

“The Report of My Death Was an Exaggeration”¹ – The Legal Treatise

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1. Frank Marshall White, *Mark Twain Amused*, N.Y.J., June 2, 1897, at A1 (In a letter, Mark Twain wrote, “I can understand perfectly how the report of my illness got about, I have even heard on good authority that I was dead. James Ross Clemens, a cousin of mine, was seriously ill two or three weeks ago in London but is well now. The report of my illness grew out of his illness. The report of my death was an exaggeration.” This is often misquoted as “The reports of my death are greatly exaggerated.”).

INTRODUCTION

*“He started retreatin’ and readin’ every treatise on the shelf.”*²

Picture the opening of the Broadway musical *Hamilton*. The energy is palpable as the lyrics tell the many misfortunes of young Alexander Hamilton, orphaned and destitute. How can he possibly change his fate and start his monumental path to become one of the founding fathers of the United States? Reading treatises. Not the answer that came to mind? Imagine a time when the treatise was of such high value that one would look to it to reverse their fortune.

The current story of the treatise is not something you can dance to, but it does raise questions within the legal research community of fate and fortune. Legal research professionals revere treatises as a vital component of the legal research process. But the high esteem of these professionals is often not reflected in the use of treatises by law students and young lawyers, the treatment given to treatises by legal publishers, or the attention of law scholarly communities.

Legal publications have massively evolved since the founding of the country. Commercial publishers made primary sources widely available, gave them useful finding aids, and later created online legal research platforms. Legal philosophy and the digital revolution also impacted the world around the treatise.

Through all this change, the treatise did not develop new features or radically change its format. The treatise is still fundamentally useful as to its content and features. But its format and availability are lacking. Because of its usefulness, the treatise should evolve to take its place alongside other legal research tools. The elements that should evolve are publishing platforms, treatise online display and discovery, problems with scholarly perception, and issues with who will author future treatises. These problems, though daunting, are addressable through changes in legal publications, law libraries, and law schools. Is the treatise vital and important as held by legal research professionals, or is it outmoded and outdated by other forms of legal scholarship? Both are

2. LIN-MANUEL MIRANDA, *Alexander Hamilton*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atlantic 2015).

true. The treatise is still vital and important, but it must evolve to meet the needs of present and future legal scholars.

Before beginning the work of studying change and evolution, two things must be made clear. First, it is necessary to answer the questions, what are the features that define a work as being a treatise; and second, what is the treatise's place in U.S. legal scholarship?

A. What is a Treatise?

First, we must understand the actual contents of the treatise and its features. At its essence, the treatise is a book explaining a legal topic in great depth and in an organized fashion kept current with updates. When the treatise originated, it had several features that made it incredibly valuable. Those features were detailed text giving a deep understanding of a topic, contextual organization of information, content that was updated continuously or periodically, and references to highly relevant primary sources.³

There are several types of legal sources, and they can be divided into two groups, primary and secondary. In law, primary sources are written by the government and have the force of law. Secondary sources are written to give understanding of the law and have no innate precedential value. Treatises are secondary sources, but there are also several other types of secondary sources.

The exact purposes of secondary sources differ enough to be quite distinct to law librarians, but they all function to aid in the gathering and understanding of primary law sources.⁴ Although these might be subject to subdivision or alternate names, these tools include the legal encyclopedia,⁵ digest,⁶ scholarly article,⁷ current awareness tool,⁸ and treatise.

The legal encyclopedia, much like its non-legal counterparts, briefly and broadly describes legal subjects. Legal encyclopedias are kept current through updates. They provide references to primary sources as

3. Although these features remain, the individual value of the features is more questionable as discussed within.

4. AMY E. SLOAN, *BASIC LEGAL RESEARCH* 4 (2d ed. 2003).

5. See MARK K. OSBECK, *IMPECCABLE RESEARCH: A CONCISE GUIDE TO MASTERING LEGAL RESEARCH SKILLS* 138-40 (2d ed. 2010).

6. See SLOAN, *supra* note 4, at 81-93.

7. *Id.* at 142-44.

8. *Id.* at 149-50.

well as other relevant secondary sources. Legal encyclopedias are best used when a practitioner is unfamiliar with a subject and needs a shallow understanding of the basic elements before doing more research. Their helpfulness increases because they contain cross-references to other secondary sources.

The digest is a system of topical references to primary sources. Digests are kept current through updates. They are best used when a practitioner knows exactly what they need to find and are ready to gather primary sources on a specific point.

Scholarly articles are written to explore a narrow legal topic in depth. They allow the author to address a “salient social problem.”⁹ Even though articles may provide some meaningful functions within the scholarly community,¹⁰ they do not treat a topic fully or systematically. More critically, they are not updated. They are written usually half a year or more before they are published and then are frozen in time. They are often innately biased because the author seeks to convey an answer to a problem or social situation. Although articles are written on many topics, they are not always easy to find because they are published by many different entities. Scholarly articles are most useful to other scholars exploring similar legal issues.

Current awareness tools include the following: magazines, newsletters, and other updates, which are written to keep practitioners abreast of news in the legal community. Although they are systematically written to produce new content, they do not keep old content current. They are most useful to practitioners who are well versed on a subject and need only to read some periodic information about changes or events within their field.

And then, finally, there is the treatise. A legal treatise is a book, or a series of books, carefully organized using references to primary sources and thoughtful commentary to give a deep understanding of any legal topic.¹¹ A treatise could be a single volume work, or a multi-

9. Detlev Vagts & Thomas M. Franck, *Review Essay: The Case of the Vanishing Treatises*, 81 AM. J. INT'L L. 763, 764 (1987).

10. *Id.*

11. See A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 633 (1981) (saying “[T]he treatise is a monograph, purporting to deal with a single branch of the law that is conceived of as possessing some quality of unity . . .”).

volume set of books.¹² Length is not critical. A treatise may be as discreet or broad as the author chooses, as long as it fully explains the subject it represents. The nature of the writing is what distinguishes a treatise. It should take a legal topic and describe the entire topic in a cogent manner.¹³ It should not be highly aspirational but, instead, should bring order and practical understanding to cited primary sources in ways that communicate the law as it stands.¹⁴ Treatises have a deeper purpose, which is to fully explain the subject at hand, unlike a study aid or hornbook.¹⁵ Unlike a casebook, a treatise should do more than just abridge cases; it should convey a deep understanding of its topic.¹⁶ The most fundamental requirement of a treatise is that it lends organized, deep understanding of an area of the law to its reader.

The organization of the treatise is a vital element of its success. Treatises are not lists of issues.¹⁷ They are not simply digests. A successful treatise deduces the law into structured principles.¹⁸ In creating these principles, it also creates structure and imposes methodical or elaborate schemes on law.¹⁹ A treatise does not have to adopt the structure of a given legal field. The author decides, based on their expertise, how to properly organize a subject. Sometimes treatise organization mirrors the primary law, like *Moore's Federal Practice*,²⁰ but a treatise might also adopt its own, different scheme, like Chemerinsky's *Constitutional Law: Principles and Policies*, designed by the author's own criteria to achieve maximum effectiveness.²¹ The goal of the organization is to make the area of law clearer to understand.

Next, treatises are kept current. Treatises are constantly and consistently revised and updated. They are not frozen in time. They

12. P. Michael Whipple, *Selection of Treatises in Academic Law Libraries*, 78 LAW LIBR. J. 219, 221 (1986).

13. T.F.T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE 19 (1958).

14. Whipple, *supra* note 12, at 221-22. *See also* Vagts & Franck, *supra* note 9, at 770 (saying the author can speculate if the foundations are clear).

15. Whipple, *supra* note 12, at 221.

16. Simpson, *supra* note 11, at 633; THOMAS LITTLETON, TENORES NOVELLI 341 (1481).

17. *See* JOEL BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE (1852).

18. PLUCKNETT, *supra* note 13, at 19.

19. Simpson, *supra* note 11, at 650.

20. *See, e.g.*, DANIEL R. COQUILLETTE, ET AL., MOORE'S FEDERAL PRACTICE (2018) (mirroring the structure of the federal rules).

21. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997). For a great discussion of the structure, *see* Edward Rubin, *Politics, Doctrinal Coherence, and the Art of Treatise Writing*, 21 SEATTLE U. L. REV. 837, 837 (1998).

reflect updates to the law and, therefore, can be relied upon by their users to be accurate and trustworthy. In many cases, a treatise represents the life work of the author.²² The actual method used to keep the material current is not a defining characteristic of the treatise; a treatise can be interfiled with new pages from time to time (loose-leaf), supplemented by pocket part, or periodically replaced with a complete new volume or even edition.²³ A treatise is reliable and trustworthy to the reader because it is accurate and contemporary.

Finally, the treatise exposes the relevant cases, statutes, and regulations to the reader. Once the treatise is organized into principles, it collects all the laws into those principles²⁴ and then lists those laws. A successful treatise must include highly relevant citations to primary sources, and sometimes will include citations to other relevant secondary sources.²⁵ This is most often done in footnotes, but it can also be done in the main text; the delivery method of the sources is not determinative. What is defining is the inclusion of citations to primary sources. These sources, which lead the reader from the organized principles of law into the citable laws themselves, are a fundamental element of the treatise.

These elements define the treatise and how it functions. It gives understanding, organizes principles, remains current to the law, and provides citations to primary sources. Keeping these defining characteristics in mind is imperative to assessing the legal treatise.

