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# Introduction: Putting the Legal Treatise in Its Place

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IN 1976, WHILE working on the first volume of *The Transformation of American Law*, Morton Horwitz noted that treatises were ‘the most neglected and really important sources of American legal history’.<sup>1</sup> Little has changed since then: treatises are still neglected, they are still really important, and not only in American legal history, but in common law history as a whole. This book aims to give legal treatises their due by undertaking an international and comparative analysis of the significance of the common law treatise in modern legal history and historiography.

The hypothesis here is that, provided one does not treat them as statements of *lex lata* (the law as it is) no matter what their authors might claim, but as a more or less stable mixture of elements of *lex lata* and *lex ferenda* (the law as it should be), treatises can provide insight into conceptions of law in general and of a particular area of law, into ideas about the project of legal scholarship, legal education (and learning), legal commentary, about the very notion of the ideal in law, and the relationship between the real and the ideal, into the role of law in broader projects, including projects of nation-building, of (scientific) systematisation, of rationalisation, and of civilisation, modernisation, and therefore also codification, and, ultimately, into the relationship between the individual, the community (however defined), and the law (and perhaps even the state, depending on one’s view of the law’s, and the lawyer’s, role within the state apparatus).

## I. WHAT IS A (LEGAL) TREATISE?

The attempt to settle on ‘the’ definition of ‘the’ treatise is as futile and uninteresting as most definitional quests – and perhaps more so, given the variety of books making an appearance in the pages of this collection that are called ‘treatise’,

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<sup>1</sup> MJ Horwitz, ‘Part III – Treatise Literature’ (1976) 69 *Law Library Journal* 460.

either by their author or others. Still, a project on the legal treatise would do well, at the outset, to arrive at a working definition of its subject matter, however preliminary and non-exhaustive. For starters, to get a sense of what a *legal* treatise is, it might make sense to get clear(er) on what a treatise is. The *Oxford English Dictionary* ventures a definition of treatise that is as good as any other:

A book or writing which treats of some particular subject; commonly (in mod. use always), one containing a formal or methodological discussion or exposition of the principles of the subject; formerly more widely used for a literary work in general.<sup>2</sup>

Three points must be emphasised. First, there is the general and capacious sense of *treatment*, a feature shared by any book or writing on a particular subject. Anything between two covers ‘treats’ its topic. Second, we must notice the more narrow focus on *principles*, so important to the legal treatise in particular. And third, there is the point about the presentation of principles in a methodological *discussion* or *exposition*. We take it that what makes a treatise *legal* is its focus on legal sources – cases, statutes, codes, constitutional text or legal doctrine – along with its implied claim of offering authoritative interpretation of those sources.

The essays in this collection take to heart a broad approach to the legal treatise in the sense that they include discussion of a number of kinds of legal literature that one might not ordinarily think of as a treatise, eg the institute-structured commentaries of William Blackstone and James Kent. These works ‘treat’ their legal topics in the required discursive way, even if some would question their status as treatises based on the way that they range across many topics (usually those included in some variation on the persons-things-actions triad Justinian’s *Institutes* borrowed from Gaius) rather than focusing on a single legal topic like English treatises such as William Jones’ book on bailments or John Joseph Powell on contracts.<sup>3</sup> In addition to essays focusing on commentaries, readers will find included here a chapter on a justice of the peace manual and another on criminal law codification. Each of these forms of legal literature certainly presents legal principles, alphabetised in the former case and conceptually arranged in the latter case of a code. What seems to be lacking is the third feature mentioned above, namely, a discursive presentation, probably connected to the second *Oxford English Dictionary* definition of a treatise as ‘[a] story, a tale, a narrative (spoken or written)’ and its third meaning as a ‘descriptive treatment,

<sup>2</sup> ‘Treatise, n. 1a’ (2nd edn, 1989); online version November 2010. [www.oed.com.myaccess.library.utoronto.ca/Entry/205390](http://www.oed.com.myaccess.library.utoronto.ca/Entry/205390); accessed 14 March 2011. Earlier version first published in *New English Dictionary*, 1914.

<sup>3</sup> AWB Simpson, ‘The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature’ (1981) 48 *University of Chicago Law Review* 632, 633 (stating that ‘the treatise is a monograph, purporting to deal only with a single branch of the law that is conceived of as possessing some quality of unity; treatises, like institutional works, are not comprehensive, though they are similar in other respects’); J Langbein, ‘Chancellor Kent and the History of Legal Literature’ (1993) 93 *Columbia Law Review* 547, 586 (stating that ‘[t]he distinguishing trait of institutionalist writing is the effort to be comprehensive, to describe the private law of an entire legal system in a single work. This breadth of field contrasts sharply with the treatise writer’s effort to delimit a single topic in exhaustive depth’).

description, account (of something)'.<sup>4</sup> Codes and manuals (as well as other forms of legal literature that use alphabetisation to present legal information like a law dictionary, a commonplace book, an abridgement or a digest) are too staccato in the way in which they speak. There is not enough narrative or descriptive fill to count as a treatise. However, there is no doubt that these works perform a similar rationalising and systematising function to the traditional legal treatise, and we operate on the premise that thinking about them alongside and in relationship to the legal treatise is a useful exercise.

We have divided the essays into type of law book under discussion, rough geography and to some extent chronology. The first division consists of the two essays on institute-structured commentaries, Kunal Parker on Blackstone's *Commentaries* (Chapter one) and Philip Girard comparing Blackstone and Kent's *Commentaries* with an institute-writer from Nova Scotia, Beamish Murdoch (Chapter two). The second division contains the three essays in the book on American legal treatises – one of us, Angela Fernandez on Tapping Reeve's treatise on domestic relations, *Baron and Femme* (1816) (Chapter three), Blaine Baker on Joseph Story's *Commentaries on the Conflicts of Laws* (1834) (Chapter four) and Roman Hoyos writing about a book that emerged after the United States Civil War on the legal principles involved in state constitutional conventions, John A Jameson's *The Constitutional Convention* (1867) (Chapter five). The third section contains the United Kingdom pieces, Stephen Waddams on English contract law treatises (Chapter six), Lindsay Farmer on English and Scots criminal law treatise writers (Chapter seven) and Lyndsay Campbell on English libel law treatises in North America (Chapter eight). The fourth and final section of the book contains Barry Wright's essay on colonial criminal law codification (Chapter nine) and Jim Phillips' piece on a Nova Scotia justice of the peace manual (Chapter 10). This is followed by a commentary by Chris Tomlins discussing the ways in which he sees the essays inter-relating (Chapter 11). We highlight here a number of themes that we believe emerge from the collection.

## II. LAW BOOKS IN ACTION

Legal historians know well how unreliable a legal treatise is in terms of operating as a source for understanding what the law on the ground was at a particular time and place. One need only think of Roscoe Pound's famous distinction between 'law in books' and 'law in action'.<sup>5</sup> Much of the thrust of law and society studies of the last 40 years has been premised on the idea that 'law in books' tells us very little about 'law in action'.<sup>6</sup> Treatises may be (ab)used as shortcuts to the detailed

<sup>4</sup> *Oxford English Dictionary* (n 2), 'Treatise n 1b & c'.

<sup>5</sup> R Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

<sup>6</sup> But see RW Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 120–23 (on the usefulness of 'mandarin' legal materials, ie case law and treatise literature).

study of legal developments, in doctrine and in the streets. One need not be a proponent of social history over the history of ideas to dismiss the use of treatises as the legal historian's Cliffs Notes.<sup>7</sup> As rationalising and systematising works, legal treatises seem to be unlikely places to find out how the law was actually operating. Indeed, they would be much more likely to set out some kind of synthesising aspiration, a kind of plea to judges, legal practitioners and students to think of things in the way that the treatise-writer recommends, drawing on hints to that effect in whatever cases can be found.

