

LEGAL RESEARCH'S HISTORICAL TAPESTRY: HOW THE HISTORY OF THE WEST PUBLISHING COMPANY IMPACTS MODERN LEGAL RESEARCH AND LAWYERS' VIEW OF THE LAW

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Legal research is complicated. It requires a high level of technical expertise to use today's legal research platforms. Legal research is so much more. Modern legal research has its roots in the West Company's digest, key number, and headnote system that was developed over 150 years ago. Today's law students must learn how West's history impacts legal research to truly understand how the company and its products have influenced the law. It is the responsibility of the legal academy to teach this history to the next generation of lawyers so that they can engage in the level of reasoning that is required of them.

INTRODUCTION

"A page of history is worth a volume of logic."¹ Oliver Wendell Holmes wrote those words in 1921, and they are as appropriate today as they were then. This statement is particularly pertinent to legal research. Today's law students must learn the history of legal research to engage in the level of logical thought that is required of them. This point was brought home for me when a professor asked me to visit her class to talk about legal research. The professor's only request was that I bring a printed copy of a case reporter to class. It was clear that my job was to bridge the gap between print resources and electronic research platforms, such as Westlaw. Implicit in the professor's request was the idea that today's law students, who are digital natives and think only in terms of electronic resources, need to know more about the history of legal research in the United States to fully understand and engage with the law. I explained to the students that the cases found on Westlaw and other electronic platforms have their roots in a sophisticated print system of topical indexes, headnotes, finding aids, and case reporters that were developed by the West Publishing Company 150 years ago. The takeaway for the students was that the history of West and the company's products impact modern legal research and our conception of the law.

The history of the West Publishing Company² has been told many times.³

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1. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

2. The terms West or West Publishing Company will be used throughout this Article understanding that the West Publishing Company was acquired by the Thomson Corporation (now Thomson Reuters) in 1996. Iver Peterson, *Thomson to Buy Legal Publisher In a \$3.43 Billion Cash Accord*, N.Y. TIMES (Feb. 27, 1996), <https://www.nytimes.com/1996/02/27/business/thomson-to-buy-legal-publisher-in-a-3.43-billion-cash-accord.html>.

3. See WILLIAM W. MARVIN, *WEST PUBLISHING COMPANY: ORIGIN, GROWTH, LEADERSHIP* (1969); Ross E. Davies, *How West Law Was Made: The Company, Its Products, and Its*

My aim is to highlight a few of the lesser talked about aspects of the company's history to shed light on the factors that impacted its success, influence on the legal community, and approach to legal research. Equally important to this story is West's relation in time to various legal thought movements. West Publishing Company was a product of the nineteenth century when classical legal thought was the prevailing belief of the day. Lawyers viewed cases as the most important source of law because they resolved most issues.⁴ Classical legal theorists, including Christopher Columbus Langdell, saw law as a science where prior precedent could be applied to other legal situations to determine the correct outcome.⁵ Langdell shaped legal education to reflect these classical legal norms.⁶ It was against this backdrop that John B. West started the West Publishing Company.

John B. West started his publishing company to provide lawyers with comprehensive access to all published appellate cases, which were difficult to obtain.⁷ He achieved his goal admirably. So well, in fact, that the West Publishing Company became the industry leader.⁸ For decades, West did not have much competition.⁹

The company became much more than the preeminent legal publisher, however. The company's digest, key numbers, and headnotes became the very system that frames our view of the law. Law students in the nineteenth century became indoctrinated in the West system. Several of the seven major West digest topics¹⁰ were the same as the first-year course subjects created by Langdell.¹¹ The first legal research text was published by West and encouraged

Promotions, 6 CHARLESTON L. REV. 231 (2012); Robert C. Berring, *Full-Text Databases and Legal Research: Backing into the Future*, 1 HIGH TECH. L.J. 27 (1986); Taryn Marks, *John West and the Future of Legal Subscription Databases*, 107 LAW LIBR. J. 377 (2015); Robert M. Jarvis, *John B. West: Founder of the West Publishing Company*, 50 AM. J. LEGAL HIST. 1 (2010).