B. The History of the Treatise.

To establish the starting point of potential decline, it is important to understand the treatise's history in the United States. American treatises are ultimately a product of their English predecessors. The earliest treatises published in the United States were re-publications of English

22. See, e.g., *infra* notes 30-32 (discussing the life and work of Joseph Story).

23. Whipple, *supra* note 12, at 221.

24. PLUCKNETT, *supra* note 13, at 19.

25. William A. Hilyerd, *Using the Law Library: A Guide for Educators Part IV: Secondary Sources to the Rescue*, 34 J.L. & EDUC. 273, 287 (2005) (saying treatises are "full of footnotes to other sources, both primary and secondary.").

treatises.²⁶ The first original American treatise focused on Connecticut law.²⁷ It was published in 1795, just a few years after Connecticut became a state.²⁸ Perhaps the most important of the early treatises was Nathan Dane's *Abridgment*, which gave a full treatment of the existing law of our newer nation.²⁹

Dane's contribution to treatise writing did not end with his own work; he endowed an academic chair at Harvard, and the first person to hold it was former Supreme Court Justice Joseph Story.³⁰ Story produced a number of important treatises such as *Commentaries on Equity Jurisprudence* (1834), *Commentaries on the Law of Partnership* (1841), and *Commentaries on the Law of Promissory Notes* (1845). All told, Story was responsible for nine important treatises. He also edited several treatises early in his career, including Chitty's *A Practical Treatise on the Criminal Law*. Story's work was not only plentiful, but also critically accomplished.³¹ Story became ill, some say from overwork, but his contributions to treatise writing helped solidly define the treatise in the United States. After Story's work, treatises were produced on a large scale, and the tradition of treatise writing was well established.³² In his book *A History of American Law*, Lawrence Friedman suggests that approximately one thousand treatises were published in the United States between 1850 and 1900.³³

Over the next few decades, the major works, which became pre-eminent treatises, were created: Wigmore's *A Treatise on The Anglo-American System of Evidence* first written in 1904, Williston's *The Law of Contracts* in 1920, *Scott on The Law of Trusts* in 1939, and *Corbin on Contracts* in 1950. Wigmore was dean of Northwestern Law

26. E.g., FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS (1st ed. London 1772) (New York 1788); G. GILBERT, TREATISES OF TENURES (London 1730) (Philadelphia 1788).

27. ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT (1795).

28. *Id.*

29. NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW (1823-29). Interestingly, Dane discussed in *Abridgment* how the mass of primary law in the United States would make a work like his almost impossible in the future, because it took on the entire body of law unlike the subject-based treatises we see now: "[t]he evil to be feared in our country is, that so many sovereign legislatures, and as many Supreme Courts will produce too much law, and in too great variety; so much, and so various that any general revision will become impracticable." *Id.* at xiv.

30. Simpson, *supra* note 11, at 670.

31. See 7 AM. JUR. 128 (1832).

32. Simpson, *supra* note 11, at 670.

33. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 624 (1973).

School,³⁴ Williston a professor at Harvard Law School,³⁵ Corbin a professor at Yale Law School,³⁶ and Scott a professor at Harvard Law School.³⁷ At this point treatise writing was not only well established, but it was established as the work of law professors.

After exploring the definition and features of the treatise, and its place in early legal publishing, it is now possible to examine its potential decline.

I. ASSESSING DECLINE

For over forty years, the decline of the treatise has been reported by legal scholars.³⁸ In 1976, Morton Horwitz, a Harvard Law professor, wrote to law librarians arguing the treatise, which was the main form of

34. Richard D. Friedman, *John Henry Wigmore*, in *YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 587, 587–589 (2009). John Henry Wigmore graduated near the top of his class from Harvard Law School in 1887 where he was also a founding member of the Harvard Law Review. He began teaching at Northwestern University Law School in 1893. In 1901 Wigmore accepted the position of Dean at Northwestern University Law School, which he held for 28 years. A prodigious scholar, Wigmore wrote on torts, comparative, and Japanese law. *Id.*

35. Austin W. Scott, *Samuel Williston*, 76 *HARV. L. REV.* 1330, 1330–1332 (1963). Samuel Williston graduated from Harvard Law School in 1888 where he was an editor of the first volume of the Harvard Law Review. Williston started his teaching career at Harvard Law School in 1890. In addition to teaching, Williston's career is marked by his pursuits as a scholar and a draftsman. He edited several casebooks and treatises before publishing his first treatise, *Williston on Sales* in 1909, and his second and best-known treatise *Williston on Contracts* in 1920. *Williston on Contracts* is currently on its 4th edition. *Id.*

36. Friedrich Kessler, *Arthur Linton Corbin*, 78 *YALE L.J.* 517, 517–524 (1969). Arthur Linton Corbin graduated from Yale Law School in 1899. After practicing for four years, Corbin returned to Yale Law School as an instructor on contract law and was promoted to full professor in 1909. His contributions include the Restatement of Contracts and the Revised Sales Act. After his retirement in 1943 he was able to complete his most highly regarded work, *Corbin on Contracts*. Corbin continued to refine his treatises, creating yearly supplements and contributing to the development of the Restatement (Second) of Contracts until 1964, when vision loss made the work impossible. *Id.*

37. Angel Castillo, *Austin Scott, Harvard Professor and an Authority of Trust Laws*, *N. Y. TIMES*, Apr. 10, 1981, at B6. Austin W. Scott graduated from Harvard Law School in 1909 and joined the Harvard Law faculty shortly after graduation. As a scholar his major contribution to the legal field came with the publication of Scott on the Law of Trusts in 1939. When the second edition of his treatise was published in 1956, he received the Ledlie Prize, Harvard University's highest faculty distinction, in recognition of the value of his work. Scott on the Law of Trust is currently published as Scott and Ascher on Trusts and is in its 5th edition. *Id.*

38. Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY* 53 (2005).

legal scholarship for a century, had declined since 1920.³⁹ He explains in part, “the decline of the treatise reflects the loss of faith in the possibilities of logical consistency of legal doctrine.”⁴⁰ Another law professor, this one from University of Kent, said in 1981 that the treatise “has by now declined rather markedly”⁴¹ The same year Christopher Stone, a professor from the University of Southern California, went so far as to say, “[L]aw scholarship, lacking any unifying sense of place and purpose, is fragmented and drifting.”⁴² By 2012, Angela Fernandez and Markus Dubber said, “[F]ew if any legal scholars in the United States today wake up filled with a burning desire to devote their professional lives to the production of a treatise.”⁴³

A decline generally ends in extinction, but that is not the case at hand. To that end, the announcements of decline are confounding. The very meaning of the word “decline” throughout the statements these professors made is unclear. The treatise itself has changed very little over time, so it has not declined in terms of its own form. It is still considered vital and useful to many legal practitioners. Treatises are still written and published in good numbers. If the idea of decline is taken very broadly, meaning any lessening in usefulness or status, then there are many changes since the advent of the treatise that might signal decline.

Perhaps these reports have little to do with the treatise declining, but more about how the world around the treatise has evolved while the treatise stood relatively still. To further consider this issue, two things must be examined: first, the body of legal publishing and how it has changed over time; second, legal attitudes in the United States and how they have changed over time.

39. Morton J. Horwitz, *Sources of American Legal History: Part III – Treatise Literature*, 69 LAW LIBR. J. 460, 460 (1976).

40. *Id.*

41. See Simpson, *supra* note 11, at 676.

42. Christopher D. Stone, *From a Language Perspective*, 90 YALE L.J. 1149, 1149 (1981).

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

A. Law Has Changed.

Legal research has changed radically since the treatise was devised. The treatise was initially valued for its organization and its index, which enabled practitioners to easily find information on a specific legal topic. Over time, these formerly unique features of the treatise became common attributes of other sources of law, such as the U.S. Code and case law digests. The U.S. Code transitioned from piece-meal publication to widespread publication with multiple finding aids. The major changes in legal research that foreshadowed the treatise's decline include the organization of the U.S. Code, greater accessibility and availability of cases, the invention of the casebook, the popularization of legal periodicals, and the start of computerized legal research.

The Code evolved from individually circulated laws published in newspapers and collected by a few officials without any subject-based organization or index to our current subject-based Code with many finding aids, including an index and a table of contents. At the time the first United States treatises were created, no official code was available to the public, and no index to statutes existed at all.⁴⁴ There were only unofficial codes.⁴⁵ But these were compiled by private individuals or groups.⁴⁶ In 1852, a commercial publisher created a code index.⁴⁷ In the late 1870s, Congress undertook subject organization of the code.⁴⁸ It was labor intensive work and had many errors in the beginning.⁴⁹ When the U.S. Government produced the 1926 Code, they enlisted two commercial publishers to help, West and Thomson.⁵⁰ The current U.S. Code is completely subject-based. State codes, though they vary in structure, also are compiled by subject.⁵¹ Codes currently have finding aids, including key word indices.

44. Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1009 (1938) (Originally statutes were published individually in newspapers, and copies were sent to Congressmen and state officials.)

45. AMY E. SLOAN, RESEARCHING THE LAW: FINDING WHAT YOU NEED WHEN YOU NEED IT 99 (2014) (explaining that official codes are those published either by the government or at their direction, while unofficial codes are compiled by publishers without authority).

46. Dwan & Feidler, *supra* note 44, at 1009.

47. *Id.* at 1023 (The publisher was Little and Brown, now Little, Brown and Company).

48. Will Tress, *Lost Laws: What We Can't Find in the United States Code*, 40 GOLDEN GATE U.L. REV. 129, 134-35 (2010).

49. *Id.*

50. *Id.* at 136.

51. SLOAN, RESEARCHING THE LAW *supra* note 45, at 97.

This evolution of the Code is fundamental to understanding the potential decline of the treatise because, before codes were organized by subject or had finding aids, one had to turn to the treatise for these functions. Although some argue that a treatise is still the superior way of finding statutes, it is not the *only* way to efficiently find statutes. The U.S. Code has evolved in ways that make the treatise less imperative.

Similarly, if we study how case law has evolved in this country, we see similar patterns of treatise decline. In the nineteenth century, case law evolved from being only available in individual courthouses, if available at all, with no finding aids, to being widely available with many finding aids. In the world of case law in 1876, a publishing company did something unheard of in legal publishing at the time. They approached legal publishing not as scholars, or as official reporters of the law, but as entrepreneurs. The company was West Publishing, a part of legal giant Thomson Reuters, the producers of Westlaw. They built the West Reporter System, arranging to receive cases directly from courts, then published and sold them to lawyers. Then, West Publishing created a system to arrange the cases by subject, the digest system, which gave lawyers the ability to quickly find relevant cases.⁵² Like the advances of codes, when cases became widely available and findable by subject, lawyers did not have to rely on the treatise alone to find relevant cases.