Stephen Waddams, the only contributor to this volume who has written a treatise, has used the term 'forensic convention' to describe the way in which the treatise-writer speaks as if he or she is arguing at the bar itself, offering in effect a plea or pleading.<sup>8</sup> Since doctrinal writing is not a formal source of law in a common law system, the voice in which the treatise-writer speaks will likely be quiet and deferential.<sup>9</sup> Ideally, from the treatise-writer's perspective, once the judges are convinced to adopt the recommended view, that makes it 'law' and the treatise-writer can quietly reflect that success in a subsequent edition, of which there always seem to be many. Joel Prentiss Bishop, an extremely prolific American treatise-writer of the late nineteenth century, was particularly vocal about highlighting the importance of the treatise-writer over the judge. And he was not very deferential.<sup>10</sup> Yes, the judges get to decide the case, but the treatise-writer gets to say what the case really decides.<sup>11</sup> Legal treatises are supposed to describe the law and report it in something like a neutral or objective way; but they do an awful lot of advocacy with respect to shaping what that law is. Why treatise-writers took up the topics they did and argued in the ways they did can make for a fascinating back story, often more interesting as a matter of legal history than the actual words on the pages of the books.

<sup>7</sup> See, eg Paul Halliday's brilliant critical history of habeas corpus, which seeks to offer a history of the 'Great Writ' 'that is better grounded empirically and broader conceptually than the one still routinely invoked in our courts and public debates', and thereby also to illustrate the pitfalls of historical analysis of law 'that limits itself to a reading of treatises and printed case reports, while ignoring 'countless parchment court records and case reports surviving only in manuscript'. P Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA, Harvard University Press, 2010) 3–4.

<sup>8</sup> S Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge, Cambridge University Press, 2011) 56 (describing 'the forensic convention' as 'the convention that the writers were indirectly addressing an English judge, as a barrister might do, and seeking to persuade him of the actual state of contemporary English law').

<sup>9</sup> Simpson (n 3) 638 ('the text writer, unless he himself is a judge, possesses as an individual no authority derived from office').

<sup>10</sup> See, eg JP Bishop, *First Book of the Law: Explaining the Nature, Sources, Books, and Practical Applications of Legal Science, and Methods of Study and Practice* (Boston, MA, Little, Brown, 1868) 130 ('oftentimes, the judges do not apprehend the true reasons of their decisions'), 250 ('[I]f the author of a legal treatise is as able a lawyer as the judge, his disquisitions upon the law are, as a general rule, more nicely accurate than those of the judge can be,' given the judge's 'duty . . . to decide no more than the simple question in controversy'). See SA Siegel, 'Joel Bishop's Orthodoxy' (1995) *13 Law and History Review* 215; see also Hoyos, in this volume.

<sup>11</sup> See, eg AWB Simpson, 'The Beauty of Obscurity: *Raffles v Wichelhaus and Busch* (1864)' in AWB Simpson (ed), *Leading Cases in the Common Law* (Oxford University Press, 1995) 135–62 (on how the treatise-writers and casebook editors turned a one-line judgment into a leading contracts case).

At least two of the essays in this collection are explicit examples of that kind of back story. So, for instance, Roman Hoyos (Chapter five) describes how John A Jameson's book emerged from the uncertainty surrounding constitutional conventions, particularly the state constitutional conventions authorising Southern secession in the American Civil War, and a concern about disorder. It was particularly important as a 'first' book, since it established a field of law that would not have been recognised as such until the book made it so.<sup>12</sup> The authority brought by the form of the legal treatise was key to the writer's point that 'yes constitutional conventions were a concern', while sending out the reassuring message 'don't worry, this can be dealt with as a matter of law' – any irrational, arbitrary, disorderly, political uncertainty can be made to be orderly, rational, certain and predictable according to formal, systematic and scientific rule.

The essay by Angela Fernandez (Chapter three) on Tapping Reeve's book on the law of domestic relations is another example of the back story of a treatise, also a 'first' treatise. However, rather than claiming to bring order to the essentially disorderly mass of cases, a common claim of many late nineteenth-century treatise-writers (see Hoyos), Reeve's book is unusual for its failure to refer to the positive law and its insistence on pure principle. Fernandez explains how Reeve rejected the common law maxim that husband and wife were one person in law, advocated for a married woman's right to make a will and convinced his students at the Litchfield Law School to pass a statute to that effect. He did all this in the face of strong counter-authority (eg Coke, Blackstone and Connecticut case law). Reeve's claim to be describing English law for an American audience was really an attempt to reflect the norms of *his* Connecticut, just at the moment at which as a 'fading Federalist' he was losing the larger political and religious project in which he was invested.

Both of these back story essays demonstrate that legal treatises as a topic of historical investigation can go beyond the words the authors wrote on the page in order to enquire about what the authors of these books thought they were doing in writing them or, at least, what the books in effect did in their wider social and political worlds. The accounts given here make it impossible to view legal treatises as simply carriers of purportedly neutral, objective, rationalising and systematising principles. Their substance was deeply normative, while much of their authority was predicated precisely on their appearing not to be. This approach requires at the very least looking with a sceptical eye on what the treatise-writer says in the preface to the work about what the work is for and trying to ask instead about what the work in fact did. To scramble Pound's distinction between 'law in books' and 'law in action', we might think of this as 'law books in action'.<sup>13</sup>

<sup>12</sup> See T Agape and V Lim, 'John Cobb Cooper: At the Frontiers of International Law' available at [www.ccil-ccdi.ca/ccil-the-essays/student-essays-from-the-university-of-toronto-project/](http://www.ccil-ccdi.ca/ccil-the-essays/student-essays-from-the-university-of-toronto-project/) (on the creation of the subfield of air and space law).

<sup>13</sup> Companion literatures here would include work on the history of the book (see, eg DD Hall, *Cultures of Print: Essays in the History of the Book* (Amherst, MA, University of Massachusetts Press, 1996)), law book publishing (see, eg M Hoeflich, *Legal Publishing in Antebellum America* (New York, NY, Cambridge University Press, 2010)) and literature on lawyers' libraries (see, eg A Fernandez,

The third example, less of a back story than Hoyos or Fernandez since it does not focus on the author of the treatise and the original context for its creation but is certainly an example of ‘law books in action’, is the essay by Lyndsay Campbell (Chapter eight) on Thomas Starkie’s *A Treatise on the Law of Slander* (1813) and its reception in North America. The 1830 London edition of Starkie elaborated on a defence of ‘qualified privilege’ that Joseph Howe, a newspaperman prosecuted for publishing criticisms of Nova Scotia’s magistracy, was able to use to convince a Halifax jury to acquit him in 1835. However, that approach went nowhere in neighbouring Massachusetts, where debate about libel and slander focused on a defence based on truth. We cannot know, of course, if the treatise was the thing that convinced the jury in Howe’s case. However, Campbell’s explanation of the role it played in this trial shows a law book figuring in very real on-the-ground events that were unlikely to have turned out this way in the United States.

### III. STEPPING STONES

Philip Girard (Chapter two) makes the argument in his essay that we should not think of institute-literature like Blackstone or Kent’s *Commentaries* as a stepping-stone on the way to the treatise (as John Langbein has claimed).<sup>14</sup> Treatises and commentaries co-existed and indeed interacted. The many editions of Blackstone’s *Commentaries* (also featured in Chapter one by Kunal Parker) show a continued use for and interest in that text, as do the subsequent editions of Kent’s *Commentaries*. Girard points out the back-and-forth exchange, for example, between Kent’s *Commentaries* and one of Joseph Story’s treatises.

