to the seeker after light: ‘Depend upon principle, upon the reason of the thing. The law is pure reason. What is not reason is not law. Do not be a case lawyer, one who is continually searching after a similar case.’”<sup>103</sup> Glover found such advice to be “misleading and dangerous,” pointing out that in many cases more than one result was reasonable; if not, every judge would reach the same conclusion in similar cases. Thus, “familiarity with the actual course of judicial decision is absolutely necessary to the successful practice of the law.”<sup>104</sup>

Concerns that the case method produced case lawyers diminished in the twentieth century, but did not disappear completely. In 1903, at the third meeting of the Association of American Law Schools, Simeon Baldwin used his presidential address to criticize the case system, describing “its main end [to] be to encourage and assist the student in the study and analysis of judicial

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<sup>97</sup> William A. Keener, *The Inductive Method in Legal Education*, 17 ANN. REP. A.B.A. 473, 482-83 (1894).

<sup>98</sup> See e.g., JAMES PAIGE, *ILLUSTRATIVE CASES IN CRIMINAL LAW* [iii] (1897). The preface to Paige's book in the “Pattee Series of Illustrative Cases” began by stating: “Teaching the fundamental principles of the law by means of actual cases illustrative of the meaning, limitations, and scope of those principles is now admitted to be, I think, the most effective method of training young men for the bar...” On the Pattee Series, see *Book Notice*, 3 YALE L.J. 230 (1894).

<sup>99</sup> Augustus S. Owen, *Hints to a Law Student*, 2 LAW STUD. HELPER 123, 137 (1894).

<sup>100</sup> Griffith Ogden Ellis, *Some Defects in Our Present System of Legal Education*, 4 LAW STUD. HELPER 231, 232 (1896) (Address before the Annual Convention of the Commercial Law League of America). See also Seymour D. Thompson, *The Reporter's Head-Note*, 2 GREEN BAG 215, 218 (1890) (“When ... the case lawyer fails to find a case on all fours with the one he has on hand, he is helpless, because he has not trained his mind to the discovery of legal principles and to their application to facts.”);

<sup>101</sup> William P. Black, *Law and Lawyers*, 14 CHI. LEGAL NEWS 331, 336-37 (1882).

<sup>102</sup> Isaac Newton Phillips, *Success at the Bar*, 30 CHI. LEGAL NEWS 16, 17 (1897).

<sup>103</sup> Glover, *supra* note 88, at 128.

<sup>104</sup> *Id.*

precedents.”<sup>105</sup> A 1904 article on “Law as an Academic Study” argued that the existence of case lawyers and judges was due to hurried preparation for practice which left them ignorant of general principles.<sup>106</sup> As late as 1905, Judge Judson Harmon told new law students at the University of Cincinnati that they would be taught to avoid becoming case-lawyers “because no case is ever quite like another and to tell whether the differences distinguish them or not requires a knowledge and application of principles.”<sup>107</sup>

A 1921 review of a new Contracts casebook noted that, for better or worse, in a time when text books were “wellnigh [sic] relegated to a very subordinate place, . . . [t]he “case system” has come to stay and . . . a thorough understanding of it is a necessary part of a lawyer's equipment.”<sup>108</sup> Yet in 1939, a new curriculum at Ohio State was announced with the comment that the changes “should make a significant contribution to the developing of the student into something more than a mere case lawyer who is helpless if not armed with a case in point.”<sup>109</sup>

### *C. Perceptions of Case Lawyers*

Nineteenth century memorials, tributes, and other articles about particular attorneys or judges often noted whether peers considered their subjects to be case-lawyers. An article comparing Alexander Hamilton and Aaron Burr observed that “probably Hamilton comprehended general principles with more tenacity of grasp than did Burr; probably Burr was the superior case-lawyer and his knowledge of precedents was more comprehensive and accurate.”<sup>110</sup> John Marshall was noted for rarely citing authorities, but “no reader of any decision ever suspected, or had reason to suspect, ignorance or forgetfulness of any principles needed for the just determination of that case.”<sup>111</sup> The *Albany Law Journal* reported that “Chancellor Kent, when asked by a hopeful law student what made him a great lawyer, laconically replied: ‘Lack of law books,’” then concluded:

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<sup>105</sup> Simeon E. Baldwin, *The Study of Elementary Law, a Necessary Stage in Legal Education*, 3 ANN. MEETING A.A.L.S. 23, 27 (1903). Baldwin’s criticisms prompted William Rogers’ retort that “I do not think it can be justly claimed that the case system tends to make the case lawyer, because I know of no more thorough drill in principles than is the careful study of cases.” *Proceedings*, 3 ANN. MEETING A.A.L.S. 1, 11 (1903) (comments of William P. Rogers).

<sup>106</sup> H.B.H., *Law as an Academic Study*, 7 LAW NOTES (Edward Thompson Co.) 203, 204 (1904).

<sup>107</sup> *Address of Hon. Judson Harmon*, 50 OHIO L. BULL. 385, 387 (1905). Harmon felt that “case system” suggested that case-lawyers were being trained. *Id.*

<sup>108</sup> *Book Review*, 7 VA. L. REG. N.S. 480, 480 (1921).

<sup>109</sup> *A New Curriculum for the College of Law of Ohio State University*, 5 OHIO ST. U.L.J. 344, 351 (1939). See also *Notes and Personals*, 8 AM. L. SCH. REV. 568, 570 (1936) (“To be a capable lawyer one must not only know the law and its history, but he must also understand those social, economic, and political forces which give it being . . . The “case” lawyer is a poor lawyer compared with the man who appreciates the nature of law and the principles which underlie it.”) (describing a new program of legal education at the University of Minnesota); Percy Bordwell, *Experimentation and Continuity in Legal Education*, 23 IOWA L. REV. 299, 329 (1938) (1936) (“Preparing class notes for the cases in the casebooks is not scholarship. . . . They may produce a higher type of case lawyer but the product will be a case lawyer just the same.”) (discussing the work of case system instructors).

<sup>110</sup> Geo. M. Curtis, *The Bar of the City of New York*, 7 YALE L.J. 327, 328 (1898).

<sup>111</sup> *John Marshall*, 1 AM. L. REV. 432, 435-36 (1867) (Marshall was “certainly, not eminent as a *case* lawyer.” *Id.* at 135.). Robert Ferguson noted that Marshall cited no court decisions in his “five greatest constitutional opinions.” FERGUSON, *supra* note 47 at 23. See also THERON G. STRONG, *LANDMARKS OF A LAWYER’S LIFETIME* 422 (1914) (noting that after delivering an opinion, Marshall concluded: “These are the views of the Court on the questions involved and our brother Story will furnish the authorities.”); R.P. Taylor, *Bards in Ermine: John Marshall*, 62 AM. L. REV. 801, 819 (1928) (“In his method of approach Marshall was the reverse of what has come to be the too common affliction known as the case lawyer.”).

“Emphatically he was not a case lawyer.”<sup>112</sup> Theron Strong remembered that Francis N. Bangs “did not often refer to adjudged cases; he appealed to common sense and the ordinary principles of justice” once remarking to Strong that “no man is fit to practice law that is not able to practice it without law books.”<sup>113</sup>

It was thought that lawyers who understood principles and knew how to apply them were likely to be remembered while case-lawyers were “often forgotten within the lapse of a generation.”<sup>114</sup> If a case-lawyer were deemed worthy of being memorialized in the journals, he was rarely a “mere” case lawyer, but a judge or lawyer who read cases not only to find precedent, but to improve his knowledge of the law. Oscar Hord knew Indiana case law, but more importantly “[h]is mental grasp was such that his knowledge of principles was as full as his mastery of details was perfect.”<sup>115</sup> An obituary of the author and scholar Andrew Abbott noted that “[h]is enormous-field of reading, embracing substantially all the decisions of the higher courts in this country and in England” allowed him to cite authority on almost any question. Still, Abbott “was by no means a ‘case lawyer,’ but considered every question on broad, legal grounds and general principles.”<sup>116</sup> New York City’s Stephen Nash “was both an arguer from the principles of jurisprudence and a veritable case lawyer; but never a case lawyer who could simply make citations without explanations and fitting adaptation, as many lawyers crudely do.”<sup>117</sup> The *Chicago Legal News* claimed that Judge Van H. Higgins “was considered the greatest case lawyer that ever appeared at the Chicago Bar. You could hardly name a legal question but what he could cite a case bearing upon it, giving from memory the title of the case, the name of the volume and page where it could be found.”<sup>118</sup> Upon his death, the newspaper reported that Judge Higgins “was noted for being able, in his opinions on the bench and in his arguments at the bar, to cite all the opinions in the books upon any legal question.”<sup>119</sup>

Good case lawyers were “capable, first, of cracking the judicial nut itself, and, then, of using its contents effectively.” A good case lawyer knew principles as well as cases, but “unlike the mere theorist” was effective in court.<sup>120</sup> U.S. Supreme Court Justice Samuel Miller urged young lawyers not to let “fear of being called a case lawyer” cause them to undervalue reported cases. “No man ever fully and thoroughly examined a difficult question of law, or mastered the intricacies of a complicated cause, without becoming a better lawyer by the effort.”<sup>121</sup>

The case-lawyer was thought more likely to be found in cities than in the “country.” In 1870, the *Albany Law Journal* found that many successful lawyers began their careers “in the rigid school of country practice, where books were scarce [and] thrown upon their own resources, these lawyers

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<sup>112</sup> *Notes*, 48 ALB. L.J. 181, 200 (1893) [reprinted elsewhere]

<sup>113</sup> STRONG *supra* note 112, at 273. Banks’s firm was a precursor to the continuing firm Davis Polk.