Another development that contributed to the decline of the treatise, much like statute and case innovation, was the popularization of the scholarly legal periodical. Specifically, the law-school-sponsored law review. As with statutes and cases, the widespread availability was at issue. But, instead of organization, this time the most detrimental development to the treatise was based in who became authors in these law reviews. Namely, the people who also wrote treatises, law professors, also became the authors in law reviews.

Although periodical publications had previously existed in the legal world, they did not become a feature of scholarly writing until 1885.⁵³ By 1900, Yale, Harvard, and Pennsylvania all had law reviews.⁵⁴ Most of their content at the time included not articles, but descriptions of cases

52. Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CALIF. L. REV. 1673, 1692 (2000).

53. Compare THE LAW JOURNAL (publishing since 1803), with LAW QUARTERLY REVIEW (publishing since 1885).

54. 1 YALE L.J. (1892); 1 HARVARD L. REV. (1887); 1 AM. L. REG. (1853).

or news about other scholarship from law schools.⁵⁵ But there were early articles, some of which are still quite valuable. For instance, “The Right to Privacy,” written by Samuel Warren and Louis Brandeis, in 1890.⁵⁶ By 1925, Columbia, Michigan, Georgetown, Cornell, and Iowa had law reviews.⁵⁷ These law reviews’ authors increasingly wrote about how the law should change. For instance, an editorial in Cornell’s law review in 1915 said it should help change the law, not just comment on the law.⁵⁸ Currently, there are almost four hundred general law reviews in the United States and hundreds more that specialize in an area of law.⁵⁹ Law reviews contain some notes and essays but also scholarly articles written by law professors. Although professors still write treatises, the scholarly article has become a preferred format for them to place their work. As important scholarship is published so often in law reviews, the treatise has again potentially declined as it shares its status as the writing focus of scholars.

At the same time law reviews were being founded, another form of legal publication that challenged the treatise’s status was developed at Harvard, the casebook.⁶⁰ Harvard’s then Dean Christopher Langdell developed the system of case-based legal education, which meant that would-be lawyers deduced principles directly from cases.⁶¹ The typical process includes students reading a case, then being led by their professor through a series of questions to identify the legal holdings.⁶² As reading cases became the primary way students learned about law, law students relied more on cases than treatises. Although the use of cases did not replace the use of the treatise, an early reliance on reading case law undermined the importance of secondary sources, including the treatise.

55. Leslie Frances, *Law “Reviews”?* *The Changing Roles of Law Schools and the Publications They Sponsor*, 101 *MARQUETTE L. REV.* 1019, 1022-23 (2018).

56. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890).

57. 1 *COLUM. L. REV.* (1901); 1 *MICH. L. REV.* (1902); *GEO. L.J.* (1912); *CORNELL L.Q.* (1915); *IOWA L. REV.* (1915).

58. Edwin H. Woodruff, *Editorial*, 1 *CORNELL L.Q.* 27, 28 (1915).

59. *W&L Law Journal Rankings*, <https://managementtools4.wlu.edu/LawJournals/> (last visited June 1, 2020).

60. ARTHUR SUTHERLAND, *THE LAW AT HARVARD* 174-80 (1967).

61. *Id.* at 174, 175.

62. See Anthony D’Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 *J. LEGAL EDUC.* 461, 466 (1987).

Originally casebooks were just curated lists of cases.⁶³ Legal realists are responsible for modern casebooks, because they wanted policy arguments to become part of the picture.⁶⁴ The policy arguments became the “and Materials” part of the often used “Cases and Materials” series in U.S. law schools. But these materials are not enough to lend to the understanding of a treatise. Because our legal education system uses cases to teach the law, students learn they should read cases to try to understand law. Instead of fostering an early understanding of gathering understanding from treatises, students learn to piece concepts together from various cases. This diminishes one of the primary functions of the treatise: reading a secondary source for understanding.

The final change in legal publishing is computerized legal research. Although treatises have been transferred to computerized systems, the organization and availability of other sources has again put the treatise in potential decline. Beginning in the 1970s, online databases published legal opinions on the website that would later become Lexis.⁶⁵ Another product called InstaCite, which would later become Westlaw, was created in the 1980s.⁶⁶ Statutes, regulations, and other forms of law were incorporated into these online databases.⁶⁷ Only twenty years later, online legal research became ubiquitous as the legal research industry was revolutionized. With the popularization of online databases, lawyers had masses of legal decisions, codes, and regulations available at their personal computers instead of housed on thousands of bookshelves. These online databases have a multitude of features, including most importantly keyword searching and, to some degree, subject organization. Although treatises are published in online databases, the ease of access to primary sources that can be searched by key terms fundamentally changed legal research in a way that made treatises less crucial.

63. See, e.g., CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

64. Leiter, *supra* note 38, at 21-25.

65. LexisNexis, *The LexisNexis Timeline*, http://www.lexisnexis.com/anniversary/30th_timeline_fulltxt.pdf.

66. Nick Borger, *Celebrating 20 Years of Excellence with KeyCite on Westlaw*, <https://legalsolutions.thomsonreuters.com/law-products/westlaw-legal-research/insights/celebrating-20-years-of-excellence-with-keycite-on-westlaw>.

67. For further reading, see William Harrington, *A Brief History of Computer Assisted Legal Research*, 77 L. LIBR. J. 543 (1984-85).

Clearly, the world around the treatise has changed. The ways to access law have changed as lawyers can physically search for, find, and read statutes and cases. The ways to find relevant law have changed because of subject-based organization and finding aids. Other forms of legal writing have changed, giving both writers and readers more options for their output and research. Because of casebooks and case-based education, lawyers have learned to read cases to understand the law. Finally, computerized legal research allowed easy storage and keyword searching of materials. All of this happened while the treatise remained virtually the same in form and function. If other systems were created to perform the functions of the treatise, and the educational system emphasized direct reading of primary law, the function of the treatise surely changed, if only by the introduction of these other innovations. Law not only changed in means of publishing, but there were also changes happening in the philosophy of law that would create further problems for the treatise.

B. Attitudes about Law Have Changed.

Legal publishing is not the only area to have evolved since the treatise was established in the United States. Legal philosophy, information retrieval, and academia have also changed over time, impacting attitudes about the treatise and long-form writing. As the United States was forming as a country, law was considered science, but over time this gave way to arguments that the law was more in the hands of individual judges than part of a formal system. Some of these philosophers openly criticized the notion of the treatise, which for right or wrong impacted some scholars' attitudes about the treatise. Another shift occurred when the advent of the internet brought information retrieval into the digital age. This shift changed the way people sought information, and especially for those born into the digital age, both realities and perceptions about the sources of law have changed. Finally, higher education changed in how, and more specifically what, academics were expected to publish.

On the heels of the American Revolution, early lawyers in the United States wanted law and lawyering to be honorable and principled-

a distinguished profession.⁶⁸ These lawyers had the rare opportunity to define a legal system, and they wanted to create something different from the seemingly arbitrary legal system of England. They wrote of law as a science, meaning law was considered principled, and the origins of individual laws were based in natural truths or rights instead of just deciding things for one reason or another.⁶⁹ Treatises were the books where these principles were organized, discussed, and clarified. In treatise writing they did not want to present law as if it were a jumble of decisions made by English royalty. In the treatise, they carefully gathered laws into their corresponding principles, making the claim that in the beginning there were rights and truths, and that laws were created and decided to maintain those rights and truths.

The idea that laws were based on principle and that judges need only to apply those rules would not be named legal formalism until the 1950s.⁷⁰ By that time another philosophy, legal realism, had already formed.⁷¹ Founded mainly at Yale and Columbia law schools in the 1920s and 30s, legal realism rejected legal formalism.⁷²

It is easier to describe what those who came to be known as realists were against rather than what they were for. The enemy was traditional legal scholarship that focused on the logic of doctrine. The enemy's home was the Harvard Law School, where the great authorities wrote multivolume treatises on the conventional areas of law. *Williston on Contracts*, *Beale on Conflicts of Law*, and *Scott on Trusts* were

68. Simpson, *supra* note 11, at 671.

69. Daniel Mayes, *Whether Law is a Science?*, 9 AM. JUR. & L. MAG. 349 (1833) (reviewing Professor Daniel Mayes' lecture to the law class of Transylvania University). "When we say that a branch of human knowledge is a science, we mean in general that it is founded on principles inherent in the subject to which it relates. We mean also that those principles serve as a basis whereon we may classify the subjects of that particular branch of knowledge. We mean, further, that such branch of knowledge may be taught by commencing with generals and descending to particulars; and that in practice we do not grope in the dark, but each particular case, as soon as it arises, is illustrated to the eye of the skillful observer, by the clear and steady light of general principles." *Id.*

70. Charles C. Goetsch, *The Future of Legal Formalism*, 24 AM. J. LEGAL HIST. 221-22 (1980).

71. See Leiter, *supra* note 38.

72. Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005).

prime examples of much of what the realist scholars attacked.⁷³

Formalist scholars contend that a system of legal rules exist that justify legal decisions.⁷⁴ Realism responds to formalism by claiming that legal decisions are not based on a fixed system of rules, but on a judge's sense of fairness. The argument of a realist is that the law is rationally and causally indeterminate, meaning the formal system of laws neither justifies nor explains judicial reasoning.⁷⁵ A brute translation is that formalism trusts that laws guide judges to predicted outcomes, while realism expects the judge to need more than just the law (if they even consider the law), namely the concept of fairness.⁷⁶

Legal realists argue that decontextualized statements of the law are misleadingly abstract and general.⁷⁷ In Columbia Law Professor Herman Oliphant's 1928 article, "A Return to Stare Decisis," he went so far as to claim judicial decisions were based on facts rather than "over-general and outworn abstractions in opinions and treatises."⁷⁸ He argued that instead of the scientific structure of legal reasoning in treatises, legal rules should be based on each fact-based situation.⁷⁹ In his estimation, judges looked at the particular facts of the case at hand and made a decision based on a general sense of what was right for that instance, not in how to apply a general abstract rule. Thinking back to our patriots, this type of thinking is much more like the history of common law they wanted to avoid.