Barry Wright (Chapter nine) makes a similar argument about our understanding of a code, which cannot always be understood as the place that the treatise was a stepping-stone to (as Brian Simpson has claimed).<sup>15</sup> While this was true in the case of the Canadian criminal code, modelled largely on the failed 1878–80 draft code prepared for England by James Fitzjames Stephen (who wrote both a treatise and a digest before his code), it was not so in the earlier case of Thomas Macaulay’s Indian Penal Code (drafted by 1837 and enacted in the wake of the

‘Albert Mayrand’s Private Law Library: An Investigation of the Person, the Law of Persons, and ‘Legal Personality’ in a Collection of Law Books’ (2003) 53 *University of Toronto Law Journal* 37; DJ Hulsebosch, ‘An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic’ (2009) 60 *Alabama Law Review* 377).

<sup>14</sup> Langbein (n 3) 593 (‘within the realm of doctrinal writing . . . the institutionalist genre could not withstand the competition from later forms of legal literature. Doctrinal writing can be done better when it is separated from the need for schoolbook simplicity that characterizes the institutionalist tradition. Breadth is the enemy of depth, and when breadth is no longer needed, depth will prevail. As a result, everywhere in the Western legal systems, the institutes gave way to the treatise, and that is what happened in the United States’).

<sup>15</sup> Simpson (n 3) 666 (‘[a] number of treatises were written in the form of codes, the code being the next logical step in the process of systematization beyond the discursive treatise’).

Mutiny or the First War of Independence in India in 1860). While there were 'hints of the treatise' in things Macaulay had written as he was preparing his code that took a synthetic and discursive approach (the *Examples* and to a greater extent his explanatory *Notes*), Wright argues that Macaulay's code must really be understood as inspired by Jeremy Bentham's critique of Blackstone's attempt to rationalise the common law. Unlike Stephen, who used the conservative approach of trying to accommodate the common law, there was no stepping-stone treatise for Macaulay. His experiment for colonial India was meant to make a radical break with the past and the common law authority that more traditional forms of legal literature like a treatise or a digest would be at pains to catalogue. However, Stephen's 'cautious' approach, beginning with a treatise, moving to a digest 'and then on to a narrow code that retained common law' was perfect for late-nineteenth-century Canada, where common law traditions were weaker than they were in England and codification of the criminal law came to be seen as key to establishing and keeping order and stability in the new Dominion.

In the United States, over a century after Macaulay's codification efforts and a good half century after the passage of Canada's Criminal Code of 1892, Herbert Wechsler conceived of the American Law Institute's Model Penal Code (1952–62) as following what he regarded as Stephen's path to codification. In fact, it is useful to think of the Model Penal Code project as a treatise project first, and a code second. Wechsler, as Chief Reporter of the Model Code, consciously followed the example of Stephen, who regarded, or at least presented, his 1878 draft of an English criminal code as merely the codified form of his *A General View of the Criminal Law* (1863) and *A Digest of the Criminal Law* (1877). To this day, the Model Penal Code itself is the best textbook of 'American criminal law', and, along with the Commentaries, the best treatise on the subject. In Wechsler's view, the Model Penal Code, in other words, was but a treatise codified.

Note here that the Model Penal Code was not a code derived from a treatise, but a treatise in code form. Unlike in the case of contracts and torts, say, there were no great criminal law treatises in the making, or for that matter on the shelves (the early efforts by such enterprising nineteenth-century publishing pioneers like Bishop and Wharton notwithstanding).<sup>16</sup> The absence of a respectable criminal law treatise, in fact, was taken as evidence of the poor, and relatively backward, state of American criminal law, which accounted for the Institute's decision to draft a model criminal code, rather than producing a restatement, as it did, for instance, in contracts and torts; there was no criminal law worth restating. Given that there was no treatise, nor was there time to produce one en route to a code, Wechsler and his collaborators produced a treatise-cum-code, later supplemented by six volumes of commentary, which produced a text on American criminal law unmatched in breadth and depth to this day.

<sup>16</sup> On the poverty of American criminal law treatise-writing, and American criminal law scholarship in general, see GOW Mueller, *Crime, Law, and the Scholars: A History of Scholarship in American Criminal Law* (Seattle, WA, University of Washington Press, 1969).

Given the enormity of the task of reforming American criminal law – and his Legal Process view of the legal world – Wechsler realised that merely capturing criminal law norms in codified forms would not be enough. Judges and other system participants would always have to exercise discretion in interpreting the provisions of the code, and that discretion required guidance. This guidance came in the form of interpretive instructions (for instance, on the proper interpretation of ambiguous offence definitions, most notably the requisite *mens rea*) but, more important, shaped the code as a whole. The code is far more comprehensive and detailed than, say, the German criminal code precisely because it was also a treatise – it taught criminal justice system participants criminal law in a systematic way (note here the parallel to Wright’s discussion of Macaulay’s *Examples* as teaching devices, designed to illustrate the operation of code provisions).

So codes could be treatises; but treatises could be codes as well. As Farmer points out (Chapter seven), in the absence of comprehensive, or reliable, case reports, treatises in late eighteenth-century Britain added up to ‘a form of de facto codification of the criminal law, as a means of solving co-ordination problems’. A treatise, written by (often young) practitioners for practitioners, thus functioned as a ‘codification . . . of practical knowledge’. These practical works, unlike the ambitious English codification movements of the early nineteenth century, Farmer reports, were less concerned with conceptual innovation than with educating the practising bar.

India, and colonialism more generally, occupy an odd, and fascinating, place in the history of treatise- and code-writing, not only in the common law world, but in civil law countries as well. As the contributions to this volume reveal, several of our treatise- and code-writers either spent a great deal of time in India or concerned themselves with matters Indian, from the more obvious (Macaulay and Stephen, see Wright) to the less obvious (Henry Colebrook, William Jones, even Pollock, who cited not only Savigny, but also ‘with full approval’ provisions from the Indian Contract Act, see Waddams).<sup>17</sup> Wright calls India a ‘colonial laboratory for utilitarian reform’ and chalks up Stephen’s failure in the Mother Country to the widely-shared sense, among Englishmen, that the Indian code, while perhaps useful ‘to keep things simple for the native population and magistrates of limited ability’, was ill-suited to a country as sophisticated as England, and a bar

<sup>17</sup> Pollock worked on six editions of a book on the Indian Contract Act from 1905 to the 1930s. See N Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford, Oxford University Press, 2004) 77. Pollock also drafted a Code of Civil Wrongs for the government of India, included as an appendix to the second edition of his *Law of Torts* (1890). He travelled to lecture at the University of Calcutta in the fall of 1893 on fraud, misrepresentation and mistake, lectures that were published in 1894. See Pollock to Holmes, 9 August, 1893, in M De Wolfe Howe (ed), *Holmes-Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock, 1874–1932* vol 1 (Cambridge, MA, Harvard University Press, 1941) 45. Pollock’s father-in-law was an official in British India; See J Gorham Palfrey, ‘Introduction’ to the *Holmes-Pollock Letters* xv (in 1873 ‘Pollock married Miss Georgina Harriet Deffell, daughter of John Deffell of Calcutta’). British India Era Papers indicate that Deffell was a sheriff in Calcutta (then Bengal) in the 1850s. See also Pollock to Holmes, 18 August 1913, 209 (noting that William Jones ‘tackled Sanskrit at Calcutta, and was the first Englishman who really knew much of it’).

as well-trained and common-sensical as the English.<sup>18</sup> While Stephen might have been right to regard, and praise, Macaulay's *Notes* as a 'succinct critical treatise on English criminal law in the 1830s', as Wright puts it, clearly English judges and lawyers thought there was no need for a code-cum-treatise to show them the way around their very own law. There is an interesting parallel here to the – woefully understudied – German colonial legal experience. As Wolfgang Naucke has pointed out, German criminal law scholars and early criminologists at the turn of the twentieth century regarded German colonial criminal law, and German colonial criminal codes in particular, as an opportunity to implement their treatmentist (rehabilitative/incapacitacionist) projects in a form, and to an extent, unimaginable in Germany itself, where the German Criminal Code of 1871 (itself based on the Prussian Criminal Code of 1851) remained firmly committed to the idea of a retributive, guilt-based criminal law.<sup>19</sup>