<sup>114</sup> *Wirt as a Jurist*, 2 ALB. L.J. 221, 221(1870). See also *William Wirt*, 16 AM. L. REG. 65, 65 (1867) (“aside from the renown achieved by meritorious service and high-minded statesmanship, the case lawyer can never be known to posterity save by hearsay and impression”).

<sup>115</sup> *Oscar B. Hord*, 11 ANN. REP. A.B.A. 330, 332 (1888).

<sup>116</sup> *Austin Abbott*, 4 AM. LAW. 198, 199 (1896)

<sup>117</sup> A. Oakey Hall, *Stephen Payn Nash, LL. D.*, 10 GREEN BAG 325, 329 (1898).

<sup>118</sup> 20 CHI. LEGAL NEWS 259, 259 (1888).

<sup>119</sup> *Judge Higgins Dead*, 25 CHI. LEGAL NEWS 289, 289 (1893) (“While he relied upon case law he was not forgetful of legal principles....”).

<sup>120</sup> *The Civil Code of the State of New York, - No. II, Relations of Case Law to a Code*, 2 ALB. L.J. 408, 409 (1870).

<sup>121</sup> *The Study and Practice of the Law*, 2 CHI. LEGAL NEWS 82, 82 (1869) (Address of Hon. Samuel F. Miller, of the Supreme Court United States, to the Graduates of the Law Department of Iowa University, 1869).

framed their arguments upon their own ingenious reasoning, with but little assistance from text-books or adjudicated cases.”<sup>122</sup> Abraham Lincoln’s contemporary Leonard Swett came to prominence in Illinois before “the degraded era of the case lawyer and the timid judge . . . [when] [e]very man at the bar necessarily became a keen and ready reasoner, or fell off into obscurity.”<sup>123</sup> Whether Lincoln himself should be considered a case-lawyer has been discussed from the late 1890s into the twenty-first century.<sup>124</sup> The *Ohio Weekly Law Bulletin* noted that, because there were fewer law libraries outside the cities, lawyers were forced to rely on reason and principles: “There is less recourse to books and the argument of counsel as well as the opinion of the court is not padded with lengthy and oftentimes irrelevant quotations. The so-called ‘case lawyer’ is an anomaly in the country.”<sup>125</sup> Solomon Boyer wrote that a country lawyer “faithfully attended to his cow cases, his family settlements, his all-important mineral and water right cases, and many other departments of the law of which the average city lawyer knows nothing . . . , and wins them, too, on principles.”<sup>126</sup> An appreciation published in 1906 noted that “[t]he country lawyer has few law books, but he knows them well. . . . Of necessity, then, he is not a case-lawyer, but reasons from principle rather than from precise authority.”<sup>127</sup>

## V. Impacts of Late Nineteenth Century Reports and Finding Tools

### A. Law Reports in England and the United States

By 1885 the Law Reports system had been in operation in England for twenty years. Nathaniel Lindley acknowledged it was an improvement over the prior system of authorized reports, but noted that the Bar still did not have “one set of reports which is alone to be regarded as containing an authoritative exposition of the law as declared and applied.”<sup>128</sup> Lindley cited the continued publication of other series of reports as proof that the Law Reports “had not wholly succeeded in removing the evil that called them into existence,”<sup>129</sup> concluding that: “[a] multiplicity of law reports is a great evil. The evil was once intolerable; it may become so again.”<sup>130</sup>

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<sup>122</sup> *A Word or Two about Law Libraries*, 2 ALB. L.J. 332, 333 (1870).

<sup>123</sup> *Hon. Leonard Swett*, 1 CURRENT COMMENT & LEGAL MISC. 293, 294 (1889).

<sup>124</sup> See e.g., Mark E. Steiner, *Abraham Lincoln and the Rule of Law Books* 93 MARQ. L. REV. 1283, 1310 (2010) (“Lincoln, according to Herndon [Lincoln’s partner], ‘was in every respect a case lawyer, never cramming himself on any question till he had a case in which the question was involved.’” Citing WILLIAM H. HERNDON & JESSE W. WEIK, *HERNDON’S LINCOLN* 148 (1889) (Douglas L. Wilson & Rodney O. Davis eds., (2006)). But see Francis Chapman, *Lincoln, the Lawyer*, 9 TEMP. L.Q. 277, 283 (1935) (“Lincoln had little knowledge of text books or decisions, hence he was not and never could be a case lawyer but he relied upon logic and reason, with his knowledge of human nature for the winning of his cases.

<sup>125</sup> [Note], 12 WKLY. L. BULL. 129, 129 (1884).

<sup>126</sup> Solomon B. Boyer, [Note], 2 CURRENT COMMENT & LEGAL MISC. 500, 500 (1890). Boyer also pointed out West Publishing Co.’s influence on the urban case lawyer: “The city case lawyer is fast learning the beauties of case law under the kindly tutelage of the St. Paul reporters, and, perhaps, someday . . . will realize the great value of the cases as a source of correct deduction for the principle upon which his case may be brilliantly won.” *Id.* at 501.

<sup>127</sup> J.C.M., *The Country Lawyer*, 10 LAW NOTES (Edward Thompson Co.) 6, 6 (1906).

<sup>128</sup> Lindley, *supra* note 5, at 137

<sup>129</sup> *Id.* at 142.

<sup>130</sup> *Id.* at 149. In 1939 A. L. Goodhart cited Lindley’s hopes that the number of law reports would decrease, but found that it had “increased to a marked extent.” A. L. Goodhart, *Reporting the Law*, 55 LAW Q. REV. 29, 29 (1939) (including list of current titles).

In the United States, official reporters were common in state courts after 1850 and decisions were published on a timelier basis than earlier. As the number of decisions issued continued to grow, however, the official reporters lacked the resources to keep up.<sup>131</sup> In 1867 a reviewer wrote that “[t]o possess a full library now of American law books, is to possess what has cost a fortune.”<sup>132</sup> Yet, American lawyers still argued for publication of all decisions, no matter how many were issued, no matter the costs or the burdens added to their research. The *Albany Law Journal* wrote that, the more cases reported, “the more likely are we to find the opinions and judgments of wise and experienced judges upon cases similar to those we may have in hand. And we all of us know how valuable is even one good precedent.”<sup>133</sup> One result was what James Campbell saw as an apparent need “for the display of erudition, which leads men who are otherwise candid into garnishing their briefs and treatises with long lists of names taken on trust at second hand, or gathered from the Digests, which represent cases that cannot possibly have been carefully read, if read at all [and] bear witness to this by repeating misquotations and verbal errors that sometimes have marred generations of predecessors.”<sup>134</sup>

When the number of decided cases increased at higher rates after the Civil War,<sup>135</sup> commercial publishers were positioned to offer quicker delivery of new opinions than the official reporters, as well as easier access to opinions from other states. As Jessen put it: “[t]he private sector saw commercial opportunity in the increasingly untimely publication of official reporters, and also in parsing the growing number of opinions in various ways.”<sup>136</sup> Some publishers offered selective

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Ben-Yishai cites John Leubsdorf for the proposition that “[a] judicial opinion tells many stories and speaks with many voices. It is less a single and anonymous utterance of the law than a condensed quarrel, less a line than a knot,” then points out that “[if] anything, Victorian reports are vastly more knotty than American ones.” BEN-YISHAI, *supra* note 3, at 52, quoting John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 447 (2001).

<sup>131</sup> In 1859, David Dudley Field estimated that these cases contained two million rules. DAVID DUDLEY FIELD, *THE MAGNITUDE AND IMPORTANCE OF LEGAL SCIENCE: ADDRESS AT THE OPENING OF THE LAW SCHOOL OF THE UNIVERSITY OF CHICAGO, SEPTEMBER 31ST, 1859* 13 (1859?).

<sup>132</sup> H., *The Iowa Reports*, 1 W. JURIST 216, 216 (1867). At the second meeting of the American Bar Association in 1879, Edward J. Phelps found the law to be “confused and distracted with a multitude of incongruous and inconsistent precedents that no man can number.” E.J. Phelps, *Annual Address*, 2 ANN. REP. A.B.A. 173, 175 (1879).

<sup>133</sup> *A Few Words about Many Reports*, 6 ALB. L.J. 331, 331 (1872). In addition, wide publication of decisions provided a check on wayward judges: “No judge is apt to decide a case rashly or corruptly, or against the known law, if he knows that his decision will be exposed to public notice and criticism.” *Id.* at 331. The article closed by pointing out: “We never hear the complaint made that there are too many books published in the other professions and sciences, . . . and yet we complain of too many books on the law, in the ashes of which it is said are taken up, ‘the sparks of all sciences in the world.’” *Id.* at 332.