Over the course of fifty years, various scholars have declared the demise of the treatise. In 1976, Professor Morton Horwitz of Harvard wrote to law librarians arguing that the treatise, which was the main form of legal scholarship for a century, had declined since 1920.⁸⁰ Another law professor said in 1981 that the treatise "has by now

73. Stewart Macaulay, *The New Versus the Old Legal Realism: Things Ain't What They Used to Be*, 2005 WIS. L. REV. 365, 368 (2005).

74. Leiter, *supra* note 38, at 3.

75. *Id.* at 3-4.

76. *Id.* at 17.

77. *Id.* at 8.

78. Herman Oliphant, *A Return to Stare Decisis*, A.B.A. J. 71, 75 (1928).

79. *Id.* at 76.

80. Horwitz, *supra* note 39, at 460.

declined rather markedly from its preeminence.”⁸¹ Horwitz attributed the decline to legal realism. He explains in part, “the decline of the treatise reflects the loss of faith in the possibilities of logical consistency of legal doctrine.”⁸²

The realist position that law is not structured plainly cast doubt on the nature of the treatise, since a main feature of the treatise is that it gives organized structure to law. For this discussion, it is not relevant if the realists are correct.⁸³ The problematic element for the treatise is not the philosophy itself, but the criticism that treatises are not the prestigious publications they were thought to be.

“Treatises, some of them splendid, are still being written, but the prestige of the undertaking has tarnished.”⁸⁴ When academics questioned the value of the treatise, the treatise suffered a potential decline in its status, in essence to its reputation.⁸⁵ The treatise’s loss of reputation means a potential loss in future authors of treatises,⁸⁶ who see the change in academic prestige as a reason to turn to other forms of scholarship.

Attitudes around legal philosophy were not the only shifts in attitude around law and legal research. The advent of the internet and online legal databases like Westlaw, Lexis, and Bloomberg Law fundamentally changed the way legal research was performed. It is important to keep in mind the tradition of common law relies on courts interpreting law in cases,⁸⁷ in addition to the many legislative bodies creating laws and the

81. Simpson, *supra* note 11, at 676.

82. Horwitz, *supra* note 39, at 460.

83. As a law librarian, and not a legal philosopher, I make no claim of the correctness of these philosophies. For this discussion, it is not at issue in part because people still undertake writing and publishing treatises, and (in discussion that follows) it is obvious the treatise is still used.

84. See Stone, *supra* note 42, at 1150.

85. See, e.g., Horwitz, *supra* note 39, at 460 (“[T]he decline of the treatise reflects the loss of faith in the possibilities of logical consistency of legal doctrine”).

86. More authors do not necessarily mean more treatises. Treatises are constantly updated, so even if no new treatises are added, more authors are needed to keep existing treatises current.

87. The Federal Court system alone has over 100 courts, with the U.S. Courts of Appeal hearing almost 59,000 appeals in 2017. *Federal Judicial Caseload Statistics 2017*, UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017> (last visited Feb. 24, 2020). The 115th Congress (2017-2018) created 442 new public laws which each represent at least one, but sometimes many, statutes. *Public Laws*, UNITED STATES CONGRESS, <https://www.congress.gov/public-laws/115th-congress>. The number of regulations is exponentially larger. In January 2020 alone, seventy-three pages of single-

many regulatory agencies and governing bodies creating rules and regulations. This results in a large body of law.⁸⁸ Obviously, given the number of primary sources (cases, statutes, and regulations) produced, practitioners cannot digest and distill every primary source on a subject. Before the internet, legal practitioners approached a problem by choosing a source (usually a secondary source) based on its characteristics and their information needs. The focus on source selection was of utmost importance. Considering the sheer amount of primary law, one could not “search” primary law effectively. Instead, a practitioner had little choice but to rely on secondary sources to provide relevant citations.

The internet had working applications in the 1960s, and by the 1970s, legal opinions were available in online databases.⁸⁹ With this development, information retrieval and searching primary law fundamentally changed. Users could now search primary laws themselves without the aid of a secondary source. The concept of precedent mapping, or the ability to simply capture the most important case components and self-organize them into a framework, is considered by law students more instinctually efficient than reading several sections of a secondary source to gather context. Students early on want more of a “gotcha” moment than a “got it” moment.

There is a theory in studies of the internet called “long-tail theory” that explains this behavior in the context of legal research. This theory says that when the internet offers an enormous amount of choice, fewer users choose things that offer broad appeal in favor of things that offer very specific appeal to their situation.⁹⁰ In this instance, students search for a case precedent that has identical facts to theirs instead of looking for a legal principle to which they can apply their facts. Consider the example of someone who keeps cockroaches as beloved pets, and the pets are destroyed by a neighbor purposefully. When asked if this is a

spaced, double-columned additions and changes to regulations were listed in the Code of Federal Regulation’s List of Sections Affected. *List of Sections Affected*, January 2020, <https://www.govinfo.gov/content/pkg/LSA-2020-01/pdf/LSA-2020-01.pdf>.

88. See, e.g., *Anglo-American Legal Tradition*, <http://aalt.law.uh.edu/>; cf. *Opinions of California Courts*, <https://www.courts.ca.gov/opinions.htm> (last visited Feb. 25, 2020).

89. Amanda Watson, *Don’t Burn the Books, Read Them!*, 46 INT’L J. LEGAL INFO. 79, 80-81 (2018).

90. Paul L. Caron, *The Long Tail of Legal Scholarship*, 116 YALE L.J. POCKET PART 38 (2006).

recoverable cause of action, does one search based on facts (cockroach and pet, or even insect and pet), or does one seek to understand the principles that make a pet a pet, and then make an argument about whether a cockroach can meet those principles? Legal research professionals consistently prefer the latter approach of comprehension to the former, a sort of treasure hunt research behavior.⁹¹ Obviously, this information retrieval pattern of searching for fact-specific cases does not favor the treatise since it was written to provide understanding of principles.

Along with the changes in legal publishing and sources of law, attitudes have shifted that may be considered reasons for the potential decline for the treatise. Legal philosophers interested in legal realism have questioned the importance of treatises. The internet and new information retrieval methods have shifted the way information is often sought away from how treatises provide information. Both of these shifts might signal decline for the treatise.

The legal academy has also shifted. For most academic fields, including law, professors must write as part of their tenure process. For many fields these publications are most often placed in peer-reviewed journals. As Professor Jason Fertig of Southern Indiana University said, "I'm rarely evaluated on what I wrote, but only on *how many* peer-reviewed published articles I completed."⁹² The need to publish, and in great numbers, does not bode well for the treatise. Although law does not engage in peer-review, law journals are still the preferred form of legal scholarship. Treatise writing is hard, time-consuming work. Since most treatises are already established, the writing credit would usually appear on a professor's publication list as an update or supplement. The quality of a treatise update is more difficult to ascertain. A journal article is quantifiable. It has placement in a journal of some rank and status. It has a number of pages, footnotes, and citations to the work. The treatise, especially the update, is much more difficult to ascertain. It would require not only reading the work, but perhaps reading an earlier

91. It is important to realize that not just in legal research, but in all aspects of information retrieval, there has been a shift to simply searching for sources instead of gathering sources first and then seeking information by browsing or using an index. *See, e.g.,* Monica Burton, *Zagat, Explained*, EATER (Apr. 2, 2019, 12:41 PM), <https://www.eater.com/2018/3/5/17080772/zagat-guide-reviews-google-infatuation-sale>.

92. Jason Fertig, *Why Must Professors Publish?*, THE JAMES G. MARTIN CENTER FOR ACADEMIC RENEWAL (Mar. 14, 2013), <https://www.jamesgmartin.center/2013/03/why-must-professors-publish/>.

version. That reading would also ask that the author know the subject well enough to know if it was being fully described and organized. Academia and, more specifically, academic writing have made treatise-writing less appealing than it once was.

After studying these potential reasons for decline, it seems the treatise has seen the world around it change in many ways, growing and shifting as it remains virtually the same. The treatise has not been the actor in any of these shifts; rather, it has been impacted by outside forces. The fair description then would not be that the treatise itself has declined, but that it has failed to evolve. The next Section will expose the elements of the treatise that are still successful as well as those that need evolution.

II. WHAT REMAINS

The treatise has failed to evolve. But the treatise is still a vital form of publication because it continues to have value as compared to other sources and is still used consistently. Although it remains vital, the treatise does need to improve. Publishing platforms, problems with online conversions of the treatise, attitudes around the treatise, and future authorship issues all present problems for the current treatise.

A. How the Treatise Remains Vital.

The treatise remains vital because of its qualities, as well as the important audiences that continue to find it useful. The treatise's qualities can be evaluated by comparing the important characteristics of secondary sources.

i. Treatises Have Value.

There are several kinds of secondary sources, and they serve various purposes. In legal research, secondary sources can be evaluated against each other to determine which type of source meets the information needs of the practitioner. Generally, timeliness, quality, neutrality, and comprehensiveness should be evaluated to determine which secondary source is most appropriate to the need at hand.

The treatise fares well in the first three evaluation categories: timeliness, quality, and neutrality. However, the treatise does not distinguish itself above other secondary sources on these three factors alone. Timeliness refers to when a resource was written, as well as how and how often it is updated. Realistically, what constitutes “timely” varies. A ten-year-old source on shipping may be considered relatively unchanged, while a six-month-old source on health care privacy may be nearing the end of its usefulness. Treatises are generally updated regularly.⁹³ Treatise writers read not only the scholarly output in their area, but also legislation and cases, and they update their work systematically.⁹⁴ Still, this feature does not render the treatise unique because other types of sources like legal encyclopedias are as timely.

Obviously, quality always matters. As consumers of information, we have developed certain systems to understand worth. Reviews are one of the most common. In a system like amazon.com, the user can sort results by review, and identify what has been valued by other users. No such feature currently exists in Westlaw or Lexis. It is possible to achieve something like this in modern library catalogs, but it is not commonly found.

Even so, each treatise must be evaluated individually because the quality of treatises varies, though generally all are credible. In law, we have developed behaviors to measure quality. We might ask a colleague, reference a guide,⁹⁵ or make a judgment by evaluating the credentials of the author or reputation of the publisher. Unlike a source like the

93. See OSBECK, *supra* note 5, at 142.

94. Consider this anecdote from University of Southern California Law Professor Christopher Stone about Professor Corbin, “Corbin, then nearing ninety . . . materialized in the law library to cull the advance sheets” Stone, *supra* note 42, at 1150.