Outside of the criminal law context, the idea that treatises acted as stepping stones to codes is often claimed in the case of the French Civil Code of 1802, where commentators have long identified the treatises of Robert Joseph Pothier as having made that codification possible.<sup>20</sup> However, it is also common to hear the claim that works like Kent's *Commentaries* and Story's treatises helped *stave off* codification in the United States.<sup>21</sup>

Kent was called the 'doctor of the laws', and part of the reason was that his *Commentaries* had saved those laws from codification.<sup>22</sup> Story was a more

<sup>18</sup> Pollock thought the codified route preferable. He wrote to Holmes '[c]ompare the Indian Penal Code with the amazing muddle English criminal law has drifted into through (among other causes) the combined meddling & timidity of the Legislature'. And he invited Holmes to 'get up a sort of moot in print' on codification generally, him for and Holmes against. See Pollock to Holmes, 26 July 1877 in Holmes-Pollock Letters *ibid* 7–8. Holmes seems to have declined the invitation and wrote five years later, 'I don't attach much importance to the codifying furore – except for India'. Pollock to Holmes, 8 April 1882 in Holmes-Pollock Letters *ibid* 21.

<sup>19</sup> See W Naucke, 'Deutsches Kolonialstrafrecht 1886–1918' (1988) 7 *Rechtshistorisches Journal* 297.

<sup>20</sup> Simpson (n 3) 667, 675.

<sup>21</sup> See, eg R Pound, *The Formative Era of American Law* (Boston, MA, Little, Brown, 1938) 152–53. The lectures the book was based on were delivered at Tulane University in honour of the Louisiana jurist and codifier, Edward Livingston, and so must have been a sharp theme for this audience. Pound called the Kent/Story approach 'taught law' or 'tough law' (evoking a phrase of Frederick Maitland) and emphasised how this tradition helped stave off codification in all states but Louisiana. As he put it, 'the great text writers of the formative era were able to bring it about that the English common law should be the basis of the law in all but one of the United States' *Ibid* 148 (emphasis added). This was typical of Pound, who as John Witt has put it, was always able to 'situate himself right at the boundaries of his audience's tolerance – to provoke, but never to disturb, to be iconoclastic and forceful but never radical or revolutionary, to startle while confirming his audience's deepest convictions'. John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Boston, MA, Harvard University Press, 2007) 230.

<sup>22</sup> JT Horton, *James Kent: A Study in Conservatism, 1763–1847* (New York, NY, D Appleton-Century Company, 1939) 306 (calling Kent 'doctor of laws to the whole republic'). See also DJ Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill, NC, University of North Carolina Press, 2005) 299 ('in practice the codification controversy was a conflict between two groups of lawyers: those who wanted to unify American law through treatises and legal education, and those who wanted to do so as delegates of state legislatures'), 280 ('Kent and other Federalist heirs resisted most codification efforts because they arose at the state rather than the national level. The federal government lacked the power to enact a private-law code').

complicated case, as Kent Newmyer has explained, as his treatises were meant to pave the way toward codification for settled areas of commercial law. However, his larger goal as a ‘moderate’ in the codification debates of the 1830s was to scuttle radical, novel, extensive, experimental, total codification.<sup>23</sup> Didactic legal works like commentaries and treatises, in other words, could support the argument that codification was either not required at all or at best was appropriate at the margins (eg David Dudley Field’s code of procedure for New York State). The message was ‘do not worry about the common law; there is no need for a code; it’s not a mess, it’s not chaos; it’s not just a jumble of cases; we have got it under control’ (see Hoyos on the need to fabricate disorder in the antidote to that disorder, the treatise). Such claims were premised on the point that the more discursive didactic literature simplified the legal universe in the way that a code would (or at least was often expected to) (see Blaine Baker in this volume on Story’s codifying).

Indeed, the view of legal treatises operating as the stepping-stone to a code and the idea that the legal treatise would act as a defence against codification made the same assumption: legal treatises provide a unifying and simplifying function. This is, however, a problematic assumption.

In the United States at least, many of the treatises that were produced in the nineteenth century arguably made things more complex rather than less by loading new editions of English and native works with layers upon layers of citations. As Dirk Hartog has pointed out, these books might have been originally written as ‘repositories of legal truth’, filled with principle for which the precedents cited were mere illustrations. However, lawyers bought these books as compendia, as repositories of all the possible positions that could be raised with regard to a particular legal problem. They bought them for the footnotes and the indexes, as shortcuts to precedents and arguments they would use as well as those they would have to counter. And the treatise writers responded to the market demand with larger and larger editions that incorporated and distinguished every possible variation and alternative. Instead of countering complexity with coherence, in the end the treatises recreated complexity.<sup>24</sup>

Lawyers wanted cases. They wanted the ability to generate complexity, which, after all, is the water they swim in. So, for instance, Stephen Waddams (Chapter six) discusses the interesting example of Henry Colebrooke who offered a contract law treatise in 1818 that tried to be all principle without cases and it fell flat. Regardless of what a text-writer might say in his preface about the principles that

Hence when Pollock asks Holmes whether Holmes thinks codification ‘a humbug’ in the sense that codification is itself undesirable ‘or only that there is no advantage in doing it by legislative authority’, Pollock fails to grasp this important federal-state distinction. See Pollock to Holmes, 26 July 1877 *Holmes- Pollock Letters* (n 17) 7.

<sup>23</sup> See RK Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill, NC, University of North Carolina Press, 1985) 278. The thought was that ‘moderate’ codification would ‘clear up areas of confusion, enhance uniformity, and rescue working lawyers from drudgery and impending chaos’ (279).

<sup>24</sup> H Hartog, *Man and Wife in America: A History* (Cambridge, MA, Harvard University Press, 2000) 16.

would drive the inquiry (or symmetry, order, science, etc), a discussion of the law would be expected to include references to cases or other primary sources of positive law, including codes. That is what Colebrooke seems not to have understood. Waddams tells us that Colebrooke was never able to write a preface to his work. Perhaps he did not understand (as someone like CG Addison did) that a preface might say one thing (very high-sounding) and the book do another (give cases that could be used as authorities slotted onto a more or less developed theoretical framework).

This says something important about legal treatises, which might well be different from other kinds of treatises and might well be true of law books more generally: they exist in the shadow of legal practice. A good, successful legal treatise must take precedent and practice into account. It cannot be all principle. That is what makes Tapping Reeve's *Baron and Femme* come dangerously close to looking like a bad treatise, as much as one might like his rejection of Blackstone on one-person-in-law. Hence, in the same way that we cannot see commentaries-treatises-codes as stepping stones towards a *telos* like the transparent and perhaps ultimately self-interpreting simplicity that the Shangri-La code was imagined to inaugurate, we must take seriously the fact that these books were not meant to be read from cover to cover for their overarching conceptual argument. Indeed, the framework in many cases was little more than a way of creating categories in which to put things (eg the Gaian triad, persons-things-actions).<sup>25</sup> Many, if not most, of these books were meant to be dipped into for this or that point and its corresponding authorities. The Scottish institute-writer George Joseph Bell said his own work was useful 'for the sudden occasions of practice'.<sup>26</sup> In other words, these works were intended to allow the practitioner to *step in and out* of the text, a text the form of which was not necessarily moving backwards or forwards in any particular direction, eg towards codification or the institute-structure, or away from it.