<sup>134</sup> James V. Campbell, *Materials of Jurisprudence*, 14 AM. L. REV. 257, 260 (1880)

<sup>135</sup> Hicks estimated that there were 2,000 published volumes of reports in 1871. HICKS (1923), *supra* note 2, at 111. Benjamin Abbott found there were about 2,500 in 1876. Benjamin Vaughn Abbott, *American Jurisprudence*, *supra* note 42, at 434, 435. In 1882 J.L. High set out the number of published volumes of American reports (2,944, including state and federal). J. L. High, *What Shall be Done with the Reports*, 16 AM. L. REV. 429, 431 (1882). John Dillon found 3,798 by 1884. JOHN F. DILLON, *LAW AND JURISPRUDENCE OF ENGLAND AND AMERICA* 380 (1884). Hicks reported 8,208 (excluding reprints) in 1910. HICKS (1923), *supra* note 2, at 111.

<sup>136</sup> Edward W. Jessen, *Official Law Reporting in the United States*, in *PROCEEDINGS OF THE SECOND INTERNATIONAL SYMPOSIUM ON OFFICIAL LAW REPORTING*, JULY 30, 2004 at 28, 34 (2004), available at <http://arjd.washlaw.edu/images/symposium04.pdf> (last visited February 24, 2016). The Supreme Court’s 1834 decision in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834) had established that the Court’s own opinions could not

publication of cases thought to have particular precedential or illustrative value; others provided comprehensive publication of appellate decisions, usually in packages of decisions from neighboring states. By the 1870s much of the growth in published decisions was driven by unofficial versions of the reports.<sup>137</sup>

In 1871 Bancroft-Whitney began *American Reports*, an unofficial series of selected state cases, which included both “leading cases” and other cases “useful and important as illustrations of established principles.”<sup>138</sup> In 1879 the West Publishing Company took a different approach with its *NorthWestern Reporter*, which contained decisions from appellate courts in Iowa, Michigan, Minnesota, Nebraska, Wisconsin, and the Dakota Territory, and became the model for West’s several series of comprehensive regional reporters, eventually known as the National Reporter System.<sup>139</sup> As West expanded its coverage, it faced competition in the market for comprehensive reporters in some regional markets. At one point, lawyers in twenty states were served by three separate series of reports: the official and two commercial series.<sup>140</sup> Despite calls for the companies to resist competing in the same regions, in August 1885 West announced plans to cover all remaining states.<sup>141</sup> By 1888, all publishers with similar reporters had ceased their publication.<sup>142</sup>

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be copyrighted and the question of copyright in state court decisions was apparently put to rest in 1888 in *Banks v. Manchester*, 128 U.S. 244 (1888).

<sup>137</sup> In 1931, Albert Kocourek told the International Academy of Comparative Law that the continuing growth in the body of American case law was due largely to the “various parallel reports” issued since the 1870s.” Albert Kocourek, *Sources of Law in the United States of North America and Their Relation to Each Other*, 18 A.B.A. J. 676, 681 (1932). Kocourek found that, despite their contributions to the bulky masses of American law, the privately published “parallel reports” (which included “annotated reports, state-group reports, and special subject reports”) each met a professional need and was in wide use. *Id.*

<sup>138</sup> HICKS (1923) *supra* note 2, at 125. Practice cases and local cases with no value outside the jurisdiction where they were decided were excluded. *Id.* at 124 (quoting Advertisement to first volume of *American Reports*). For a contemporary review, see *The ‘American Reports’*, 2 ALB. L.J. 491 (1871). The success of *American Reports* prompted the company in 1878 to begin publishing a retrospective compilation of important cases, *American Decisions* (published in 1878-88), starting from the earliest reports. *American Reports* was retitled *American State Reports* in 1888 and continued to 1911.

<sup>139</sup> An 1880 review praised West for how quickly new cases from the five jurisdictions were available in pamphlet form, then in full volumes. *The Northwestern Reporter*, 14 AM. L. REV. 717 (1880). *The Ohio Law Journal* concluded that West had reached publishing’s “ultima thule of cheapness and perfection.” *New Books*, 1 OHIO L.J. 39 (1880). See also *Review of Northwestern Reporter, Vol. II*, 4 VA. L.J. 642 (1880).

West had started publishing decisions, mostly from Minnesota, in newspaper format in 1876. West’s newspaper was published between 1876 and 1879, first as *The Syllabi*, then as *The Northwestern Reporter*. See W.E. Butler, *John Briggs West and the Transformation of American Law Reports* in *THE SYLLABI: GENESIS OF THE NATIONAL REPORTER SYSTEM* iii, viii-xii (2011).

<sup>140</sup> Note: *The Lawyer’s Reports, Annotated*, 22 AM. L. REV. 921, 921 (1888).

<sup>141</sup> WILLIAM W. MARVIN, WEST PUBLISHING CO.: ORIGIN, GROWTH, LEADERSHIP 42 (1969) (official West Company history). The same month, in an article titled “The Revolution in Law Reports,” *The Nation* reviewed lawyers’ complaints about the law reports, called for “publication of one series to contain all the State reports, issued under responsible editorship—something after the pattern of the present English ‘Law Reports,’ and praised West for its plans to cover all state and federal courts, while noting the competition from other publishers. *The Revolution in Law Reports*, 41 THE NATION 167, 167 (1885). In 1885, an observer noted that eleven states were covered by two or three companies’ “schemes,” presumably in addition to the official reports.” *The New “Reporters,”* 19 AM. L. REV. 930, 932 (1885).

<sup>142</sup> For specific dates, see MARVIN, *supra* note 142, at 43, 47-48.

In 1882 J.L. High predicted that the rate of increase in published volumes would continue to accelerate<sup>143</sup> and “lawyers now in practice at the bar may live to see the number of volumes of reports in the English-speaking countries exceed twenty thousand.”<sup>144</sup> High attributed the growth to increased business before the courts and the number of new courts established to handle the workload,<sup>145</sup> but also blamed court reporters and publishers of official reports who issued as many volumes as possible and tended to pad the volumes with material of questionable value.<sup>146</sup> Selective reporters such as *American Decisions* and *American Reports* were “directed, not to the prevention or curtailing of the multiplicity of reports, but merely to condensing the volumes of a given series into a more compact form and into fewer volumes, still leaving the series itself to be perpetuated and increased.”<sup>147</sup> For High, these were inadequate solutions.

High wrote only a few years after the start of the *NorthWestern Reporter* and did not discuss the impacts of West’s comprehensive approach on the growth of published reports. In the *Ages of American Law*, however, Grant Gilmore blamed West for the flood of case law and the problems it caused, arguing that the National Reporter System “may have dwarfed the contributions of Langdell, Holmes, and all the learned professors on all the great law faculties.”<sup>148</sup> Lawrence Friedman has been less harsh, arguing that “lawyers’ own hunger for precedent, for case law” drove the publication of more and more cases with the result that they “simply gave up any attempt to grasp the whole of the law or stay abreast of it. They concentrated on problems at hand, on the corners of law they dealt with day by day; and they grumbled about the expense and the confusion of the law reports.”<sup>149</sup> Willard Hurst pointed out that a multi-jurisdictional common law legal system based on precedent “was inherently costly to work with. It required time-taking search for authorities. It called for expensive law libraries.”<sup>150</sup>

### ***B. Finding Cases***

Case lawyers were criticized for focusing on finding cases matching the facts of their current cause. In 1898, the reviewer of a set of negligence cases described a trial in which one lawyer read “a case on all fours with the case at bar,” only to have his opponent successfully object that the case had no authority for the matter because it involved a cow, while the current

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<sup>143</sup> High, *supra* note 136 at 434

<sup>144</sup> *Id.* at 435.

<sup>145</sup> Intermediate appellate courts, usually with both original and appellate jurisdiction, had been established in six states before 1882. See Edward O. Curran & Edson R. Sunderland, *The Organization and Operation of Courts of Review*, in 3 REP. JUDICIAL COUNCIL OF MICH. 152, 152-155 (1933). Between 1891 and 1895, six additional states established intermediate courts of appeal. *Id.* at 155.

<sup>146</sup> High described: “Long and discursive head-notes, unduly extended statements of fact, prolix arguments of counsel, often printed literally, page by page, from the arguments filed, the only reportorial labor involved being the use of the scissors . . . .” High, *supra* note 136 at 438. He also noted the length of published opinions written as “elaborate essays about questions of law involved in the particular case,” often by inferior judges whose rulings would be overturned on appeal. *Id.* at 439.

<sup>147</sup> *Id.* at 440

<sup>148</sup> GRANT GILMORE, *THE AGES OF AMERICAN LAW* 59 (1977).

<sup>149</sup> FRIEDMAN (2005), *supra* note 19, at 475. In his critique of Miller’s *The Life of the Mind in America*, Friedman suggested that “The increasing bulk of American law was due more to population growth, economic development, and social diversity” than to the writings of what Miller termed the ‘behemoths of legal scholarship.’” Friedman (1968), *supra* note 59, at 1244, 1249 (1968).