95. One very useful tool is the Georgetown treatise finder. This free, online guide is a product of the Georgetown University Law Library. It divides the law into over sixty topics and then lists treatises (and other materials) for those subjects. The materials are given icons that note their availability on Westlaw, Lexis, or Bloomberg. Some are given a small medal icon that notes them as preeminent. Not every subject area has a preeminent treatise noted and some have more than one. *Treatise Finders*, GEORGETOWN LAW LIBRARY, <https://guides.ll.georgetown.edu/home/treatise-finders> (last updated Jan. 17, 2019). *Compare ADR & Mediation Treatises*, GEORGETOWN LAW LIBRARY, <https://guides.ll.georgetown.edu/treatise-finders/adr> (last updated Nov. 26, 2019) (listing no preeminent treatises), *with Bankruptcy Law Treatises*, GEORGETOWN LAW LIBRARY, <https://guides.ll.georgetown.edu/treatise-finders/bankruptcy> (last updated Mar. 7, 2018) (listing two preeminent treatises).

Restatements,⁹⁶ where the institutional author guarantees quality, legal research experts cannot endorse all treatises as being of outstanding quality. Again, this evaluation point does not render the treatise more valuable compared to all of its peers.

The next quality to consider is neutrality. Neutrality in this context is used to describe a particular point of view, which might exclude relevant information from other points of view. The obvious example is a book like *Winning Medical Negligence Cases: A Guide for the Plaintiffs' Lawyer*.⁹⁷ This title written for plaintiffs' counsel is certainly valuable to its intended audience, but it is making a specific claim and does not seek to include a balance of information for all. Some forms of scholarship, most notably the scholarly article, include point of view as a feature. The author has a claim and is writing towards that claim; in fact, having something to say is an important part of writing a good article.⁹⁸

However, lack of neutrality requires a practitioner to balance potential holes in a resource's explanations. A full picture of a topic is not one that leans toward a particular author's view. Generally, a treatise does not feature the author's personal views.⁹⁹ The work in a treatise is in writing comprehensively and in structuring the writing well, not in expressing a position on the topic. Though again the treatise fares well in this evaluation, many other secondary sources like the American Law Reports (ALR) are claim-neutral, so it does not distinguish itself above all others on this factor.

Finally, there is comprehensiveness. Here is where the treatise truly is exalted. Comprehensiveness describes a resource's depth of subject coverage as well as its breadth of subjects across the spectrum of legal

96. The American Law Institute is a well-respected independent organization of legal scholars who work to improve the law through writing. They produce the Restatements of Law. See *About ALI* (2020), <https://www.ali.org/about-ali/>.

97. WILLIAM TRINE & PAUL N. LUVERA, *WINNING MEDICAL NEGLIGENCE CASES: A GUIDE FOR THE PLAINTIFFS' LAWYER* (1993).

98. See EUGENE VOLOKH, *ACADEMIC LEGAL WRITING* 10 (2003).

99. It is relevant to note some sources might have structural bias, meaning they organize in a way that makes one topic or another more or less important. Consider, for example, the structural differences in the casebooks JOHN G. SPRANKLING, *UNDERSTANDING PROPERTY LAW* (4th ed. 2017) and THOMAS MERRILL & HENRY SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (3d ed. 2016). Merrill and Smith start by introducing the concept of trespass while Sprankling waits until chapter thirty, five hundred pages in, to discuss trespass.

topics. A comprehensive resource discusses all the elements of a topic along with its defenses or peculiarities. It will not focus solely on a few aspects of an area of law, but instead, it seeks to fully cover a topic to the extent possible.

Why is evaluating comprehensiveness important? When a legal practitioner seeks information on a topic, they either need to clarify a specific detail or seek general understanding. If seeking a detail, they must consider comprehensiveness in light of cost considerations. Choosing a non-comprehensive resource means they may need to consult other sources before getting the information they need, which is neither time nor cost effective as a strategy. If seeking a general understanding, using a non-comprehensive source means they will need to seek other information sources to finish the task at hand or risk that they are missing elements.

Research experts hold that for general understanding, especially a deeper understanding, a treatise best fits the information need. An ALR offers deep treatment, but ALRs are only written on specific issues in controversy. A treatise focuses on a single subject comprehensively in great depth, and treatises exist on virtually every subject. Treatises are the most comprehensive sources, so they remain important, even though they have failed to evolve.

ii. Treatises Remain Useful.

The treatise also remains valuable to important audiences, including legal research experts, judges, and established lawyers. Legal research experts find that the treatise's features, especially comprehensiveness, are unique and important to the legal research process, so they consistently refer to treatises in their instructional writing. Judges continue to rely on treatises and cite them frequently. Finally, established lawyers use treatises in practice and report them as useful.

Legal research experts recognize the value of treatises. Many texts on legal research identify and recognize the importance of using treatises. Research expert Amy Sloan describes treatises as "definitive sources in their subject areas."¹⁰⁰ The authors of *The Process of Legal Research* similarly write that treatises are highly credible;¹⁰¹ Armstrong

100. SLOAN, *supra* note 4, at 65.

101. CHRISTINA L. KUNZ ET AL., *THE PROCESS OF LEGAL RESEARCH* 84 (7th ed. 2008).

and Knott also describe treatises as fundamentally useful.¹⁰² Finally, legal research expert Shawn Nevers writes “much of your research has been done for you in a legal treatise – and by an expert no less.”¹⁰³

Judges also value treatises. Traditionally in opinions, judges only cite primary sources. But along with the Restatements, treatises are a frequent exception to this rule. This use has not declined over time, demonstrating that judges still find treatises valuable enough to cite in their opinions. A look through recent decisions of the U.S. Supreme Court yields dozens of citations to treatises.¹⁰⁴

Attorneys also value treatises. In an annual American Bar Association (ABA) survey, approximately 91% of practicing lawyers surveyed reported using treatises (whether online or in another format).¹⁰⁵ This high number of positive responses clearly indicated that lawyers still find treatises useful.

In evaluating secondary sources, treatises distinguish themselves among types of sources for their comprehensiveness, meaning the depth of treatment of a subject and treatment of subjects across all topics of law. Legal research experts, judges, and lawyers still find the treatise valuable. Because of their innate value and use by important user groups, the treatise is still vital.

102. J.D.S. ARMSTRONG & CHRISTOPHER A. KNOTT, *WHERE THE LAW IS: AN INTRODUCTION TO ADVANCED LEGAL RESEARCH* 129 (5th ed. 2018).

103. Shawn G. Nevers, *Legal Research: Smart Researchers Save Time by Starting with Legal Treatises*, 37:4 *STUDENT LAW* 8, 9 (2009).

104. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016) (citing 2 W. Rubenstein, *Newberg on Class Actions* § 4:50, pp. 196–197 (5th ed. 2012); 2 W. Rubenstein, *Newberg on Class Actions* § 4:54, p. 21 (5th ed. Supp. June 2015); 7AA C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1778, pp. 123–124 (3d ed. 2005); 7AA C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure*, § 1778, p. 37 (3d ed. Supp. 2015)); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592, 594, 595 (2013) (citing 9 J. Wigmore, *Evidence* §§ 2588, 2590 (J. Chadbourn rev. 1981); 5 A. Conte & H. Newberg, *Class Actions* § 16:7, p. 154 (4th ed. 2002); 14AA C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3702.1, p. 335 (4th ed. 2011)); *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1417 (2019) (citing 3 A. Corbin, *Contracts* § 559, pp. 268–270 (1960); 2 E. Farnsworth, *Contracts* § 7.11, pp. 300–304 (3d ed. 2004); 11 R. Lord, *Williston on Contracts* § 32:12, pp. 788–792 (4th ed. 2012); *Restatement (Second) of Contracts* § 206, pp. 80–81, 105–107 (1979)); *McDonough v. Smith*, 139 S.Ct. 2149, 2156 (2019) (citing D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 119, pp. 870–871, 874–875 (5th ed. 1984); 3 D. Dobbs, P. Hayden, & E. Bublick, *Law of Torts* §§ 586, 589, 590, pp. 388–389, 402–404 (2d ed. 2011)).

105. AMERICAN BAR ASSOCIATION, 2017 A.B.A. LEGAL TECH. SURVEY REP. 5 (https://www.americanbar.org/groups/law_practice/publications/techreport/2017).

B. What Must Evolve.

The treatise has failed to evolve, yet it remains vital. Vitality, however, is not the entire story of today's treatise. As other forms of legal scholarship have innovated and become more prominent in use, the treatise has sat relatively still, ensuring it is not as well used as it perhaps should be. There are ways the treatise should evolve to make it reach its maximum potential but certain problems must be addressed before that evolution can happen. First, there is a problem caused by for-profit legal publishing platforms' exclusivity of their own treatise publications. Second, the treatise has not been optimized for digital use. Third, negative perceptions exist around the legal treatise. Fourth, treatise writing relies on scholars, but it is problematic for pre-tenure scholars.

i. Publishing Platforms are Problematic.

The movement of treatises from print to online formats has created issues not found in print libraries.¹⁰⁶ Treatises are published by different publishers, and no one publishing house is responsible for all the pre-eminent treatises.¹⁰⁷ A print library collects treatises across publishers and displays them physically alongside one another, as well as collecting them into equal catalog records that are searched by title, subject, or other criteria side by side. A practitioner using the print collection can choose amongst them by deciding which is the best for their information needs.

What was once a field of many publishers, varied in size and portfolios, is now generally a field of four giant houses: Thomson

106. Peter W. Martin, *Possible Futures for the Legal Treatise in an Environment of Wikis, Blogs, and Myriad Online Primary Law Sources*, 108 LAW LIBR. J. 7, 8-9 (2016).