Lindsay Farmer (Chapter seven) takes up the point about use and the legal treatise in his essay explicitly, asking specifically about how principled English and Scottish criminal law was. Not very, Farmer argues. 'Criminal law was conceived of primarily as a practical subject, and that utility to the practitioner was the organising principle both in terms of structure and substance'. Rather than drawing distinctions between institutional works and handbooks and other texts, Farmer asks us to think about what they had in common, namely, operating as actual sources of law for criminal lawyers. As he puts it, 'in the absence of detailed case reports and other sources, they *are* the law for the developing profession'. So, for example, for the Scottish criminal law writer David Hume, nephew of the famous philosopher, principle and practice were inseparable – 'the principle *is*

<sup>25</sup> The Gaian triad has been called 'one of the most distinctive and enduring systems of thought in Western history'. See DR Kelley, 'Gaius Noster: Substructures of Western Thought' (1979) 84 *The American Historical Review* 619, 620.

<sup>26</sup> KGC Reid, 'From Text-Book to Book of Authority: The *Principles* of George Joseph Bell' (2011) 15 *Edinburgh Law Review* 6, 12.

the practice'. It would be misguided therefore to assume that principle was more appropriately expressed in 'higher' forms of legal literature and practice in some 'lower' form like a justice of the peace manual. Farmer argues that treatise-writers were achieving a kind of de facto codification with these works, rather than acting as a stepping-stone to codification or operating as a defence against it.

Jim Phillips (Chapter 10) examines one justice of the peace manual in depth, prepared in the 1830s by an imperious judge and assemblyman, John George Marshall, for the use of magistrates in Nova Scotia. Calling this book a 'counter treatise', Phillips argues that it embodied 'low law', highly positivistic and statute-based, to be used on the ground by justices of the peace, ordinary men who were not trained in the law and, indeed, for whom Marshall seems to have held not a little contempt. Marshall's book was meant to instruct, Phillips claims, not persuade as a treatise would. The work was 'an instructional guide, pure and simple, written for a class of people desperately in need, in his [Marshall's] view, of instruction'.

We should note that the form of 'low law' Phillips describes is not confined to the alphabetised manual form. So, for instance, Zephaniah Swift's *A System of the Laws of the State of Connecticut: In Six Books* (1795–96) was actually written in part for justices of the peace and used by them in states like Ohio that looked to Connecticut when they were settled.<sup>27</sup> That was despite the fact that Swift used the institute form, strongly associated with high principle. However, Swift was very positivistic (see Fernandez contrasting him with Tapping Reeve). As Philip Girard explains in his essay (Chapter two), comparing the institute-structure in Blackstone and Kent to the Nova Scotia institute-structured book, Beamish Murdoch's *Epitome of the Laws of Nova Scotia*, Murdoch's work was very practical and statutory. It contained 'a wealth of detail about local statutes, civil and criminal procedure, and actual practice and usage'. In other words, work that was positivistic, statute-oriented and practice-oriented could exist in high forms, as well as low ones.

Conversely, the 'highest' kind of legal treatise could be directed at 'lower' audiences. Take Savigny's famous treatise on possession. It was translated from the German into English by Sir Erskine Perry, Chief Justice of the Bombay Supreme Court. Perry dedicated the work to 'the members of the Honourable Company's Service engaged in the administration of justice in India'.<sup>28</sup> Such individuals cannot be expected to have 'the same scientific knowledge of the law which follows only upon deep study and exclusive attention to the subject'.<sup>29</sup> However, these officials of the East India Company, Perry supposed, would rush to consume this book by 'the greatest master of Roman law in Europe'.<sup>30</sup> Why? '[A]n accurate

<sup>27</sup> See EC Goodwin, *The Magistracy Rediscovered: Connecticut, 1636–1818* (Ann Arbor, MI, UMI Research Press, 1981) 95–96.

<sup>28</sup> E Perry, 'Preface' to Von Savigny's *Treatise on Possession or the Jus Possessionis of the Civil Law* 6th edn (London, S Sweet, 1848) iii.

<sup>29</sup> *Ibid* iv.

<sup>30</sup> *Ibid*.

knowledge of the distinction between Possession and Property, and of the legal protection afforded to the former in order to repress violence and breaches of the public peace' was especially valuable to colonial administrators, Perry implied.<sup>31</sup> This book, in other words, was high law for the unscientifically-oriented lowly.<sup>32</sup>

#### IV. THE ORNAMENTAL

Blaine Baker's essay (Chapter four) deals with an American figure essential to any collection on the legal treatise: Joseph Story. Story wrote so many treatises and there were so many editions of the books, many of them on very boring topics, one can easily see why not much has been written about them. Baker argues that Story's treatises should be understood in relationship to his other systematising writing – an alphabetised digest, a consolidation of state statutes, his codification initiatives and even his encyclopaedia entries. The treatise was just one of the forms Story used, even if it was the one he managed to make work most successfully. However, no simple stepping-stone story emerges. Baker focuses on Story's *Commentaries on the Conflicts of Laws* (1832), explaining how that book is dominated by Story's concerns about individuals engaged in exchange transactions across state lines rather than conflicts between the laws of independent sovereign nations. 'Although Story had limited interest in genuinely transnational private-law discord', Baker writes

[s]ituating a domestic, private law problem in the context of international practice and the law of nations was in some measure a rhetorical flourish on Story's part, intended to add appealing classical cachet to choice-of-law rules at risk of being ignored or rejected by parochial state courts.

Story was a cosmopolitan. As Baker notes, 'a single page of *Commentaries on Conflicts*, for example, has . . . quotations from Louis Boullenois, Achille Rodemburg, Paul Voet, John Voet, Charles D'Argentré and Ulricus Huberus'. However, this was, at least in part 'rhetorical flourish', 'intended to add appealing classical cachet' to a set of much more mundane domestic problems relating to the lack of coordination among state courts on rules directly affecting property, trade and commerce. Like one of Story's most important judicial decisions, *Swift v Tyson* and its creation of a federal common law,<sup>33</sup> establishing a set of fixed and determined choice of law rules was about augmenting national power in order to create strong national markets. These concerns were resolutely domestic, not international.

<sup>31</sup> Ibid.

<sup>32</sup> Apparently, when he retired, just four years after the translation, Perry 'occupied himself, with strange ingratitude, in advocating for the abolition of the Honourable Company'. CHS Fifoot, *Judge and Jurist in the Reign of Victoria* (London, Stevens and Sons, 1959) 87 n 3. See also J Keay, *The Honourable Company: History of the English East India Company* (London, HarperCollins, 1991).

<sup>33</sup> *Swift v Tyson*, 41 U.S. 1 (1842).

Stephen Waddams (Chapter six) also describes the way in which cosmopolitan sources operated in an ornamental way for English contract law writers. This was most apparent in the little failed book prepared by Colebrook. Waddams writes that '[t]he book is replete with references to Roman law, to the French Civil Code, to Hindu law and to civilian writers, including Barbeyrac, Pufendorf, Godefroy, Grotius, Domat, Pothier and Erskine'. However, more commercially and intellectually successful writers like Frederick Pollock also referred to the civil law, the writings of Savigny and Pothier, who was praised by many for his 'manly' style. The continental promise of order, elegance and science created a powerful drug, and Pothier's treatise on the law of obligations was available in English (unlike Savigny whom Waddams notes Pollock insisted on quoting in German for an English audience who were unlikely to have been able to appreciate the nuance Pollock sought to preserve). However, Waddams explains how the principles taken from the civil law, and specifically from Pothier, turned out to be too wide for common law lawyers in many cases and how even Pollock retreated from Savigny's emphasis on intention as Pollock moved closer towards Holmes and the American emphasis on reasonable expectations. The extent of actual deep influence of the civil law on the English contract law writers might have been minimal; however, Waddams notes an attachment to 'an *idea* or ideal of civil law, closely associated as it was with order, science, elegance, logic and principle'. Ironically, Pollock's admiration for Pothier's 'elaborate and elegant works' in general did not keep him from rejecting specific positions taken by Pothier as 'cumbrous and inelegant', suggesting that Pollock was not content to imitate Pothier's elegance but to exceed it.