<sup>150</sup> JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 308 (1950).

case was about a hog. As the reviewer put it: “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.’”<sup>151</sup>

An 1888 review of a new digest of cases suggested that case lawyers and judges should be called “fact lawyers” because of their obsession with finding cases having similar, preferably identical, facts to their case of the moment. George Chase described the decision-making process of a case-judge: “He collects a mass of cases, states the facts and decision in each, and then finding them unfortunately in disagreement is in a state of unhappy bewilderment, ... and lets his decision fall, as likely as not, to the side where the cases are the greatest in number.”<sup>152</sup>

West Publishing Co. objectives were not limited to dominating the market for comprehensive publication of judicial opinions. In 1889 John B. West stated: “it is the principle 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.”<sup>153</sup> In 1887 West began publishing the annual *American Digest*<sup>154</sup> and in 1897, the 50 volume *Century Edition of the American Digest*: “A Complete Digest of all Reported American Cases from the Earliest Times to 1896.”<sup>155</sup> By the time the *Century Edition* was completed in 1904, West largely controlled the market for digests in the same way that its reporters had taken over the market for publishing case law in the 1880s.<sup>156</sup>

In 1898 the A.B.A. Committee on Law Reporting and Digesting referred to “an unnamed publisher” 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.” As a result, “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.”<sup>157</sup> Although it was not

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<sup>151</sup> *Book Review, American Negligence Cases; American Negligence Reports: Current Series*, 32 AM. L. REV. 479, 480 (1898). Years later, Claude Horack told “the old story of the lawyer who sent his young assistant to the library to get a few citations to decorate his case which involved the conversion of a horse, bridle, and saddle.” After searching for a few days, the assistant reported that despite finding cases dealing with “the conversion of a horse, some of the conversion of a horse and bridle, some of the conversion of a horse and saddle, and he had even found cases of the conversion of a bridle and saddle, but he had found no authorities which covered the case of the conversion of a horse, and a bridle, and a saddle!” H. Claude Horack, *The Bar Examiner and the Law Schools*, 8 AM. L. SCH. REV. 611, 611-12 (1936).

<sup>152</sup> George Chase, *Methods of Legal Study--Part 2*, 1 COLUM. JURIST 77, 77 (1885)

<sup>153</sup> *Symposium of Law Publishers*, 23 AM. L. REV. 396, 400 (1889) (written comments of John B. West).

<sup>154</sup> The *American Digest* was a continuation of Little & Brown’s *United States Digest*. Two other comprehensive digests started publication at about the same. The Digest Publishing Company’s *Complete Digest* (compiled by former editors of the *United States Digest*) started in 1889 and the *General Digest* (from Lawyers’ Co-operative Publishing Company) in 1890. Each would eventually consolidate with the *American Digest*. In 1882, J.L. High had 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.” High, *supra* note 136 at 434.

<sup>155</sup> 1 CENTURY EDITION OF THE AMERICAN DIGEST [i] (1897).

<sup>156</sup> The set was supplemented by annual volumes of the *American Digest* and decennial compilations. Eventually West published separate digests for its regional reporters of state decisions, as well as for individual states, the federal courts, and the U.S. Supreme Court.

<sup>157</sup> *Report of Committee on Law Reporting and Digesting*, 21 ANN. REP. A.B.A. 437, 441 (1898).

named specifically, West viewed the Committee's recognition as a formal endorsement of its classification system as "the model of modern digesting."<sup>158</sup>

Late nineteenth century lawyers also used legal treatises and encyclopedias to locate cases. The earliest American treatises had documented the emerging common law and responded to the earlier problems posed by the growing amount of case law, becoming perhaps the most significant form of legal writing in the nineteenth century.<sup>159</sup> In the latter part of the century, larger numbers of treatises were published,<sup>160</sup> but were no longer seen as sources for discussion of legal principles. Like digests, they were now used as means to locate cases, and were often written by "a second or third-rate lawyer, ... employed to prepare a text-book on some legal subject, the fundamental and governing principles of which he knows little or nothing about."<sup>161</sup> In 1888, Justice Samuel Miller reminded University of Pennsylvania law students that "[m]ost of these modern treatises ... are but digests of the decisions of the courts, and though professing to be classified and arranged in reference to certain principles discussed in the book, they are generally but ill-considered extracts from the decisions of the courts."<sup>162</sup>

Legal encyclopedias provided a measure of explanatory text along with summaries of individual cases.<sup>163</sup> The first to take on the specific problems facing late nineteenth century American lawyers was Edward Thompson Company's *American and English Encyclopedia of Law*, which began publication in 1887, and was often cited in the law journals.<sup>164</sup> The *Cyclopedia of Law and Procedure* began publication in 1901<sup>165</sup> and eventually reached 40 volumes before being succeeded in 1914 by *Corpus Juris*.

Did access to an extensive law library and the tools to find "everything the courts have said" encourage an attorney to become a case lawyer? Supreme Court Justice Joseph P. Bradley had a large library ("probably the finest and largest private law library in the United States"), and was

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<sup>158</sup> See MARVIN, *supra* note 142, at 73-74. See also *Panel Discussion on the Duplication of Law Books*, 28 LAW LIBR. J. 291, 321 (1935) ("It so happens that there is a standard classification in this country which seems to have met with the approval of the lawyers. . . . I know it has received the approval of the American Bar Association." Comment of Harvey T. Reid, Editor-in-Chief, West Publishing Company).

<sup>159</sup> See generally POUND, *supra* note 19, at 138-67; A. W. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 668-74 (1981).

<sup>160</sup> Lawrence Friedman estimates that about one thousand legal treatises were published in the United States in the last half of the nineteenth century. FRIEDMAN (2005), *supra* note 19, at 477

<sup>161</sup> Geo. H. Christy, *The Evils of Case-Law*, 22 CAN. L.J. (N.S.) 383, 402 (1886) ("the use of such compilations by the ordinary practitioner makes him more of a case lawyer than he was before....").

<sup>162</sup> Samuel F. Miller, *The Use and Value of Authorities*, 23 AM. L. REV. 165, 165-66 (1889). In a 1893 report, the Virginia State Bar Association said: "We may well be thankful when text-books cease to be digests and become treatises, citing a few leading cases, instead of a mass of contradictory decisions .... They will lead the courts instead of following them." *Report of the Committee on Library and Legal Literature*, 5 ANN. REP. VA. ST. B. ASS'N. 67, 70 (1893).

<sup>163</sup> See generally HICKS (1923) *supra* note 2, at 232-36

<sup>164</sup> *Id.* at 240-43. See also James Cockroth—*The American and English Encyclopedia of Law*, 28 CHI. LEGAL NEWS 78 (1895); *Banqueting a Publisher*, 3 AM. LAW. 545 (1895); *Encyclopedias*, 9 LAW STUD. HELPER 149 (1901). See *The American and English Encyclopedia of Law*, 26 AM. L. REV. 252 (1892). In 1903 West sued the Thompson Company for copyright infringement, claimed the contents of the Encyclopedia were taken from West digest paragraphs. See *Suit for \$1,000,000 Copyright Damages*, 65 ALB. L.J. 154 (1903); *Infringement of Copyright*, 6 LAW NOTES (Edward Thompson Co.) 227 (1903); *Law Book Publishers at War*, 11 AM. LAW. 218 (1903)

<sup>165</sup> Its appearance prompted a suit over authorship of the articles. See *B. Jones v. American Law Book Co.*, 4 BRIEF 154 (1902).

reputed to know “every book in it, as a shepherd knows his sheep.” But Bradley wasn’t “a mere case lawyer; on the contrary he was inclined and loved to discuss points rather on principle than by precedent.”<sup>166</sup> N.C. Moak was “unquestionably the most accomplished case-lawyer in this region, having reduced “the study and handling of cases . . . to an exact science.” His extensive library, however, may have led him to be “too much addicted to case study and case learning.”<sup>167</sup> The *Albany Law Journal*, however, suggested that it was “by no means a misfortune to a young practitioner that he has not easy access to a large or a complete law library.”<sup>168</sup> An 1895 ABA committee report suggested that “It is not at all clear but that it would be highly beneficial to the profession, the bench and the client, if the fate of the Alexandrian library should befall very much the larger portion of the reports of adjudicated cases in all English-speaking countries....”<sup>169</sup>

Contemporary digests and other finding tools drew mixed comments. An 1889 letter to the *Green Bag* noted the need for better indexing of the facts of cases: a lawyer working on a dog case “should at once be enabled . . . to find what he is after by looking under the heading of dog cases; so with a cow case, horse case, etc.”<sup>170</sup> Despite the shortcomings, Irving Browne argued that there had not been another time “when it was so easy to find out what has been decided - not to say, what the law is - as the present.” Thus, “if one is forced to be a case-lawyer, and that seems to be inevitable now-a-days, there is no excuse for his not having ‘the last case’ at his fingers’ ends, and for not being intimately acquainted with all its ancestors and brethren.”<sup>171</sup>

English courts issued fewer decisions than American courts, but late nineteenth century commentators were ready to criticize the indexing and digesting systems put in place for the *Law Reports*. Nathaniel Lindley’s 1885 “History of the *Law Reports*” included detailed criticisms of the Council of Law Reporting’s *Law Reports Digest of Cases*. Lindley found that its classification system used too few (and often poorly chosen) titles, the titles were not sufficiently subdivided into smaller divisions, and was “a Digest of cases, rather than of legal principles and rules with references to the cases which illustrate them.”<sup>172</sup> As late as 1939, A.L. Goodhart wrote: “It is a striking, although unfortunate, fact that it is less difficult to find the relevant American case among the 40,000 annually reported cases in that country than it is with the 750 in England: this is due to the centralized and efficient indexing system in the American reports.”<sup>173</sup>

## VI. Principle and Precedent at the Turn of the Century

In the 1880s, some writers suggested that the continuing growth in published decisions might eventually overwhelm case-lawyers and force them to focus on legal principles. James Campbell observed that the multitude of reported cases had “led to excessive citations, and thus produced confusion; but no court will listen to the indefinitely prolonged reading of authorities. However indulgent the bench may be to such repetitions, there must be required at some time a statement of

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<sup>166</sup> *Current Topics*, 45 ALB. L.J. 85.86 (1892).