107. See, e.g., RICHARD A. LORD, WILLISTON ON CONTRACTS (4th ed. 2020) is published by Thomson Reuters, <https://store.legal.thomsonreuters.com/law-products/Treatises/Williston-on-Contracts-4th/p/100005004>; MARK L. ASCHER, AUSTIN WAKEMAN SCOTT, & WILLIAM FRANKLIN FRATCHER, SCOTT ON TRUSTS (5th ed. 2020) by Wolters Kluwer, <https://lrus.wolterskluwer.com/store/product/scott-and-ascher-on-trusts-fifth-edition/>; and TIMOTHY MURRAY, ARTHUR L. CORBIN, JOSEPH M. PERILLO, & JOHN E. MURRAY, JR., CORBIN ON CONTRACTS (2002) by Lexis, <https://store.lexisnexis.com/products/corbin-on-contracts-skuusSku6674>.

Reuters, LexisNexis (who holds Matthew Bender), Wolters Kluwer (who holds Aspen and CCH), and Bloomberg Law (who holds BNA).¹⁰⁸ As legal research has moved online, publishers have developed their own online research platforms and have generally not cooperated to bring access to their works across their online platforms. This means practitioners are only presented with the treatises that are published by each company independent of the others.¹⁰⁹ Many practitioners, specifically practicing lawyers, do not have access to all or even more than one platform, due to price.¹¹⁰

A positive feature of online platforms is that users can perform a full-text search for treatises, which is a major enhancement over print use. But, because legal publishers do not usually allow their resources to appear on other publishers' online platforms or to be accessed by third party search programs, no comprehensive online search through all treatises exists. Users cannot search at a full-text level for relevant results across publishers; each platform must be searched individually.

If a practitioner does not already know what source they want to use, they may either seek external advice¹¹¹ or just use whatever the publisher offers and hope for the best. Without the ability to easily consider alternative sources, a practitioner may not use the pre-eminent treatise or even just the treatise best suited for the given issue because it is owned by another platform. There is also no internal system of ratings on these platforms. Their offerings are not curated like a print collection would be but, instead, are presented as a group on each platform, making it difficult to discern shades of quality even when bound just to one platform.

108. Martin, *supra* note 106, at 21. There are other valuable publishers, like the American Bar Association, but they are not as large as the four giant houses. HeinOnline is a major holder of law reviews, but unlike the others mentioned is a non-profit.

109. Library catalogs can and do sometimes catalog electronic records (containing links) that allow side-by-side search of title, subject, etc. However, these searches do not allow full-text searches and individual subscription services are still needed. *See, e.g., Tulane University Law Library Catalog*, <https://library.law.tulane.edu/> (last visited Nov. 10, 2020).

110. *See* Robert Ambrogl, *Price Wars in Legal Research Means Deals for Small Firms*, LawSites (May 23, 2019), <https://www.lawsitesblog.com/2019/05/price-wars-in-legal-research-mean-deals-for-small-firms-i-compare-costs.html>.

111. *See, e.g., Treatise Finders*, GEORGETOWN LAW LIBRARY, *supra* note 95.

ii. Online Features Need Evolution.

There is a common misconception among law students and young lawyers that all relevant legal research materials are available online.¹¹² Putting aside the merits of using print versus online resources, remaining relevant in legal research requires treatises to be online. Legal publishers have been adding treatises to their holdings as long as they have had online platforms. Since the early 2010s, major legal publishers have also released treatises in eBook form.¹¹³ These books were created to be published in print but have been placed into an electronic format. There are features added to the eBooks, but whether or not these features add up to something of great consequence is debatable. They are advertised as beneficial features, but cause cognitive disruption, making the content harder to read and retain.¹¹⁴

When a source is not designed for online reading and discovery, it might not be optimized for online use.¹¹⁵ In legal research, some sources, most notably the case, work very well online. Cases are easily indexed and categorized by existing elements like court, date, and jurisdiction. Their decision date is clear. Their author's authority is established. But this is not true of the treatise. They are naturally a much longer format that requires a denser organizational scheme, making them harder to read online. Their dates are not as easy to locate, nor are the authors. Once the author's name is found, their connection to quality or subject may not be obvious.

The display of online treatises diminishes optimal comprehension of the text.¹¹⁶ Although the many features added to online versions of treatises are helpful to practitioners, their display makes treatises more difficult to simply read. Consider for instance, hyperlinks to cited sources. It is convenient to be able to click into cited sources. However,

112. See Sarah Stevens-Rayburn & Ellen N. Bouton, "If It's Not on the Web, It Doesn't Exist at All": *Electronic Information Resources – Myth and Reality*, 153 ASP CONFERENCE SERIES 153 (1998), <http://adsabs.harvard.edu/full/1998ASPC..153..195S>.

113. See, e.g., Michael Cohn, *Thomson Reuters Builds eBook Library*, ACCOUNTING TODAY (July 10, 2012).

114. Watson, *supra* note 89, at 82.

115. Martin, *supra* note 106, at 8-9 (saying that "these remain, at core, minimally enhanced books, tied down by the print form for which they were originally prepared even more than their online counterparts.").

116. Watson, *supra* note 89, at 82.

there is no reason for hyperlinks to still be underlined or to be in a contrasting color from the text (see Figure 1). Most systems have evolved beyond displays like this, because interlinking is obvious (see Figure 2). Footnote display is also problematic, with some platforms using large symbols of contrasting colors to note them and some breaking up the text to display them throughout the text. Although treatises are online, their online presence is not optimized for reading comprehension.

Figure 1: Example of contrasting color hyperlinks in an online case


For a valid contract to have been formed, there must have been an offer, acceptance of the offer, and consideration, and the parties must have intended to be bound by the agreement.  [Goodman v. Physical Resource Engineering, Inc., 229 Ariz. 25, 270 P.3d 852 \(Ct. App. Div. 2 2011\).](#)

Figure 2: The figure contains the online front page of the *New York Times* on November 10, 2019. Although all items in the figures are links, they appear as regular text for easy reading.

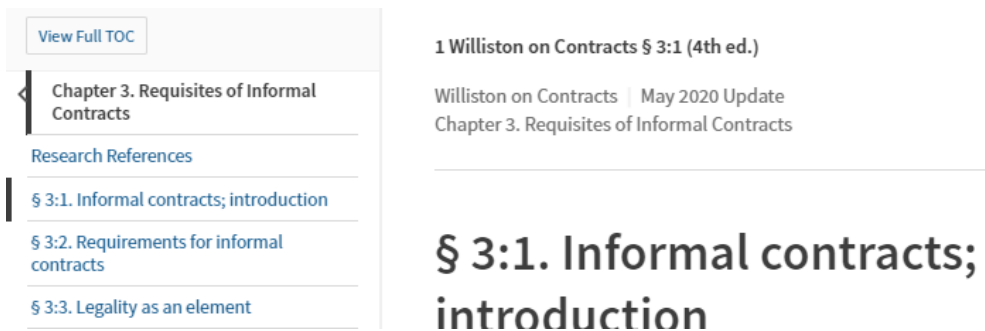
Markets

- [Hopes for a return of the 737 Max and a vaccine have Boeing's shares rallying.](#)
- [United Airlines will return to J.F.K. after a five-year absence.](#)

Issues with display are not the only non-optimized feature of treatises online. Looking to finding aids within the treatise, the concept of controlled vocabulary (in this context, the index) and organizational context (here, the table of contents) are often lost or awkwardly converted in online treatises. Generally, a user would rely on the table of contents and index to access relevant content in a paper treatise. Although indices are sometimes included in online treatises, they are often completely missing. When they are present, they are listed separately, sometimes even requiring another search instead of co-

existing with their treatise. By disregarding or devaluing the index, a practitioner loses a valuable feature. Full-text searching has become a critical part of legal research, but using a controlled vocabulary is also an invaluable tool. Similarly, the tables of contents are usually available online but are awkwardly displayed. Sometimes they present as expandable menus, other times as popup lists with clickable links (see Figure 3). If a user is directed to a certain section using a keyword search, they may lose the context of the surrounding sections.

Figure 3: Varying styles of tables of contents on Westlaw.



Another issue is that treatises are displayed by individual sections. A user must move through many sections to gain context instead of simply reading down the page. Although some platforms have developed “reading” views, they still do not simply present the treatise as a readable book but are divided by section (though they sometimes let more than one section be read with only some separation between them). Treatises have not been properly optimized for online use. Their print versions have been placed onto legal research platforms with digital enhancements but without critical thinking about how to make sure the treatise is fundamentally readable and how its features are findable and usable.

iii. Perception Problems Are an Issue.

Some of the issues presented throughout this Article have created perception problems for the treatise. As with any perception problem, the truth is not the issue. The damage inflicted by negative perception occurs whether or not the perception is accurate. If a resource has negative perceptions, it has an impact, whether or not the resource is

used or even written or published. The problematic perceptions around treatises include being out of date, impractical, and inefficient.

As noted above, secondary sources are evaluated to consider if the source is up to date or current. When asked if legal treatises are current, meaning they contain recent developments, law school students report thinking treatises will most certainly not be updated, and often that they are very out of date.¹¹⁷ It is as if students imagine them as dusty tomes sitting on an untouched shelf — a relic of an older legal system. And in this way, they perceive them as fundamentally out of date.

Why would students think this? Though most major treatises are updated multiple times a year, it may not be obvious they are updated. This is due to how they are updated or how their updated information is displayed. Electronic research services do little to combat this perception. Although dates of primary sources are prominently displayed, treatise dates must be sought by the user, and then are often unclear (see Figures 4 and 5, Figure 5 is what appears after you follow the link behind the “i” in Figure 4).

Figure 4: Example of treatise title and information icon in Lexis



Figure 5: To reveal the dates of the treatise, the “i” icon in Figure 4 must be selected. Then, the dates in Figure 5 appear.

Publication Information

Weinstein's Federal Evidence

Publisher:

Matthew Bender & Company, Inc.

Coverage:

Through March 2020; Release No. 127

Frequency: Published regularly - Atypical frequency/three times per year;

117. Student discussion boards on file with the author.

Treatises might also be perceived as impractical or inefficient. In earlier research processes, treatises were valued for their ability to organize information, present legal issues in context of others in the same field, give deep understanding of the topic, and provide exemplary references to primary sources. The perception that treatises are impractical or inefficient has to do with the current research process and what value remains in the treatise.