4. See Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 2–3 (2004); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 335 (1st ed. 1973).

5. See CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vii–viii (1871); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983); ANDREW FORSYTH, COMMON LAW AND NATURAL LAW IN AMERICA: FROM THE PURITANS TO THE LEGAL REALISTS 110–11 (2019).

6. See Grey, *supra* note 5, at 3–5.

7. See John B. West & Co., *October 21, 1876*, 1 THE SYLLABI 1 (1876), reprinted in MICHAEL H. HOEFLICH & WILLIAM E. BUTLER, THE SYLLABI: GENESIS OF THE NATIONAL REPORTER SYSTEM 1 (2011); Jarvis, *supra* note 3, at 6.

8. See Davies, *supra* note 3, at 267–68.

9. See FREDERICK C. HICKS, MATERIALS & METHODS OF LEGAL RESEARCH WITH BIBLIOGRAPHIC MANUAL 120–22 (1923); Roger W. Cooley, *Use of the Law Books*, 2 LAW LIBR. J. 1, 2 (1909).

10. The seven major digest topics were Persons, Property, Contracts, Torts, Crimes, Remedies, and Government. See Sarah Gotschall, *Common Scolds, Drunkards and Embracery: Exploring the Past and Present Through West Digest Topics*, RIPS LAW LIBR. BLOG (Nov. 24, 2020), <https://ripslawlibrarian.wordpress.com/2020/11/24/common-scolds-and-drunkards-exploring-the-past-through-west-digest-topics/> [<https://perma.cc/GJ6T-QZ7E>].

11. Langdell's first-year curriculum at Harvard consisted of Property, Contracts, Torts, Civil Procedure, and Criminal Law. Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 341 (2007).

law students and inexperienced lawyers to use the digest to find cases.¹² West representatives, including Thomas Cooley, often lectured about research and advocated for law students to use the digest.¹³ Through repeated exposure, the West digest topics became ingrained in the thought process of law students and lawyers.¹⁴ West's infrastructure operated "like DNA; [it] enable[d] the current system to replicate itself endlessly, easily, and painlessly."¹⁵ Eventually, lawyers began to think in terms of the West digest topics.¹⁶ If a legal topic was outside the scope of the digest, then, for all intents and purposes, it did not exist.¹⁷ Thus, legal arguments and outcomes were framed in terms of West's digest and limited by it at the same time.

West's digest, key numbers, and headnotes are the foundation of modern legal research. West's digest remains relevant today even for those researchers who have not used it in print. West continues to incorporate its digest topics and key numbers as part of Westlaw's algorithmic functionality, impacting search results.¹⁸ In addition, Westlaw's most recent electronic platform (Westlaw Precision) prominently displays a link to the key numbers, allowing researchers to interact directly with the key numbers and digest topics to find cases. This research method may sound familiar. It is the very same method that West created and championed over one hundred years ago. In addition, Westlaw's functionality clearly shows the company's continued priority on cases. Westlaw's Google-like search functionality lists cases as the first search results. It is almost impossible to separate modern legal research and the law from the West Publishing Company. Ultimately, most aspects of modern legal research are the result of West's early operation and its priorities on case reporting and digesting.

Significant to West's story but virtually ignored is the fact that West's case-first approach to legal research is inconsistent with the standard legal research process. For over one hundred years, legal research theorists have articulated a legal research process that begins with secondary sources.¹⁹ Yet, West has never embraced the standard legal research process, choosing instead to focus on cases.²⁰ In its early days, West's choice to focus on cases was understandable.

12. See WILLIAM M. LILE ET AL., *BRIEF MAKING AND THE USE OF LAW BOOKS* (1906).

13. See Paul D. Carrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495 (1997).

14. F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 570–71 (2002).

15. Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories: Law Reform, Critical Librarianship, and the Triple Helix Dilemma Essay*, 42 STAN. L. REV. 207, 208 (1989).