<sup>167</sup> *Current Topics*, 46 ALB. L.J. 261, 261 (1892).

<sup>168</sup> *A Word or Two*, *supra* note 123, at 333.

<sup>169</sup> *Report of the Committee on Law Reporting*, 18 ANN. REP. A.B.A. 343, 354 (1895). The annex to the report provides detailed information about the currently published official reports. *Id.* at 362.

<sup>170</sup> [Anon.], *Letter to the Editor*, 1 GREEN BAG 407, 408 (1889).

<sup>171</sup> Irving Browne, *The Lawyer's Easy Chair*, 6 GREEN BAG 93, 93-94 (1894).

<sup>172</sup> Lindley, *supra* note 5, at 147.

<sup>173</sup> Goodhart, *supra* note 131, at 30-31.

the principle claimed to result from the aggregate....”<sup>174</sup> In 1884, John Dillon told the ABA that as searching for precedents became increasingly onerous, the case-lawyer would be diminished and cases would be argued and decided based on “knowledge of the great, living, fundamental principles of our law and equity systems.”<sup>175</sup> In 1888, an unsigned note in the *American Law Review* held that the number of published cases hindered the case-law researcher more than it helped: “there is scarcely a subject in this vast mass of case-made law upon which conflicting authorities, if authorities they can be called, may not be found.... it is hard to tell whether the successive efforts at rethinking the same question have been attended by any improvement of result.”<sup>176</sup> In 1892, while emphasizing that “[t]he multiplication of reports and decisions is evil altogether,” J.R. Lamar acknowledged the benefits of having new cases from all states “published, digested, and within a week after they are delivered, scattered into the offices of half of the lawyers of the Union ....” Among other things, access to the full multitude of cases would itself “so weaken their authority that the mere case lawyer will be practically useless .... Precedent will neutralize precedent. The bar will again be forced to the discussion of principles ....”<sup>177</sup> In 1904, Edward B. Whitney suggested that judges had become more resistant to citation of precedents: “[A]s the wilderness of authorities presented upon the briefs of counsel tends every year to become more hopeless, the courts in general tend more and more to decide each case according to their own ideas of fairness, . . . and to pass the previous authorities by in silence . . . .”<sup>178</sup>

In addition, by the 1890s, more articles commented on the importance of understanding principles and precedents. J.W. McLoud pointed out that although “[t]he general principles of law have probably nearly all been discovered and settled,” how they are applied changes with changes in society. The case-lawyer should not be commended, but “the lawyer who studies the most cases, will reach the most deserved eminence in his profession and success at the bar. There is more wisdom in the many than in the few. Lawyers should get wisdom from all sources.”<sup>179</sup> In 1892 Emlin McClain noted that the “practical lawyer” looks to find “discussion of the particular principles applicable to his concrete case, [but] especially he wants to find the adjudications involving facts similar to those of his case . . . .”<sup>180</sup> An 1895 ABA report on “the condition of law reporting” stated that because principles are found in published reports, “the ‘case lawyer’ wins

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<sup>174</sup> James V. Campbell, *Materials of Jurisprudence*, 14 AM. L. REV. 257, 261 (1880).

<sup>175</sup> John F. Dillon, *American Institutions and Laws*, 7 ANN. REP. A.B.A. 203, 233 (1884). A committee report of the Virginia State Bar Association predicted that “the day of the case lawyer is waning” due to the discrimination of the Bench and the recurrence to first principles by the Bar.” *Report of the Committee on Library and Legal Literature*, 6 ANN. REP. VA. ST. B. ASS’N. 43, 48 (1894).

<sup>176</sup> Note: *The Lawyer’s Reports Annotated*, *supra* note 141 at 922.

<sup>177</sup> J.R. Lamar, *Georgia’s Contribution to Law Reform*, 46 ALB. L. J. 501, 516 (1892)

<sup>178</sup> Edward B. Whitney, *The Doctrine of Stare Decisis*, 3 MICH. L. REV. 89, 100 (1904).

<sup>179</sup> J. W. McLoud, *The Value of Precedents*, 28 AM. L. REV. 218, 220 (1894). Others argued that, because the principles of the common law were so well-established, new cases only complicated the work of lawyers and judges. An 1892 ABA committee report stated that “[n]o conception held in common by a large number of men such as the members of a State or great community can be very complex in its nature or difficult of comprehension.” *Report of the Committee on Legal Education*, 15 ANN. REP. A.B.A. 317, 342 (1892).

<sup>180</sup> Emlin McClain, *Classification of the Law for Lawyers*, 26 AM. L. REV. 223, 223 (1892) McClain noted that the practical lawyer “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.” *Id.* But see STRONG, *supra* note 112, at 424 (“‘All four’ cases upon a critical examination are not very common. There is almost always some minute point of difference which will upset a whole line of cases apparently very similar to that under consideration.”).

cases because he has examined the books thoroughly....”<sup>181</sup> R. McP. Smith argued that “principles are best learned by reading cases. The judge makes a fuller exposition of the principle than the text-writer. The facts elucidate it. The style of the opinion is more familiar--more like that of a good newspaper editorial--the best of style for such matter.”<sup>182</sup> How could a lawyer advise his clients “if he were obliged to rely on his understanding of general principles which he might deem applicable to the complicated questions which are presented? How could the courts dispose of business if every case were to be argued and decided without regard to precedents?”<sup>183</sup> A brief article in the *Weekly Law Bulletin* noted that “the growth and development of the law can be learned only from the decisions of the courts.” The problem was not that case-lawyers relied more on precedents than principles, but that many lawyers were not well-trained in analysis and comparison of cases.<sup>184</sup>

In 1898, a letter to the editor of the *Weekly Law Bulletin* pondered whether there were as many case-lawyers as “the noise made about them presumes to exist.” Although the expression suggests that case-lawyers are ignorant of legal principles, it was hard to see “how any man, without a well-grounded knowledge of legal principles, can be even a good case-lawyer. The ability to properly sift the enormous mass and select the right cases as precedents to gain the point he seeks to establish, presupposes a knowledge of the law.”<sup>185</sup> But were there now too many cases for even the skilled case-lawyer to sort through? J.D. Shewalter told the Missouri Bar: “When we reflect that there is scarcely a mooted question upon which decisions cannot be found upon both sides .... the case lawyer of the future can hope for nothing but a confused and unfathomable sea of perplexity.”<sup>186</sup>

Still, as the nineteenth century neared its close, Judge U. M. Rose told the Virginia Bar:

[N]ow 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.<sup>187</sup>

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<sup>181</sup> *Report of the Committee on Law Reporting* (1895), *supra* note 171, at 354. Arkansas judge U.M. Rose noted in 1896 that, although the Statute of Frauds seemed to be a short and simple statute, the latest treatise on the subject was “a bulky volume, containing references to thousands of cases.” He concluded “that, if with all these adjudications we do not understand the statute, then we never can do so.” U.M. Rose, *The Present State of the Law*, 2 VA. L. REG. 651, 658 (1897).

<sup>182</sup> R. McP. Smith, *Method of Teaching Law*, 1 UNIV. L. REV. 198, 198 (1894) (Letter to Dr. Austin Abbott).

<sup>183</sup> Harvey Henderson, *Origin and Utility of Case-Law II*, 4 KAN. L.J. 97, 105 (1886)

<sup>184</sup> J.V.L., *The Use and Misuse of Case Law*, 40 WKLY. L. BULL. & OHIO L.J. 142, 142 (1898) (“the growth and development of the law can be learned only from the decisions of the courts.”). The author argued that if the best lawyers of earlier times argued from principles, it was only because there had been so many fewer cases. *Id.*

<sup>185</sup> *To the Editor of the Weekly Law Bulletin*, 40 WKLY. L. BULL. & OHIO L.J. 152, 152-53 (1898)

<sup>186</sup> J.D. Shewalter, *Reform in the Practice and Administration of the Law*, 6 AM. LAW. 172, 172 (1898).