Elegance, at the same time, was treated with considerable suspicion in the common law world – perhaps partly because of its association with civil law in general, and French law in particular. Farmer notes, for instance, that Hume's late eighteenth-century treatise on Scots criminal law sought to 'avoid . . . strained and artificial rules of law', while Waddams quotes Pollock's approval, over a hundred years later, of 'the modern tendency to look to 'the realization of reasonable expectations' as the ground of just claims rather than an artificial equation of wills or intentions', thus throwing Savigny, and presumably his own enthusiastic previous endorsement of Savigny, under the shiny new wheels of American Legal Realism.<sup>34</sup> Blackstone, of course, was frequently both lauded and chided for his elegance, not only by Bentham (quoted by Wright as snarkily dismissing the *Commentaries* as an 'elegant palliative to the inherently chronic confusion of the common law') but also by the likes of Thomas Jefferson, who bemoaned the waning influence of Coke on Littleton, that 'black-letter text' filled with 'uncouth but cunning learning' as the fashionable 'honeyed Mansfieldism of Blackstone became the students' hornbook'.

<sup>34</sup> The Legal Realists had no use for elegance for elegance's sake. For a typical dismissal of the 'intellectual passion for *elegantia juris*, for symmetry of form and substance', see BN Cardozo, *The Nature of the Judicial Process* (New Haven, CT, Yale University Press, 1921) 34.

Unlike 'the deep and rich mines of Coke, Littleton', fact- and case-based, well-grounded, proudly inelegant in its reportorial restraint, Blackstone's suspiciously elegant *Commentaries* had been 'perverted . . . to the degeneracy of legal science'. Their attempt to systematise and scientise the material, with an apparently aloof 'elegance', ill concealed the celebration of central authority hidden behind an apparently abstract, and objective, system of legal principles. Here the treatise, or rather the elegant treatise, carries the whiff of despotism ordinarily associated with codes, which as Wright points out, Macaulay considered 'almost the only blessing, perhaps the only blessing, which absolute governments are better fitted to confer on a nation than popular governments'. (This is not to say, incidentally, that Jefferson was opposed to codification, provided he drafted the code and in drafting the code he relied heavily on Coke, to the point of imitating Coke's marginal style and medieval spelling habits.)<sup>35</sup>

The interrelation between treatise and code, however, once again turns out to be less straightforward than one might think. Not only are there codes-as-treatises and treatises-as-codes, but treatises, even elegant ones, do not necessarily serve the centralising and controlling functions often ascribed to codes (at least in the common law world, while codification elsewhere has the exact opposite connotation of subjecting state power to comprehensive, systematic, visible, and therefore monitorable and enforceable legal constraint). In Germany, for instance, treatises have been said to serve the end of subjecting state power to principled (and, yes, scientific or, if you prefer, 'scientific') control by the law professoriate, which one commentator went so far as to elevate and institutionalise as a fourth – externally critiquing – branch of government.<sup>36</sup>

This critical, or normative, function of the treatise is often associated with its scientific ambition. Certainly the German law professor who writes a legal treatise traditionally has seen herself as doing legal science, and her claim to influence derives from her status as a legal scientist who occupies a position of objectivity, from which she critically assesses positive law (*lex lata*) and from which she proposes corrections to any errors she might discover (*lex ferenda*). This is not to say, however, that the treatise (or the *Lehrbuch*) is unique in its legal scientific ambition. In Germany, law has been considered a science since (at least) the early nineteenth century and all legal scholars have been regarded, and have regarded themselves, as scientists by definition (and occupation), whether they write a treatise, a code commentary, a case comment, an article or a monograph (even an op-ed piece in a general newspaper, though they may need to simplify their scientific analysis for a lay audience).<sup>37</sup>

<sup>35</sup> See MD Dubber, "An Extraordinarily Beautiful Document": Jefferson's Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment' in MD Dubber and L Farmer (eds), *Modern Histories of Crime and Punishment* (Stanford, CA, Stanford University Press, 2007) 115.

<sup>36</sup> B Schünemann, 'Strafrechtsdogmatik als Wissenschaft' in B Schünemann *et al* (eds), *Festschrift für Claus Roxin* (Berlin, de Gruyter, 2001) 1, 8.

<sup>37</sup> On German legal science, see M Reimann, 'Nineteenth Century German Legal Science' (1990) 31 *Boston College Law Review* 837; MD Dubber, 'The Promise of German Criminal Law: A Science of Crime and Punishment' (2005) 6 *German Law Journal* 1049.

The association between the idea of law as science (or, the common non-committal, 'science') and the idea of the treatise in particular is characteristic of the common law world, where the very project of legal science (and within that project, of different conceptions of legal science) has been contested for decades, if not centuries.<sup>38</sup> The appeal of the treatise as a marker for the scientific ambitions of the common law thus reflects both a yearning, however conflicted, to move beyond a non-scientific, or insufficiently scientific, conception of law and a recognition of the possibility of that conception. At the same time, and for the same reason, anxiety about the idea of a treatise reflects anxiety about the idea of a scientific conception of law.

The connection between the ideas, and ideals, elegance and science also deserves more critical attention than it occasionally receives. The artificiality of elegance, the veneer of sophistication, the pretence of learning, the putting on of airs, can be distinguished from the pursuit of, and the attempt to claim, the objectivity, systematicity, comprehensiveness and complexity of science. Elegance is not rigour. Whatever might have been said about Savigny and his fellow nineteenth-century Romanists, German legal science – as opposed to German Roman law scholarship – since then could hardly be described as motivated by a concern for elegance and, in fact, might be just as well, if not better, regarded as driven by a disdain for elegance that rivals Jefferson's, if for entirely different reasons.

While citations to, and even quotations from, civil law legal scientists may have signalled a common law treatise-writer's attempt to associate his project with a foreign idea of law as science, often more sensed than fully grasped or endorsed, the ornamental significance of these cross-systemic references should not be discounted. Why would the author of a legal treatise orient (or at least pepper) the work in this way? Why pretend to be cosmopolitan when the concern was actually domestic (Story)? Why quote in German text that most readers will not be able to understand, or agonise over whether or not Pothier was right about a fine point relating to offer and acceptance (Pollock)?<sup>39</sup>

Part of the answer has to do with stature and reputation and what these legal scholars would have thought necessary to achieve greatness. Kent wanted to be recognised as the American Blackstone. Story sought after and attained an international reputation with his books, quite a feat since England would have viewed the United States of the 1830s and early 1840s as a backwater. Each of these jurists wanted to be the Pothier of their time and jurisdiction, to be known as a great legal scientist.<sup>40</sup> Greatness included learnedness, filtering it in a way that also demonstrated it. Repackaging pretend Roman and civil law was one way to do this. In

<sup>38</sup> See H Schweber, 'The Science of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education' (1999) 17 *Law and History Review* 421.

<sup>39</sup> See Waddams (n 8) 307–10.