16. See Robert C. Berring, *Ring Dang Doo*, 1 GREEN BAG 2D 3, 3–4 (1997).

17. See Robert C. Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L.J. 189, 192–93 (1997).

18. See Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 LAW LIBR. J. 387, 399–401 (2017).

19. See HICKS, *supra* note 9, at 160; James DeWitt Andrews, *The Use of the Law Library*, 2 LAW LIBR. J. 8, 15 (1909).

20. See James E. Briggs, *A Symposium of Law Publishers*, 23 AM. L. REV. 396, 400–01 (1889).

During the nineteenth century, cases were the most important source of law.²¹ However, the dominance of cases waned over time with statutes and regulations becoming more prominent.²² The invention of electronic legal research platforms provided the perfect opportunity for West to reconsider its approach to legal research. West declined to do so. Instead, the company continued with business as usual. It designed Westlaw to emphasize cases with the digest, key numbers, and headnotes as its foundation.²³

West's legal research apparatus that worked well when it was developed in the 1870s does not reflect today's legal landscape or modern legal theory, which rejects classical legal ideals that law is a science that can be mechanically applied. If, as a legal community, we have handed over so much control to West, the question becomes what should we do about it? While it may be impossible to turn back the clock on West's influence, the least we can do is examine how we arrived where we are today and consider ways to combat our blind adherence to its impact on the law.

This Article will proceed in three parts. Part I lays the foundation for the Article, focusing on the history of the West Publishing Company. Specifically, Part I details West's development of the early legal research system. Part I explains how the decisions made by West a century ago impact legal research and the law today.

Part II provides a brief history of legal education as it relates to West, legal research, and legal research textbooks. It explains how West's digest system is compatible with the case method of legal education, which has been a popular teaching tool for decades. Further, Part II explores the development of an accepted legal research process that begins with the use of secondary sources and explains how West's digest system and Westlaw's functionality are inconsistent with this legal research method.

Part III connects the histories outlined in Part I and Part II to explain West's impact on the law. Specifically, Part III explains the ripple effect that West's history and its dominance in legal publishing has had on legal education and the practice of law in terms of how lawyers think about the law. Part III explains how West's focus on cases has become ingrained in the way lawyers view the law. Part III frames the story of West within the context of prominent legal theories. West's case-first approach to the law has implications for legal education and the practice of law in that it creates a false impression that law is determinate and establishes artificial limits on legal arguments, outcomes, and solutions. Finally, Part III encourages further conversations around these ideas, including suggesting places within the curriculum where law students can learn more about the history of legal research to gain a better understanding of the law.

21. See FRIEDMAN, *supra* note 4, at 335.

22. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163–64 (1982).

23. THOMSON REUTERS, WESTSEARCH: WESTLAWNEXT SEARCH TECHNOLOGY (2011). See also Mart, *supra* note 18, at 400; Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15, 23–25 (1987).

I. THE EARLY DAYS OF LEGAL PUBLISHING

A. The History of the West Publishing Company, its Case Reporters, Digests, and Key Number System

The history of the West Publishing Company is the focal point of this critique. West's success has been attributed to many factors, including "location, innovation, litigation,²⁴ and perhaps a little luck."²⁵ The entrepreneurial spirit of John B. West, the founder of West Publishing Company, was critical to the company's success. In 1870, at the age of eighteen, West moved from Massachusetts to Minnesota.²⁶ He began his career, not as a lawyer, but as a salesperson for the Merrill Company.²⁷ Merrill was a general office supply company that also sold legal publications to lawyers.²⁸ As a salesperson to Merrill's legal customers, West saw first-hand problems with legal publishing. Merrill's legal customers were frustrated that it took months to publish cases.²⁹ West also observed the disjointed, disorganized, and incomplete nature of legal publications. Legal publishing consisted of several different reporters with different coverage and quality.³⁰ In addition, each state had its own official court reporter, which contributed to the inconsistent quality of case reports:

[N]ot all courts published their opinions, and those that did frequently delegated publication to the court's reporter. The court's reporter printed cases under his own name, making it difficult to determine the court from which the opinion came. The reporters could be unreliable, and the publication occurred at random intervals and in varying formats. To further muddle the system, courts frequently awarded publishing contracts based on political associations rather than on publishing merit. As a result, opinions were often poorly edited, incorrect, and published

24. The copyright litigation that affected West is beyond the scope of this Article. A summary of the cases is as follows: West also benefited from a series of copyright litigation cases that related to the rights of the officer who served as the court reporter. Ultimately, three decisions cleared the way for West to publish state court decisions without violating copyright law. First, in *Banks & Bros. v. West Publishing Co.*, a federal court denied the petition for an injunction by the Iowa-appointed publisher, allowing West to continue to publish the Iowa Supreme Court cases in the *Northwestern Reporter*. 27 F. 50, 61 (D. Minn. 1886). Next, in *Nash v. Lathrop*, the Supreme Judicial Court of Massachusetts held that the state reporter must make its decisions available to the public, giving West access to Massachusetts' cases. 6 N.E. 559, 563 (Mass. 1886). Finally, in *Banks v. Manchester*, the United States Supreme Court held that a court could not seek copyright protection for its opinions, headnotes, or syllabus. 128 U.S. 244, 253 (1888). As a result, "West would thus have protection for its headnotes and keynumbers and, also, have unimpeded access to the decision of all states." Thomas A. Woxland, *Forever Associated with the Practice of Law: The Early Years of the West Publishing Company*, 5 LEGAL REFERENCE SERVS. Q. 115, 122 (1985).

25. Woxland, *supra* note 24, at 117.

26. See Jarvis, *supra* note 3, at 2, 4.

27. Marks, *supra* note 3, at 379; Woxland, *supra* note 24, at 115.

28. See Woxland, *supra* note 24, at 115.

29. See Marks, *supra* note 3, at 380; Jarvis, *supra* note 3, at 4–5.

30. Berring, *supra* note 23, at 18.

at irregular or rare intervals.³¹

West set out to solve the problems that he witnessed with legal publishing with a focus on case reporting. West had a unique perspective on the legal publishing industry, which allowed him to consider changes to it.³² He saw firsthand that frontier lawyers needed timely access to cases to serve their clients.³³ West's distance from the legal establishment in New York and Massachusetts also gave him the freedom to experiment with new publications.³⁴

In 1872, West began his own publishing company.³⁵ He sought to provide lawyers with comprehensive, high quality, and fast access to cases at a low cost. One of West's first inventions was the *Syllabi*, which published the text of all the Minnesota Supreme Court cases.³⁶ The *Syllabi* was significant because it provided attorneys with access to Minnesota Supreme Court cases within days of when they were issued rather than months.³⁷ West capitalized on the success of the *Syllabi* and began publishing the *Northwestern Reporter* in 1879.³⁸ The *Northwestern Reporter* expanded the *Syllabi*'s scope of coverage to the entire northwest region, publishing the full text of all cases from Iowa, Michigan, Nebraska, Wisconsin, and the Dakota Territory.³⁹ In 1882, the West Publishing Company was incorporated.⁴⁰ Over the next few years, West expanded the regional reporter system, ultimately providing national coverage.⁴¹ West set his sights on a national reporter system that provided lawyers with all of the published appellate cases from across the country.⁴² West's National Reporters solved many of the problems with case access that had plagued the legal publishing industry.⁴³ Accurate, high-quality cases from across the country were in the hands of lawyers within weeks for the relatively low cost of \$40 per year, which would be approximately \$1,200 per year today.⁴⁴

While the National Reporters made cases available, lawyers needed to be

31. Marks, *supra* note 3, at 381 (citing MARVIN, *supra* note 3, at 32–33).

32. See Woxland, *supra* note 24, at 118 (“A[n] . . . advantage that St. Paul offered West was relative anonymity So the fledging went unnoticed; the announcement of the *North Western Reporter* ‘was hardly given a passing through by the publishers in the eastern states and this, as time proved, was to give the young firm a head start that was of inestimable value when the competition did assert itself.’” (quoting MARVIN, *supra* note 3, at 34–35)).