<sup>187</sup> Rose, *supra* note 183, at 656. In 1893, J.J. Willett (“a younger member of the bar”) told the Alabama Bar Association that, although he had once looked down on the lawyer who did not rely on general principles, but needed “a case to fit a case,” 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.” In court, when the case lawyer “leisurely picks up a volume and informs the court that he has a “case in point”, the interest with which we have followed him changes to fear, and when the case really proves to be a case in point, in most cases we feel completely floored.” J.J. Willett, *The Case Lawyer*, 1 AM. LAW. 36, 36 (1893) (Transactions of the Sixteenth Annual Meeting of the Alabama Bar Association).

Criticisms of the case-lawyer continued in the early twentieth century. In his 1903 presidential address to the Association of American Law Schools, Simeon Baldwin argued: “The term ‘case-lawyer’ is justly one of reproach.”<sup>188</sup> John Dos Passos wrote that because searching for principles had become subordinated to seeking precedents, the modern lawyer “carries, as a soldier would a knapsack, a memory filled with sections of codes and adjudicated cases.... [his] nose is always to be found in a digest, ‘case’-law accumulating so fast that he must have indices to search for his precedents.”<sup>189</sup> Theron Strong observed that “the effect of 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.”<sup>190</sup>

Yet, a *Law Notes* article claimed that the researcher’s real problem was not the bulky body of case law, but the “clumsy and inferior tools” available for finding cases.<sup>191</sup> A 1901 article in the *Yale Law Journal* acknowledged that the many digests, encyclopedias, and other case-finding tools were often poorly-compiled, but saw that they had “placed the youngest and oldest members of the profession on a level in the examination of authorities.”<sup>192</sup> As a result, “the most nimble searcher among the digests triumphs over an opponent who relies on logical deduction from principle,” while “the persistent continuance in practice of elderly men is viewed with ill-concealed impatience by the pushing members of a profession in which activity is more in demand than counsel.”<sup>193</sup> Alfred Beveridge suggested that it was impossible to become a great lawyer without being well-read in Blackstone and other classic legal texts, as well as in the sciences, literature, and history, but he admonished young lawyers not to “go into a court without having thoroughly reviewed and mastered all the precedents bearing on every phase of your proposition.”<sup>194</sup>

Some wondered why lawyers viewed the growth of knowledge in their field as an evil.<sup>195</sup> In 1901, a review of the forthcoming *Cyclopedia of Law and Procedure* questioned the complaints about the bulkiness of the professional literature, pointing out that other fields had developed over time by incorporating past knowledge into new and then discarding the old. Lawyers had not put

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<sup>188</sup> Baldwin, *supra* note 106 at 34 (applying the term to lawyers who believed that “a reported case is anything more than a statement of how a particular court decided a particular cause by applying particular rules to particular facts.”)

<sup>189</sup> JOHN R. DOS PASSOS, *THE AMERICAN LAWYER AS HE WAS - AS HE IS - AS HE CAN BE* 13-14 (1907). Dos Passos took pains to note, however, that “A comparison between the past and present lawyer, is not disadvantageous intellectually to the latter. He has no less brains; no less natural intelligence; and he is a better business man, withal, than the lawyer of yore. Simply, he is armed with different weapons.” *Id.* at 22.

<sup>190</sup> STRONG, *supra* note 112, at 427.

<sup>191</sup> *The Growing Mass of Case Law*, 7 *LAW NOTES* (Edward Thompson Co.) 144,146 (1903).

<sup>192</sup> George F. Shelton, *Law as a Business*, 10 *YALE L.J.* 275, 281 (1901) (“A clerk can run down the cases and prepare as sound an opinion as the most learned scholar of the profession.”)

<sup>193</sup> *Id.*

<sup>194</sup> Albert J. Beveridge, *The Young Lawyer and His Beginnings*, 1 *S. L. REV.* 196, 203-204 (1901).

<sup>195</sup> *Growing Mass*, *supra* note 193, at 144:

To say this accession is an evil is to assert that knowledge and experience gained are not valuable as guides for the future. Members of professions other than the law ... do not take that position. The successful physician or sanitary engineer, for example, reads with avidity what is going on in the world in the line of his profession. We do not hear him complaining that the publication of results obtained by experimenters in his field is “a serious evil.”

See also I. W. Foltz, *It is Better to Seek the Fountains than to Wander Down the Rivulets*, 39 *CHI. LEGAL NEWS* 362, 363 (1907) (“Scientifically viewed the legal profession is far in the rear ranks in the procession of the professions .... We have no scientific system or correlation of our law, nor do we show much disposition to appreciate the need ....”).

aside older knowledge as new knowledge was created. As a result, their knowledge base had only increased, leaving the modern lawyer “doomed to begin at, practically, the same point from which his predecessors of a hundred years ago took their start, and ... [to] sift out for himself from the ever-increasing pile of chaff the grains of wheat for which he seeks.”<sup>196</sup> With the continual addition of new cases, “knowledge of the law in its entirety has long been an utter impossibility, and every lawyer has become, of necessity, a ‘case lawyer,’ ... forced to rely upon the text writers and digesters to guide him to the authorities.”<sup>197</sup> The legal literature had fallen “further and further behind, until the necessity for radical improvements in the methods of law writing has become decidedly apparent, even to antiquated believers in general principles who deem a ‘case lawyer’ beneath contempt.”<sup>198</sup>

Iowa judge A.N. Hobson noted the “contemptuous manner” in which some lawyers claimed the ability to resolve questions by applying principles without reference to cases.<sup>199</sup> Hobson pointed out that because the principles applicable to non-statutory questions were themselves based in adjudicated cases, “no counsel can reasonably aspire to lasting success who does not study and understand the cases.”<sup>200</sup> An article in the *West Docket* feared that, if other lawyers continued to sneer at the case lawyer, “knowledge of ... objective authorities will have become a thing of the past, while subjective impressions from uninformed and feeble reasoners will be rampant, and our jurisprudence will be turned into a riot of loose thinking.”<sup>201</sup>

Other early twentieth century commentators acknowledged that practitioners frequently had no choice but to thoroughly research the body of case law to lessen the chances that opposing counsel would unearth unfamiliar precedents they could not counter. At the second meeting of the American Association of Law Libraries, Frank B. Gilbert described the work of the modern case-lawyer: “he knows his facts and seeks to apply thereto the law . . . . 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.”<sup>202</sup>

The West Publishing Company stood ready to facilitate a lawyer’s search for precedent, even as some critics complained that the law “has been seized upon and converted into an industrial scheme of gigantic proportions ... for the manufacture of reports of decided cases of ponderous digests and of so-called treatises compiled by day laborers from the digests.”<sup>203</sup> In the early 1900s,

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<sup>196</sup> *Book Review: Cyclopaedia of Law and Procedure, vol. 1*, 9 AM. LAW 77, 77 (1901). See also FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 36 (2009) (“Law characteristically faces backward . . . legal decision-making is preoccupied with looking over its shoulder.”); DUXBURY, *supra* note 39 at 4 (“Precedent-following is very obviously a backward-looking activity.”).

<sup>197</sup> *Book Review, supra* note 198, at 77.

<sup>198</sup> *Encyclopedic Notes*, 13 GREEN BAG 212, 212 (1901).]

<sup>199</sup> A.N. Hobson, *The Case Lawyer*, 14 ANN. MEETING IOWA ST. B. ASS’N 67, 67 (1908)

<sup>200</sup> *Id.* at 74.

<sup>201</sup> Hugh K. Wagner, *What is a Case Lawyer?*, 1 WEST PUB. CO. DOCKET 153, 153-54 (1909). Wagner argued that the term case-lawyer was used originally to describe lawyers who did not know the principles of law found in published cases, but focused on the facts of his own case, and did not cite authorities, but stretched his own sense of “‘principles’ into some kind of shadowy relation to his ‘case’.” *Id.* at 155.

<sup>202</sup> 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)

<sup>203</sup> W. H. Rossington, *The Wilderness of Single Instances*, 14 AM. LAWYER 167, 169 (1906) (address before the Kansas State Bar Association).

West began taking an active role in training law students and practitioners to use its products.<sup>204</sup> Company representatives visited law schools to lecture on topics of legal bibliography<sup>205</sup>; in addition, the company started two journals,<sup>206</sup> and published a legal research and writing textbook.<sup>207</sup> In 1907 West representative Roger W. Cooley made the company philosophy clear in an *American Law School Review* article stating that “knowledge of the law is to a great degree a knowledge of precedents . . . to 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.”<sup>208</sup> Two years later, Cooley told an audience of law librarians that when a lawyer comes to the law library, he should already have worked out the principle to be applied to his problem: “[W]hat he wants now is cases applying that principle to facts on all fours with, or similar to the facts in his case.”<sup>209</sup> The second edition of West’s textbook: *Brief Making and the Use of Law Books*, edited by Cooley, suggested that starting from a principle of law rather than the facts required: “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.”<sup>210</sup> The descriptive word approach, which West was developing at the time,<sup>211</sup> did not require the lawyer “to know the theory or rules of classification” and ignores “all considerations of the science and theory of digesting.”<sup>212</sup>

In 1912 West introduced a comprehensive “Descriptive Word Index” consisting 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.”<sup>213</sup> R. A. Daly, one of West’s law school instructors, wrote that the aim of legal research “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.”<sup>214</sup> In 1915 Daly suggested that the principles of law are “well known to the profession” from law school; but to apply principles in practice, “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.”<sup>215</sup> Precedents are

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<sup>204</sup> See generally Frederick C. Hicks, *The Teaching of Legal Bibliography*, 11 LAW LIBR. J 2-4 (1918).