A law firm survey participant explained “[a]most every new associate comes to the firm wanting to look for cases. But half the time cases aren’t the answer, and even when they are, the best way to start looking for cases is usually using another resource.”¹¹⁸ Some young lawyers would say that they are simply performing good legal research with their own methods. But in a survey of legal practitioners, inexperienced lawyers rated poorly across a number of quality and efficiency questions.¹¹⁹

Law students and young lawyers often start legal research with case law, due in part to how we educate them. Doctrinal courses use cases almost exclusively to teach law students legal principles. The typical process includes students reading a case, then being led by their professor through a series of questions to identify the legal holdings.¹²⁰ This early reliance on cases leads students away from other sources, like treatises, in favor of using cases to try to map precedents. The perception is that cases are the way to understand the law and using some other source would be impractical or inefficient.

118. Patrick Meyer, *Law Firm Legal Research Requirements and the Legal Academy Beyond Carnegie*, 35 WHITTIER L. REV. 419, 434 (2014).

119. ALL-SIS TASK FORCE ON IDENTIFYING SKILLS AND KNOWLEDGE FOR LEGAL PRACTICE, A STUDY OF ATTORNEYS’ LEGAL RESEARCH PRACTICES AND OPINIONS OF NEW ASSOCIATES’ RESEARCH SKILLS 84, 88 (June 2013), https://www.aallnet.org/allsis/wp-content/uploads/sites/4/2018/01/final_report_07102013.pdf (saying 44% of recent graduates rated as poor or unacceptable at administrative research and 40% poor or unacceptable at cost-effective research).

120. See D’Amato, *supra* note 62, at 466.

121. It is important to me to note that the world of treatise authorship has been predominately male and racially non-diverse. It is certainly a worthy subject of discussion, but not one I take on in this Article. I do, however, think it critical work to be done.

*iv. Authorship Deserves Attention.*¹²¹

If we are to accept a premise that treatises already exist on most subjects, treatises still need good authors to ensure they are current and reliable.¹²² It takes an incredible amount of work to update a treatise, but the glory of creating and naming the treatise has already taken place. For example, Samuel Williston, a Harvard Law Professor, initially authored *Williston on Contracts*. He is now deceased, and the editions have most recently been updated by Campbell Law Professor Emeritus Richard Lord. Most treatises have a similar fate as the torch must be passed from generation to generation. But the most impactful work of creating the treatise has already been done, so the new author is asked to take on the task of updating another person's work instead of, or in addition to, creating their own. Likewise, an author would have little incentive to create a treatise on a subject where one or more great treatises already exist.

To further complicate authorship, treatise authors should be academics. The author should be immersed in the subject. Certainly, many practicing lawyers are subject experts. But it is vital that a treatise-writer's reputation be bound to their treatise. While many practitioners are accomplished writers, their law practice is their most critical task. While some, like the late Melville Nimmer, will take on the treatise author's role with much success, they are generally the exception to the rule.

Academic tenure in law schools is generally based on three categories: teaching, service, and scholarship.¹²³ Although each law school has its own policies for these elements, there exists some general wisdom about how to create a successful record for tenure. Since as early as the 1980s, and perhaps even before, this consensus has been that treatise writing is not part of a path to success for pre-tenure academics. Multiple scholars have confirmed that young academics are not generally interested in writing treatises.¹²⁴ This emerging lack of

122. Certainly, as the world develops, new laws develop that do not fit into an existing treatise. However, most of the larger works are considered complete.

123. Devon W. Carbado & Mitu Gulati, *Tenure*, 53 J. LEGAL EDUC. 157, 159 (2003).

124. See, e.g., Horwitz, *supra* note 39, at 460. ("I would be surprised if there are more than a handful of law professors under the age of 45 who will ever write a treatise on law."); see also Fernandez & Dubber, *supra* note 43, at 20-21 ("[F]ew if any legal scholars in the United States today wake up filled with a burning desire to devote their professional lives to the production

support and interest in writing treatises by legal academics is a significant problem because preeminent treatises have most often been written by law professors. In a review of preeminent treatises, of sixty-six authors, only five were not academics.¹²⁵ It is difficult to study exactly how many pre-tenure law professors are writing treatises, as books are usually excluded from empirical studies about legal tenure and scholarship.¹²⁶ What is clear is the tenure system is not directly supporting or leading to treatise writing.

Perhaps treatise writing is only truly meant for post-tenure scholars. It would be fair to say post-tenure scholars are usually more equipped to write as experts in their fields. But does it follow that scholars automatically shift their interests to writing long-form after tenure? The Fall 2020 issue of the Yale Law Journal contains articles only written by full professors.¹²⁷ Certainly some post-tenure scholars are writing treatises. But this writing cannot simply be expected to continue. The emphasis placed on short-form writing for purposes of tenure must be balanced by realistically valuing the sources that support practical legal research, most importantly the treatise.¹²⁸

III. WHAT WE DO NOW

A. In the Law Library and Legal Publishing.

i. Discoverability.

Because treatise publishers have almost exclusively kept their treatises on their online platforms, practitioners do not have a way

of a treatise.”); *see also* Stone, *supra* note 42, at 1150-51. (“In the fifteen years I have been interviewing prospective law teachers, prompting them in overheated hotel lobbies to describe their idealized careers, I cannot recall any who fancied doing a treatise. Indeed, it is my impression that few today aspire to the mastery of any body of law in particular.”).

125. Appendix A.

126. *See, e.g.*, Albert H. Yoon, *Academic Tenure*, 13 J. EMPIRICAL LEGAL STUD. 428, 450 (2016).

127. 130 YALE L.J. 1-275 (2020) (publishing articles by Farah Peterson, Professor of Law, University of Chicago Law School; Robert C. Post, Professor of Law, Yale Law School; and Jennifer E. Rothman, Professor of Law, Loyola Law School, Loyola Marymount University).

128. Restatements are already highly valued because of membership in the esteemed ALI. Other forms of jurisprudence, like encyclopedias, are often written by those outside of academia.

to conveniently search across multiple platforms to find the best treatise. An individual library might have catalog records for online treatises, but they will only allow for searches across title, subject, and similar metadata, not the powerful full-text searches practitioners expect.

Outside the legal world there are search systems, called discovery layers, that search full-text in conjunction with library catalogs.¹²⁹ Major legal for-profit publishers have declined to allow connections through these discovery layers, so multiple databases from different publishers cannot be searched at the same time. Although it would be helpful to have a robust discovery layer for legal resources, what would be more helpful is a discovery website that is not bound to any individual library.

The premium solution is a discovery website designed to address several problems. First, the search itself and the list of results must be free. Treatise discovery should not be bound to commercial decisions. A practitioner should be able to understand all the choices available to them without being bound to a subset of treatises because they only have subscriptions to one service or another.

The site should search full text, but return only the title, reference to the chapter or section where the material exists, link to the resource, and any other legally producible elements, like the index or table of contents. This website would not require cooperation from the publishers and should be provisioned not to violate the copyright protection of any of the materials. Ultimately, the practitioner would have to obtain the actual text of the treatise. The discovery website should contain links to the commercial platforms. It should also invoke WorldCat to return records for print availability near the practitioner.

A resource like this would require cooperation from multiple sources to keep it current and free of error. Law librarians seem to be the most obvious fit. They are in a particular position to understand the sources, researchers, and publishers. Additionally, as legal research experts, law librarians could add recommendations to help practitioners understand which treatises were preeminent.

129. For further reading, see Jenny Bossaller & Heather Sandy, *Systematic Review of Library Discovery Layers*, 78:5 COLL. & RES. LIB. 602 (2017).

A free discovery layer may not solve the problems caused by publisher platform exclusivity, but it would make treatises as available as having them on a library shelf. It would also make it more possible for them to be returned as search results from non-legal search engines, ultimately leading practitioners to treatises instead of less-reliable free sources.

ii. Online Format.

Once a practitioner has found the best treatise for his or her issue, the treatise should be highly readable. Features added to the online format should not distract from the text. The text and background should be optimized for comprehension and allow for customization by the individual user. Online text display should allow an uninterrupted reading experience, minimizing cognitive disruption. The online format should also make the date and author of the source obvious and clear.

Many advances have been made to make books more readable online. Take, for instance, the Amazon Kindle Cloud Reader. The interface allows book-like reading without cognitive disruptions like crowded menus or features. A settings menu permits users to customize font and color to best suit their needs. Simple navigation features exist that allow the reader to move around in the book, as well as create bookmarks, highlights, or notes.

Major legal publishers have developed or adopted platforms for their eBooks that come much closer to optimizing reading experiences. On the Lexis and Westlaw eBook platforms, the text and background have many settings and allow users to customize. The text is displayed well for a continuous reading experience. The date is made very obvious and clear, and the author is as obvious as it would be in the print version. However, there are still underlined hyperlinks of contrasting color throughout the text, causing disruption. At the very least, this should be a feature that can be turned off. The eBook platforms also allow users to add notes to a source, highlight material, or create bookmarks.

Unfortunately, publishers have not extended this experience to their online databases like Westlaw Edge or Lexis Advance. These online platforms need to allow users to launch an eBook experience for treatises (and other secondary sources) from their sites to optimize online format. Any optimized reading experience should not carry an additional fee or require additional membership. Sources that

practitioners have already paid to access should be optimized for reading comprehension.

B. At the Law School.

i. Treatise Authorship.

Treatise writing must remain the important work of legal scholars. To ensure this, treatises must be respected for the crucial resources they are. The treatise has been described as being “in decline.” But, if there was decline, the decline was only in prestige. Judges, lawyers, and legal research experts still use the treatise. The treatise also still has valuable qualities when measured against its peers. So even if the treatise has declined in prestige, it has only declined from being considered the pinnacle of resources to being one of several very good resources.

Understanding that the treatise is important, and that we need legal scholars to take on the hard work of creating and maintaining treatises, law school administrations and bodies that influence administrations must consistently choose to support the writing of treatises. Treatise writing cannot be relegated to the “dirty work” of legal scholarship. Law professors must be supported, and yes even revered and celebrated, for taking on treatise writing.