<sup>40</sup> See D Hulsebosch, 'Debating the Transformation of American Law: James Kent, Joseph Story, and the Legacy of the Revolution' in DW Hamilton and AL Brophy (eds), *Transformations in American Legal History: Essays in Honor of Professor Morton J Horwitz* (Cambridge, MA, Harvard University Press, 2009) 1 (emphasising differences between Kent and Story).

fact, Pothier did this himself when he reworked Justinian's *Digest*.<sup>41</sup> Pollock seems to have been genuinely interested in Pothier and Savigny. However, Waddams shows us that Pollock also wished to appear, at least to Holmes, to have been ahead of the curve on reasonable expectations in contract law.<sup>42</sup> If Pollock had any hope of being recognised as a legal scientist with international stature, presumably Holmes would have to concur in that judgment. Individuals in these small rarefied circles were very dependent on each other for their promotion and recognition, which could be a fickle process.<sup>43</sup> Waddams describes what Jones' book on bailments and Evans' English translation of the *Law of Obligations* did for Pothier among English lawyers who might otherwise have never known who he was. A cosmopolitan orientation, even if it was largely ornamental, meant that a treatise-writer got to play in a larger and more learned circle of scholars, thereby increasing the chances of notoriety, name-recognition and a shot at greatness.

When the author of a didactic work made a conscious choice to keep the focus local – Zephaniah Swift and his *System of the Laws of the State of Connecticut* or Beamish Murdoch's *Epitomes* – this would take them and their work out of these circles. Not only did Swift refer to the state in the title of his book, he also referred to 'laws' in the plural. Nothing could more clearly communicate that he was positivistic. No claim was made about 'the law' in the singular. It was this sense of 'our lady the common law' that later academic jurists like Pollock and Holmes took themselves to be investigating and explaining and writing to each other about.<sup>44</sup> Murdoch, Girard tells us (Chapter two), was also focused on the local and the legislative. He was not interested in commercial law, a tremendous

<sup>41</sup> See JE de Montmorency, 'Robert-Joseph Pothier and French Law' (1914) 13 *Journal of the Society of Comparative Legislation* 265, 278–79.

<sup>42</sup> Holmes had filtered 'learned law' in his editing of the 12th edition of *Kent's Commentaries*. Langbein (n 3) 566–70 (on 'learned law'), 565 (noting the Holmes edition).

<sup>43</sup> Holmes was very free in making such judgments in his correspondence with Pollock. See, eg Holmes to Pollock, 17 June 1880, in *Holmes-Pollock, Letters* (n 17) 15 (speaking about Melville M Bigelow who wrote a history of procedure in England from the Norman Conquest that '[h]e is a man whom I greatly respect for his sincere love of learning which he has proved in spite of poverty etc., but there is nothing incisive or masterly about him – so that whatever he does will have to be done over again. He is, however, getting to be a really learned man') (emphasis added); Holmes to Pollock, 23 March 1883, 21 (speaking about James Fitzjames Stephen, 'I am reading Stephen's *Criminal Law*. My opinion of him as a law writer does not grow higher, as I read this or his former books. He knows nothing, it seems to me, of the scientific aspects of the history of law, and is to my mind rather a model of a fine old 18th century controversialist than a philosopher. He would knock the stuffing out of an antagonist upon a point of dogma I don't doubt, in the handsomest way. He is an adult male animal, but he hasn't the intuition of [Henry Sumner] Maine or the higher class of writers'); Holmes to Pollock, 4 March 1888, 31 (speaking about Maine at the time of his death and noting that while *Ancient Law* 'brilliantly caught and popularized' the science of law, '[h]e seems to have been impatient of investigation himself and I do not think will leave much mark on the actual structure of jurisprudence, although he helped many others do so'). Bigelow was a young scholar in Boston also using a historical approach to understand English law whom Holmes likely saw as a rival. Holmes' issues with intellectual generosity were manifold. So, for instance, he denied that Maine's influence extended to himself despite the fact that his lectures on the common law corresponded to the chapters in Maine's *Ancient Law*. See M De Wolfe Howe, *Justice Oliver Wendell Holmes*, vol 2 *The Proving Years 1870–1882* (Cambridge, MA, Belknap Press, 1963) 139 (on Bigelow), 148–49 (on Maine).

<sup>44</sup> See *Holmes-Pollock Letters*, *ibid*; Richard Cosgrove, *Our Lady the Common Law: An Anglo-American Legal Community, 1870–1930* (New York, NY, New York University Press, 1987).

contrast with Kent and Story. And Murdoch, who unlike Blackstone and Kent enjoyed legal practice, was not very interested in the elaborate or scholarly. Girard quotes Murdoch warning the ‘young collegian’ to avoid taking excessive ‘pride of classic lore’. ‘While his learning may be an ornament, and perhaps give grace and intensity to his eloquence, yet it is rather a holiday garb’. Murdoch’s text was not, like Kent and Blackstone’s, ‘ready-made for export and empire’. Probably, for that reason, it did not need a story about the importance of commercial law as a civilising function.<sup>45</sup>

If Swift and Murdoch had problems with name-recognition, there was no such issue for William Blackstone. As Kunal Parker explains in his essay on *Blackstone’s Commentaries* (Chapter one), Blackstone’s text shifted from being an object of use to an object in a museum admired for its style. What that style was is very difficult to say. There is certainly dogma and oversimplification, but many much less influential didactic works have had this. Is the style merely ornamental? Or is it somehow essential to the central role this set of books has played? Parker explains the way in which editors of Blackstone’s work eventually gave up trying to update the text to a particular time and jurisdiction and simply accepted that what was important about the text was just that it was Blackstone. In his description of the text’s journey from use to style and the text taking up its place as a museumised object, Parker asks us to think about what has stayed the same in relation to this text over time. Rather than focusing on difference or change over time, we can see something important about Blackstone’s text as a kind of museum exhibit of how one (particularly influential) eighteenth-century English gentleman thought he could renovate a Gothic castle and live comfortably in it.

## V. CONCLUSIONS

We could write for a very long time about all the different things that the essays in this collection are doing: describing how individual law books operated in a political event (Campbell), invented – or at least cordoned off – a field of law (Hoyos, Farmer), offered a local iteration in the institute form (Girard), presented the local as if it were English common law that could operate for the American nation (Fernandez) and adopted national concerns and embedded them into a cosmopolitan and international context (Baker). There is a sub-theme in the chapters relating to the end user of the text – justices of the peace, who were being lectured to and instructed so as to harness them in (Phillips), criminal lawyers, who

<sup>45</sup> Hulsebosch, ‘Debating the Transformation of American Law’ (n 40) 6 (noting that both Kent and Story embraced commerce, which ‘[i]n the sociology of the Scottish Enlightenment, which both learned from British books . . . was the primary index of civilization’). See also Baker in this volume, quoting from Story who dramatically stated that a nation that ignored the disorderliness created by inter-state conflicts of law ‘would soon find its whole commercial intercourse reduced to a state, like that, in which it now exists with savage tribes, with the barbarous nations of Sumatra, and with the other portions of Asia, washed by the Pacific’.

needed a way to access and cite the law (Farmer), students, who received the dogmatic principles of contract from Anson, as opposed to the more thoughtful and nuanced Pollock (Waddams) and magistrates in India, who could use Macaulay's code to impose a straightforward version of British justice on the native population (Wright).

We are cognisant that the longer we write, the longer it will take readers to get to the essays themselves, which contain so much more than we have been able to highlight here. We must, however, say a word about what the essays in the collection do not treat. As the title of the collection indicates, these essays are focused on the Anglo-American legal treatise. The books our authors have chosen to write about are all common law works from the United States, the United Kingdom and Canada (with the exception of Barry Wright on the Indian Penal Code). The civil law arguably triggered common law interest in the form but there are no essays on civil law legal treatises per se, not to mention treatises in other legal traditions such as Islamic law or on fields of law like international law.<sup>46</sup> Even within the Anglo-American tradition, no one here has written about earlier works like *Littleton on Tenures* or 'the ultimate treatises'<sup>47</sup> or 'mega-treatises'<sup>48</sup> of the late nineteenth century in the United States – Williston, Wigmore, Powell, Scott or Corbin. Rather than striving for an ever-elusive coverage, we have opted for a collection of essays that highlight important features of the treatise as a form of legal literature, as a law book in action, as a work that complicates simple stepping-stone stories about the relationships among the treatise and codes or institutes and other forms of legal literature, and as a talky text that can and often does contain important ornamental aspects.