<sup>205</sup> *Id.* at 3-4.

<sup>206</sup> The *American Law School Review* (1902-1947) was billed as an “intercollegiate law journal.” *West Publishing Company’s Docket* (1909-1944) aimed at a broader professional audience.

<sup>207</sup> NATHAN ABBOTT, ED., *BRIEF MAKING AND THE USE OF LAW BOOKS* (1906). The book was regularly reprinted and issued in revised editions through the 1930s.

<sup>208</sup> Roger W. Cooley, *The Purpose of a Digest*, 2 AM. L. SCHOOL REV. (West) 77, 77 (1907).

<sup>209</sup> Roger W. Cooley, *Use of Law Books*, 2 LAW LIBR. J. 1, 2 (1909).

<sup>210</sup> 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).

<sup>211</sup> Hicks (1918), *supra* note 206, at 3.

<sup>212</sup> *Id.*

<sup>213</sup> *Advertisement: Editorial by the Advertising Manager*, 1 WEST PUB. CO. DOCKET, Sept. 1912 [n.p.].

Fred Hicks referred to descriptive word indexes as “indexes to the master index” and suggested that: “Lawyers of the old school used to scoff at such books, calling them ‘Yellow Dog books,’ suggesting that only the ignorant need them.” Frederick C. Hicks, *Technique of Legal Research for the Practicing Lawyer*, 31 LAW LIBR. J. 1, 9 (1938). James Kerr suggests that the first indexes of this type were the “common sense indexes” devised by Callaghan & Company. See James M. Kerr, *Fixing the Law and Finding the Law*, 15 LAW. & BANKER & S. BENCH & B. REV. 275, 285 (1922).

<sup>214</sup> R.A. Daly, *The Descriptive Word*, 3 AM. L. SCH. REV. 79, 79 (1912)

<sup>215</sup> R.A. Daly, *Analysis of Facts: Salient Elements*, 3 AM. L. SCHOOL REV. (West) 593, 593 (1915).

found by analyzing the facts of the case at hand and using the descriptive word index.<sup>216</sup> In 1920 he wrote that “finding the law in active practice means the locating of that adjudicated case 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.”<sup>217</sup> West’s publications were designed for lawyers needing to find that case.

The situation of the case lawyer may have been captured best by Solicitor General John W. Davis in a 1916 talk before the Judicial Section of the A.B.A.<sup>218</sup> Davis quoted a recent opinion that described the current bar as “an industrious, painstaking, far-reaching army of sleuths of the type 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.”<sup>219</sup>

Davis justified the need to examine all published cases because of the courts’ reliance on precedent: “To make precedents the fount and origin of the law is to compel their study ... to put a premium on this knowledge is to encourage its overexhibition by the overzealous.”<sup>220</sup> As a result, “the case lawyer... is not wholly a self-made man.... [h]e is rather the product of an environment and of circumstances which he is powerless of his own motion to change or greatly modify.”<sup>221</sup> Speaking to an audience of judges, Davis suggested that the judiciary write fewer full opinions, write shorter opinions, cite fewer cases in their opinions, and publish them more selectively.<sup>222</sup>

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?<sup>223</sup>

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<sup>216</sup> *Id.* at 602.

<sup>217</sup> R.A. Daly, *Finding the Law*, 4 AM. L. SCHOOL REV. 569, 569 (1920).

<sup>218</sup> John W. Davis, *The Case for the Case Lawyer*, in 32 ANN. REP. A.B.A. 757-769 (1916).

<sup>219</sup> *State v. Rose*, 106 N.E. 50, 52 (Ohio 1914), quoted in *id.* at 758-59.

<sup>220</sup> *Id.* at 760. Davis counted a present total of 11,650 volumes of English and American reports, over half of which had been published since 1885. *Id.* at 761

<sup>221</sup> *Id.* at 759.

<sup>222</sup> *Id.* at 765-67. 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.

<sup>223</sup> *Id.* at 761.

If private companies persisted in publishing decisions not designated for official publication, judges could ignore those decisions if cited in briefs or argument, and refrain from citing them in later opinions. *Id.* at 765-66. See also *Should Reduce Number of Published Opinions*, 19 J. AM. JUD. SOC. 69, 69 (1935) (“No body of judges was ever wooed with sweeter words, but Mr. Davis put it squarely up to them to accept and employ remedies.”). Davis acknowledged that in some states there were constitutional and legislative requirements that all cases be published.

In 1923, in his presidential address to the A.B.A., Davis hailed the establishment of the American Law Institute, suggesting that escape from the “Serbonian bog” of case law would come “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*, 39 ANN. REP. A.B.A. 193, 196 (1923).

## V. Conclusion: Are We All Case-Lawyers Now?

American law and the legal environment changed dramatically in the nineteenth century,<sup>224</sup> then, as Lawrence Friedman put it, went “from a walk, to a run, to travel on a supersonic jet”<sup>225</sup> in the twentieth. Among the changes was what Friedman called the “law explosion,” which encompassed both the growth in the “sheer size and scale of the legal system,” and the quantity of “sheer legal *stuff*.”<sup>226</sup> In 1916 John Davis had argued that case lawyering was perhaps inevitable in a system that put a premium on the knowledge in published cases, but he also saw that “overexhibition [of this knowledge] by the overzealous” was exacerbated by the ever-growing number of cases.<sup>227</sup> In the early part of the century, American Bar Association committees continued to study the problems created by the growth in law books, sometimes in collaboration with other organizations, but ultimately without much result.<sup>228</sup> The 1923 report calling for establishment of the American Law Institute cited “the great volume of recorded decisions” as a significant cause of the two chief defects of American law: “its uncertainty and its complexity.”<sup>229</sup> Advocates for restatements of the law suggested that the weight of the reported cases might break down the legal system.<sup>230</sup> In lectures published as *The Growth of the Law*, Benjamin Cardozo called “the multiplication of decisions” the greatest cause of uncertainty in the law, suggesting that “[t]he fecundity of our case law would make Malthus stand aghast.”<sup>231</sup>

Yet, complaints about the difficulties of locating precedent became less frequent, even as the body of published law continued to grow. As early as 1917, librarian Mary Foote observed that the bar’s criticisms were “now directed almost entirely to the problems of time and expense; difficulty in finding the law is scarcely mentioned.” For Foote: “the increased facilities for the examination of legal authorities have almost kept pace with their multiplication.”<sup>232</sup> By the mid-1920s, American lawyers had nearly forty years’ experience with West’s *American Digest* and its classification system. The *Century Edition* of the digest covered cases through 1896; pamphlets and annual digests indexed and organized newly decided cases; and a third decennial compilation was in progress. Descriptive word indexes designed to facilitate fact-based research were widely available. Other publishers based the classifications in their books on the West system.<sup>233</sup>

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<sup>224</sup> LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20<sup>TH</sup> CENTURY* 1-2 (2002). See also Anat Rosenberg, *The History of Genres: Reaching for Reality in Law and Literature*, 39 *LAW & SOC. INQUIRY* 1057, 1059-60 (2014).

<sup>225</sup> FRIEDMAN (2002), *supra* note 226, at 3.

<sup>226</sup> *Id.* at 3-8.

<sup>227</sup> Davis, *supra* note 220, at 759-60.

<sup>228</sup> See generally Richard A. Danner, *The ABA, the AALL, the AALS, and the “Duplication of Legal Publications,”* 104 *LAW LIBR. J.* 485 (2012).

<sup>229</sup> REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR IMPROVEMENT OF THE LAW PROPOSING THE ESTABLISHMENT OF AN AMERICAN LAW INSTITUTE 6 (1923).

<sup>230</sup> See, e.g., *Transactions of the Forty-Sixth Meeting of the American Bar Association*, 46 *ANN. REP. A.B.A.* 19, 90 (1923) (statement of William Draper Lewis).

<sup>231</sup> BENJAMIN N. CARDOZO, *GROWTH OF THE LAW* 4 (1924). In support of his proposition, in 1938, citing Cardozo, Francis Aumann called the volume of decisions “one of the most thought-provoking problems which confronts the American lawyer today.” Aumann, *supra* note 24, at 331.

<sup>232</sup> Mary S. Foote, *The Need for College Instruction in the Use of Law Books*, 10 *LAW LIBR. J.* 25, 28 (1917).