Perhaps treatise writing is not the work of pre-tenure scholars. But clearly the emphasis on short-form writing is a product of the tenure system and not based in the usefulness to the practice and study of law. This artificial emphasis must be countered by measures to encourage long-form scholarship.

As law schools measure and collect scholarship, every effort should be made to recognize the efforts of those writing and updating books, including the treatise. Law schools must not exalt the scholarly article as the best form of scholarship. Articles are generally the accepted form of pre-tenure scholarship. But why? Because they are a shorter form, and the professor has the time and opportunity to build a small body of work to be measured by tenure committees and reviewers. Articles also have a built-in system of measurement in how they are published, with selection by prestigious institutions bringing obvious success. Articles are not the preferred format because they are somehow a superior form of writing.

Much the way that membership in the American Law Institute is revered by law schools, treatise writers must be properly applauded for their work. It may seem frivolous to say the law school must encourage the treatise writer. But the writer of important works should not be asked to work without the encouragement of their institutions. If treatise writing must wait until post-tenure, law schools should recognize the aspiration of legal scholars to participate in long-form writing, including the treatise.

ii. Teaching and Reading.

Law students should be taught to instinctively use the treatise to understand legal issues. Traditional law school teaching involves assigning cases for students to read, then using the Socratic method to extract relevant information from the cases. This system of asking students to read and rely on cases for this pivotal start to their law career creates an early reliance on using cases to understand law.

Legal research experts agree that legal research should not begin in cases. Although legal research is taught, it is a very minor component of early legal education as compared to the amount of case-led teaching. One course cannot overcome the impression left by multiple doctrinal courses emphasizing case reading repeatedly.

Legal pedagogy does not need to revolutionize on this point. A simple shift would correct this unintended problem. Selected treatise readings should be assigned alongside cases to increase understanding and make an early connection for students that treatises help them achieve comprehension, while cases only give limited examples of issues.

Teaching law students to turn to treatises for understanding will help correct an over-reliance on case research. Doctrinal professors assigning treatise readings specifically to aid comprehension will teach students to instinctively turn to the treatise when they need understanding of a legal topic.

CONCLUSION

In the early history of the law in the United States, the treatise was a critically important part of law. Over time, it failed to evolve as other legal publications changed around it. Some of these changes also lessened the importance of many of its once prime features. Further,

attitudes shifted about the prestige of the treatise in the scholarly world of post-realism and the importance of the treatise in an increasingly online world.

Treatises remain vital. Though legal research has greatly changed, the treatise remains a useful and important tool. It is still the best way to get a deep understanding of a broad legal topic. Treatises are still lauded by legal research experts, consistently cited by courts, and surveyed as useful by practitioners.

Treatises deserve to and critically need to evolve. Without treatises, the world of legal research, and law itself, would suffer. More than any other source, a treatise offers a practitioner a clear understanding of a topic of law across legal subjects. Currently, the treatise needs evolution in its online form, both in discovery and display. It also needs some assistance to set right the shifted attitudes about the treatise both in legal scholarship and education. Though it may at first seem challenging for these evolutions to occur, the answers are potentially simple. Changes must be made both in the world of legal research by librarians and publishers, as well as in the world of legal scholarship and teaching in law schools.

It would not be incorrect for me to say that “law librarians must work to evolve treatises.” But it also would not be a complete statement. Legal publishers must join this work. Legal technology developers must join. Law professors must do their part. Law school administrators must contribute. Treatises must be valued by us all as the important resources they continue to be. With the evolutions suggested, the treatise will continue as an extremely useful and valuable resource.

**APPENDIX A:
PREEMINENT TREATISE AUTHORS AND ACADEMIC
TITLES**

Title (edition year)	Credited Authors	Titles at Time Written
Newberg on Class Actions (5th ed.)	William Rubenstein	Bruce Bromely Professor of Law at Harvard Law School
	Alba Conte	Not academic
	Herbert B. Newberg (deceased)	Deceased at time of publication, during earlier editions was a faculty member at Temple School of Law (1975-~1981)
Farnsworth on Contracts (3d ed.)	E. Allan Farnsworth (deceased)	Professor at Columbia Law
	Zachary Wolfe	Assistant Professor of Writing at George Washington University
Corbin on Contracts (rev. ed.)	Arthur L. Corbin (deceased)	Deceased at time of publication, during earlier editions Corbin was Professor Emeritus at Yale Law
	Timothy Murray	Not Academic
	Joseph M. Perillo (deceased)	Professor Emeritus at Fordham University School of Law
	John E. Murray Jr. (deceased)	President, 1988-2001, of Duquesne University

Williston on Contracts (4th ed.)	Samuel Williston (deceased)	Deceased at time of publication, during earlier editions Williston was a professor at Harvard Law
	Richard A. Lord	Professor at the Norman Adrian Wiggins School of Law
Prosser and Keeton on Torts (5th ed.)	W. Page Keeton (deceased)	Professor at the University of Texas School of Law
	Dan B. Dobbs	Rosenstiel Professor of Law at the University of Arizona College of Law
	Robert E. Keeton (deceased)	Federal judge during time of publication, prior to publication (1954) Keeton was a faculty member at Harvard Law
	David G. Owen	Visiting Professor of Law at Indiana University
Law of Torts (2d ed.)	Dan B. Dobbs	Rosenstiel Professor of Law at the University of Arizona College of Law
	Paul T. Hayden	Thomas V. Girardi Professor of Consumer Protection

		Law at Loyola Law School
	Ellen M. Bublick	Dan B. Dobbs Professor of Law at the University of Arizona, James E. Rogers College of Law
American Constitutional Law (3d ed.)	Laurence H. Tribe	Professor of Law, Harvard Law
Treatise on Constitutional Law (5th ed.)	Akhil R. Amar	Yale Law, Sterling Professor of Law
	Vikram Amar	Professor of Law at University of California, Davis School of Law
	Steven Calabresi	Northwestern University, Clayton J. and Henry R. Barber Professor of Law
	John E. Nowak	Raymond and Mary Simon Chair in Constitutional Law at Loyola University
	Ronald D. Rotunda (deceased)	Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at the Dale E. Fowler School of Law
Administrative Law Treatise (6th ed.)	Richard J. Pierce, Jr.	Lyle T. Alverson Professor of Law at George Washington

		University School of Law
	Kristin E. Hickman	Professor of Law at the University of Minnesota Law School
Administrative Law (rev. ed.)	Jacob A. Stein (deceased)	Visiting professor at Harvard Law
	Glenn A. Mitchell	Not academic
Administrative Law and Practice (3d ed.)	Richard Murphy	AT&T Professor of Law at Texas Tech School of Law
	Charles H. Koch Jr. (deceased)	Dudley Warner Woodbridge Professor of Law at William & Mary Law School
Wharton's Criminal Law (15th ed.)	Charles E. Torcia	Multiple sources report Torcia has been a law professor at Dickenson School of Law, the Marshall-Wythe School of Law of the College of William and Mary, and the New York University School of Law, but give no specifics regarding years of service.
Search and Seizure: A Treatise on the Fourth Amendment (5th ed.)	Wayne R. LaFave	Research Professor, the David C. Baum Professor of Law Emeritus, and Center for Advanced Study

		Professor Emeritus at Illinois College of Law
Criminal Procedure (4th ed.)	Wayne R. LaFave	Research Professor, the David C. Baum Professor of Law Emeritus, and Center for Advanced Study Professor Emeritus at Illinois College of Law
	Jerold H. Israel	Professor Emeritus at Michigan Law
	Nancy J. King	Lee S. & Charles A. Speir Professor of Law at Vanderbilt University Law School
	Orin S. Kerr	Fred C. Stevenson Research Professor at George Washington University Law School
Powell on Real Property	Richard R. Powell (deceased)	Dwight Professor of Law at Columbia University
	Patrick J. Rohan (deceased)	Professor of Law and Dean Emeritus at St. John's University School of Law
	Michael A. Wolf	Professor of Law and History University of Richmond
Thompson on Real Property	David A. Thomas	Rex E. Lee Endowed Chair and Professor of

		Law Emeritus at Brigham Young University, J. Reuben Clark Law School
Federal Practice and Procedure (4th ed.)	Charles A. Wright (deceased)	Professor at University of Texas School of Law
	Arthur R. Miller	University Professor at New York University
	Richard W. Murphy	AT&T Professor of Law at Texas Tech School of Law
	Vikram D. Amar	Professor of Law at University of California, Davis School of Law
	Jeffrey Bellin	University Professor for Teaching Excellence and Robert and Elizabeth Scott Research Professor of Law at William & Mary Law School
	Daniel D. Blinka	Professor of Law at Marquette University Law School
	Edward H. Cooper	Thomas M. Cooley Professor Emeritus of Law at Michigan Law
	Richard D. Freer	Professor of Law at Emory University

	Victor J. Gold	Professor of Law at Loyola Law School
	Kenneth W. Graham Jr.	Professor of Law Emeritus at University of California Los Angeles School of Law
	Peter J. Henning	Professor of Law at Wayne State University Law School
	Helen Hershkoff	Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties at New York University School of Law
	Mary K. Kane	Hastings College of the Law, Distinguished Professor of Law
	Charles H. Koch (deceased)	Dudley Warner Woodbridge Professor of Law at William & Mary Law School
	Andrew D. Leipold	Edwin M. Adams Professor of Law at University of Illinois College of Law
	Richard L. Marcus	Distinguished professor of law at UC Hastings College of Law

	Ann Murphy	Professor at Gonzaga University School of Law
	A. Benjamin Spencer	Earle K. Shawe Professor of Law at University of Virginia School of Law
	Adam Steinman	University Research Professor of Law at University of Alabama School of Law
	Joan E. Steinman	Distinguished Professor of Law Chicago-Kent College of Law
	Catherine T. Struve	Professor of Law at University of Pennsylvania,
	Sarah N Welling	Professor of Law at University of Kentucky
Moore's Federal Practice (3d ed.)	Daniel R. Coquillette	Charles Warren Visiting Professor of American History at Harvard
	Gregory P. Joseph	Not academic
	Georgene M. Vairo	David P. Leonard Professor of Law Emerita at Loyola Law School
	Chilton Davis Varner	Not academic