One question that we do not address in great detail is what happened to the treatise as a form of literature in the twentieth century. Roscoe Pound recounted this evolution in *The Formative Era in American Law*, where he gave a stepping-stone story, casebooks were the 'necessary forerunner[s] . . . of the great treatises',<sup>49</sup> the 'ultimate' or 'mega' treatises. And those 'great treatises' paved the way for the American Law Institute Restatement projects.<sup>50</sup> How did the United States get from this 'Age of the Treatise' to the study of doctrine being seen as *passé* by the

<sup>46</sup> Holmes interestingly used the fact that international law was 'a subject which lawyers do practically study' and that there were 'rules of conduct *so definite as to be written in textbooks*, and sanctioned in many cases by the certainty that a breach will be followed by war' as his reasons for recognising it as part of the law. De Wolfe Howe, *The Proving Years* 71 n 22 (emphasis added).

<sup>47</sup> Simpson (n 3) 674.

<sup>48</sup> Langbein (n 3) 593.

<sup>49</sup> Pound, (n 21) 165. So, for instance, Williston produced his collection of cases before his treatise. See S Williston, *The Law of Contracts* (New York, NY, Baker, Voorhis, 1920); S Williston, *A Selection of Cases on the Law of Contracts* (Boston, MA, Little, Brown, 1903–04). Wigmore's treatise was published shortly after his casebook. See JH Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of Jurisdictions of the United States* (Boston, MA, Little, Brown, 1904); JH Wigmore, *A Selection of Cases on Evidence: For the Use of Students of Law* (Boston, MA, Little, Brown, 1906).

<sup>50</sup> For instance, Williston produced his *A Selection of Cases on the Law of Contracts* in 1903–04, the treatise on *The Law of Contracts* in 1920, and his work for the American Law Institute's Restatement of the law of contracts in the late 1920s and early 1930s.

late 1970s and early 1980s? Simpson identified the lack of enthusiasm for doctrine in the United States with the rise and effects of legal realism.<sup>51</sup> There is clearly some truth to this observation, although there are many jurisdictions that had significant ‘realist’ or ‘sociological’ movements in which treatises continued to be produced.<sup>52</sup> Treatise-writing was not just an outmoded vestige of ‘Langdellian formalism’, or ‘Classical Legal Thought’, if you prefer.<sup>53</sup> Corbin, for instance, saw his treatise as a Legal Realist alternative to Williston’s formalism, one that drew on inductive case analysis rather than deductive reasoning from higher principles to lower doctrines. Corbin’s treatise, after all, appeared only in 1950, long after Legal Realism had replaced formalism as the orthodoxy in American legal thought.<sup>54</sup> (Even the first edition of Williston was published in 1920, at the very end of the ‘heyday’ of legal formalism.) Karl Llewellyn, who regarded Corbin as his ‘father in the law’, complained bitterly about his fellow Legal Realists’ dismissal of doctrinal analysis, and of treatise and Restatement writing in particular. Although no treatise-writer himself, Llewellyn, like Corbin, played a central part in the American Law Institute’s work. His Uniform Commercial Code, more explicitly than Corbin’s Restatement of Contracts, implemented the core Legal Realist claim that it was impossible to deduce the resolution of every issue from a set of principles by leaving space for local legal communities (in this case communities of merchants) to frame and resolve issues based on their experience and expertise.<sup>55</sup> Farnsworth’s contracts treatise, first published in 1982, can be seen as a more explicitly normative, if not to say neo-formalist, alternative to Corbin’s Realist project.<sup>56</sup> Prosser’s torts treatise, first published in 1941, too was more intellectually ambitious – and in particular animated by then-dominant Legal Realist thought – than it would appear in hindsight, after a series of editions that, as in all such works, tend to dilute the conceptual clarity of the original vision.<sup>57</sup>

That said, few if any legal scholars in the United States today wake up filled with a burning desire to devote their professional lives to the production of a treatise, great or not so great. While short treatlets survive on the margins of the American legal textbook market, neither students nor teachers, not to mention courts or practising lawyers or, for that matter, legislators or their aides, feel the need to bury their noses in heavy tomes of treatise learning. The Great Treatise very much

<sup>51</sup> Simpson (n 3) 677 (stating that the realist movement ‘involved a scepticism and even a cynicism about the significance of legal doctrine in the determination of cases’), 678 (‘a movement that minimizes the importance of legal doctrine is hardly likely to generate enthusiasm for the work of analyzing doctrine and expounding it as the principled science of law’).

<sup>52</sup> See A Hunt, *Sociological Movement in Law* (London, Macmillan, 1978). Thanks to Blaine Baker for this point and this reference.

<sup>53</sup> See TC Grey, ‘Langdell’s Orthodoxy’ (1983–84) 45 *University of Pittsburgh Law Review* 1, 2 (using the term ‘classical orthodoxy’); D Kennedy, ‘Two Globalizations of Law and Legal Thought: 1850–1968’ (2003) 36 *Suffolk University Law Review* 631, 633 (using the term ‘Classical Legal Thought’, which he made famous).

<sup>54</sup> See F Kessler, ‘Arthur Linton Corbin’ (1969) 78 *Yale Law Journal* 517.

<sup>55</sup> See JQ Whitman, ‘Commercial Law and the American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code’ (1987) 97 *Yale Law Journal* 156.

<sup>56</sup> EA Farnsworth, *Contracts* (Boston, MA, Little Brown, 1982).

<sup>57</sup> L William, Prosser, *Handbook of the Law of Torts* (St Paul, MN, West, 1941).

has gone the way of the Great Men of the Law; just as the American Law Institute is not what it once was, and ALI giants like Herbert Wechsler no longer roam the halls of American law schools, so Model Codes or even Restatements no longer demand the attention of the producers or the consumers of legal literature in the United States.<sup>58</sup>

Other common law countries, such as Canada, however, continue to generate treatises on the standard range of topics, including – even – in criminal law, a subject long neglected in its Neighbour to the South. In the Mother Country, too, scholars and practitioners continue to churn out treatises, though the name may have fallen out of favour, perhaps so as not to scare off students and lawyers eager for a quick hit of doctrine. In civil law countries, say Germany, the production of comprehensive – and heavy – tomes of doctrinal analysis continues, both in the form of *Lehrbücher* and (often multi-volume) treatises-cum-code-commentaries, though here too shorter forms of legal educational literature have found a willing market.

Given the treatise's shape-shifting resilience over the past few centuries and its intimate connection with ideas of legal scholarship, legal education, and even of law itself, it would be foolish to count it out, now or in the future, in civil law countries or in the common law world. Perhaps even in an apparently hostile environment such as American legal scholarship, where 'doctrine' has for some time been a four-letter word, a fundamental and widespread reassessment of the very project of so-called interdisciplinary ('law and') legal scholarship may usher in a renaissance, or at least a reassessment, of the treatise in one form or another, as the disciplinary pendulum swings back from the 'and' to the 'law' and the analysis of law reasserts itself, both chastened and complicated in the wake of insights gleaned from decades of peering into law from the outside.<sup>59</sup>

<sup>58</sup> MD Dubber, 'The Model Penal Code and European Criminal Law' in A Klip (ed), *Substantive Criminal Law of the European Union* (Antwerp, Maklu, 2011) 209.

<sup>59</sup> See, eg S Lavi, 'Turning the Tables on "Law and . . .": A Jurisprudential Inquiry into Contemporary Legal Theory' (2011) 96 *Cornell Law Review* 811.