<sup>233</sup> West’s efforts to promote its classification system to other publishers are described at *Report of the Committee on Law Reporting and Digesting*, 23 *ANN. REP. A.B.A.* 376, 376-77 (1900). See also Cooley, (1909), *supra* note 211, at 2 (providing examples of how “the Standard Classification Scheme... has been used in a great many other digests published by different people.”); *Panel Discussion*, *supra* note 159 at 321 (“It so happens that there is a standard classification in this country which seems to have met with the approval of the lawyers, and I think I can say it has

With the start of the Great Depression in 1929, law librarians and others became more vocal regarding the budget and space problems posed by the multiplicity and duplication of law books, and much less was said about problems finding the law in the reports.<sup>234</sup> Although occasionally harsh criticisms of case-lawyers appeared through the middle of the twentieth century, they were few<sup>235</sup> and mostly historical.<sup>236</sup>

In 1977 Myron Jacobstein found that, although the “literature on court reporting is abundant with dire predictions related to the flood of opinions,” the number of recent articles on the topic had declined dramatically.<sup>237</sup> Jacobstein attributed the lessened concern to newer specialized research tools which reduced the impacts of the overall growth in published case law for lawyers working in areas with significant legislative and administrative components.<sup>238</sup> After the 1930s, topical loose-leaf services became important research tools for many practice areas, bringing together up-to-date versions of statutes, regulations and other material, as well as reporting new

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the approval of the majority of the librarians.” Comments of Harvey T. Reid, editor-in-chief of West Publishing Company); Urban A. Lavery, *A Formula for Finding the Law*, 25 A.B.A. J. 911, 912, n. 2 (1939) (noting that the Standard Classification system had “long dominated the law book world”).

<sup>234</sup> See generally Danner (2012), *supra* note 230, at 496-501.

<sup>235</sup> In 1928 R. P. Taylor wrote: “The case lawyer stands for reversion to animism. A case is not with him the illustration of a principle so much as a fetish to be invoked and worshipped as a special dispensation of the only providence it is given him professionally to know.” R. P. Taylor, *Bards in Ermine: John Marshall*, 62 AM. L. REV. 801, 819 (1928). As late as 1950 Leon McCord found “one of the most dangerous and undermining influences in the legal profession today” to be “the rabid ‘case lawyer’ [who] in the most dangerous sense . . . will not apply the correct law to the proven facts, but . . . attempts to twist and distort the facts so as to bring them within totally inapplicable rules and decisions found to be in his favor.” Leon McCord, *The Right of It*, 2 ALA. L. REV. 261, 262 (1950).

After 1920, searches for “case lawyer” in the Hein Online Law Journals library mostly turn up references to types of litigators in such phrases as “small case lawyer,” “test case lawyer,” “rate case lawyer,” “patronage case litigator,” “civil case lawyer,” etc.

<sup>236</sup> Some memorials and tributes noted whether a prominent attorney was considered to be a case-lawyer. See, e.g., Arthur W. MacLean, *Lemuel Shaw and His Influence upon American Jurisprudence*, 4 TEMP. L.Q. 148, 151 (1930) (“Like John Marshall, [Lemuel Shaw] was not a “case lawyer,” and precedents were not so plentiful then as now. In one of his opinions, twenty-four pages long, not a single case is cited.”); *The Late James C. Carter*, 11 VA. L. REG. 12, 13 (1905) (“He was not a case lawyer and did not cumber his briefs by an immense citation of authorities.”).

For comments on more contemporary figures, see Felix Frankfurter, *Mr. Justice Brandeis*, 55 HARV. L. REV. 181, 182 (1941) (“Mr. Justice Brandeis was the antithesis of a ‘case lawyer.’ To no one less than to him was a case a discrete phenomenon. It was an organism. It had antecedents and offspring.”); John Van Voorhis, *Cardozo and the Judicial Process Today*, 71 YALE L.J. 202, 204 (1961) (Cardozo “was anything but a case lawyer. He believed that lawsuits should be decided according to principles, derived from experience and understanding of every branch of life, of which the existing case law is only a part.”). Robert Jackson was praised for being a case lawyer. See Paul A. Freund, *Mr. Justice Jackson and Individual Rights*, in MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR 29, 37 (1969) (“Justice Jackson was, above all—and this was one of his great strengths—a case lawyer.”).

<sup>237</sup> J. Myron Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 795 (1975).

<sup>238</sup> Jacobstein acknowledged that small practitioners and lawyers working with criminal law, landlord tenant issues, and domestic relations had fewer alternatives to the general reports. *Id.* at 795-76. Jacobstein wrote shortly after the introduction of Lexis and Westlaw, and does not mention either service or their possible impacts on publication of appellate cases. See also Byron D. Cooper, *The Role of Publishing Houses in Developing Legal Research and Publication: The United States*, 38 AM. J. COMP. L. (SUPP.) 611, 626-27 (1990) (“The prevalence of looseleaf services, digests, indexes, citators, and online full text databases has made researching the mass of published case law manageable.”).

case law.<sup>239</sup> In the last quarter of the century, as lawyers began to rely on legal research databases like Lexis and Westlaw, and then the Internet, to locate case law and other legal information, digests and other print-based tools became less important.<sup>240</sup> A number of writers analyzed the impacts of the changes on the practice of legal research, and the potential loss of structure that the digests had provided.<sup>241</sup> In the early twenty-first century, American lawyers continue to face growth (and duplication) in published court opinions and other sources of law, but concerns about the amount of law have taken second place to efforts to make all of it widely accessible. Initiatives to promote free or low-cost access to digital sources of legal information for lawyers and the public began to appear in the 1990s and have continued.<sup>242</sup>

In the late 1800s publishers who favored more selective publication of cases sometimes disparaged West Publishing Company's effort to publish all appellate cases as the "blanket" system of publication.<sup>243</sup> John B. West embraced the term, seeing his company as providing a blanket insurance policy to protect lawyers from losing cases because they did not find all decisions on point.<sup>244</sup> Access to published case law in the twentieth century contrasted sharply with the nineteenth century, when a lawyer's recourse was limited "to the digest of the reports in the state in which he 'hung out his shingle,' -- if there was a digest," or "to the *United States Digest* . . . incomplete as it was in extent, and inconvenient as it was in use."<sup>245</sup> The West reporters and digests gave lawyers confidence that could find what they needed, and helped quiet concerns about case lawyers. In the twentieth century, we were all case-lawyers, as Judge Rose had predicted in 1896. In the twenty-first, lawyers and others needing legal information look less frequently to digests than to networked digital sources to find the cases and other law they need. Some research suggests that electronic research tools encourage lawyers to search for "directive language from higher courts" to apply to their current cases, lessening their need to study full opinions.<sup>246</sup> Could

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<sup>239</sup> For discussion of such services in the 1940s, see FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 300-19 (3d. rev. ed. 1942). Compare with the briefer treatment in Hicks's second edition, prepared by a research assistant. FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 249-255 (2d. rev. ed. 1933) (written by Elliott R. Katz). By the 1980s, Bob Berring and Valerie Wedin would call loose-leaf services "perhaps the most important tool in legal literature today." Robert C. Berring & Valerie Wedin, *Looseleaf Services: A Subject Bibliography*, LEGAL REFERENCE SERVICES Q., Winter 1981 at 51.

<sup>240</sup> Bob Berring observed that by 2000, "[l]aw students come to law school trained in Internet searching, fully conversant with modern search engines and interfaces. Rather than having legal information shape their perceptions of the world, they are shaping legal information to their existing information world." Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 313 (2000).

<sup>241</sup> In 2002, Allan Hanson wrote that "[b]ecause indexing identifies particulars in isolation, research with automated tools promotes a view of the subject matter as a depthless congeries of facts and doctrines rather than the hierarchically organized system that presents itself in research with print sources. F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 575 (2002).

<sup>242</sup> Currently active examples include: the Legal Information Institute at Cornell Law School, <https://www.law.cornell.edu/>, last visited January 16, 2016; Law.Gov, a project of Public.Resource.Org, <https://law.resource.org/index.law.gov.html>, last visited January 16, 2016; and the Harvard Law School Free the Law Project, <http://librarylab.law.harvard.edu/projects/free-the-law>, last visited January 16, 2016.

<sup>243</sup> An 1888 note commented that "So far as blanket or waste-basket reporting is concerned, the Wests now have the entire field to themselves, and those who have dabbled in that business no doubt feel that they are welcome to it." Note: *The Lawyer's Reports Annotated*, *supra* note 178, at 921.

<sup>244</sup> *Symposium of Law Publishers*, *supra* note 154, at 406-07.

<sup>245</sup> Kerr, *supra* note 215, at 284.

<sup>246</sup> Neal Devins & David Klein, *The Vanishing Common Law Judge?* 165 U. PA. L. REV. \_\_\_\_ (forthcoming 2016) (manuscript at 27) (<http://ssrn.com/abstract=2748666>) The authors point out that their findings of greater reliance on "directive language" in published opinions of higher courts tend to support Peter Tiersma's argument that "the

this be seen as a new form of case-lawyering? It appears safe to say that, regardless of changes in publishing formats and the tools available to locate precedents, and perhaps also in how they use the precedents they find, American lawyers remain case-lawyers now as they have been since increasing numbers of cases became accessible to them in the second half of the nineteenth century.

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language of opinions is increasingly being viewed as authoritative text, not all that different from statutes.” Peter Tiersma, *The Textualization of Precedent*, 82 N.D. L. REV. 1187, 1247 (2007).