33. See Marks, *supra* note 3, at 380.

34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.* (“The first *Syllabi*, an eight-page weekly newsletter that printed Minnesota Supreme Court cases, served John West’s goal of ‘provid[ing] lawyers with a cheap and efficient means for learning about new cases.’” (alteration in original) (quoting Jarvis, *supra* note 3, at 6)).

38. See *id.*

39. See *id.*; Jarvis, *supra* note 3, at 6.

40. See Jarvis, *supra* note 3, at 7.

41. See Marks, *supra* note 3, at 381; Woxland, *supra* note 24, at 116.

42. See Woxland, *supra* note 24, at 118–19.

43. See *id.* at 119.

44. See *id.* The U.S. dollar has had an average inflation rate of 2.4% per year since the 1880s. See *CPI Inflation Calculator*, IN2013DOLLARS, <https://www.in2013dollars.com/us/inflation/1880?amount=40> [https://perma.cc/T8PM-MFRE] (last visited Feb. 20, 2026).

able to locate them quickly in an ever-expanding reporter system. Digests were gaining traction as a case finding tool.⁴⁵ Digests created an index that allowed lawyers to locate cases by topic. In 1847, Little, Brown and Company began publishing the *United States Digest*.⁴⁶ Within one year, its digest included cases from sixteen states and the decisions from the United States Supreme Court.⁴⁷ Little, Brown hired Benjamin Vaughn Abbott to publish the next iteration of its digest, *United States Digest, First Series*.⁴⁸ The *First Series* included ten classification categories—Persons, Corporations, Property, Conveyance, Contracts, Wrongs, Crimes, Remedies, Evidence, and Government.⁴⁹ These categories have little meaning without proper context. Abbott's explanation of this classification scheme highlights its significance:

The classification of the United States Digest is founded on a principle or theorem condensable thus—I must not try to give it in full or pursue the subject in detail.

Law is the effort of society to protect PERSONS, including CORPORATIONS, in their rights and relations, to guard them in their PROPERTY, enforce their CONVEYANCES and CONTRACTS, and redress or punish their WRONGS and CRIMES, by means of judicial REMEDIES, founded upon EVIDENCE, and administered by the civil arm of GOVERNMENT.

The words in capitals form ten categories roughly designating ten large fields or classes in which most propositions easily fall. But further subdivision is needed. That is obtained by considering each as including distinct species, and by making a separate title for each species, to include whatever is peculiar to it, while what is applicable to all, or to a species having no alphabetic name, remains under the broad title.⁵⁰

West understood the important role that publishers played in helping lawyers find cases through digests.⁵¹ In 1887, West purchased Little, Brown's *United States Digest* and published it as the American Digest.⁵² John A. Mallory, who developed West's key numbers, recognized the importance of acquiring Little, Brown's digest:

[T]he selection of titles and sub-titles and the division of matter among

45. See Jarvis, *supra* note 3, at 8.

46. See Michael O. Eshleman, *A History of the Digests*, 110 LAW LIBR. J. 235, 242 (2018).

47. See *id.*

48. *Id.* at 243.

49. See *id.* at 244.

50. See *id.* (citing Benjamin Vaughan Abbott, *Uniform Indexes*, 22 ALB. L.J. 179, 179 (1880)).

51. See Briggs, *supra* note 20, at 400–01.

52. See Eshleman, *supra* note 46, at 247.

them must be based on some theory of classification, and must proceed according to logical rules The constant application of some theory of classification is implied in and essential to any orderly arrangement of digest matter; and knowledge of the principles applied in such a work is as useful to the reader as to the compiler.⁵³

John B. West saw its digest as an organizing tool that conformed to logic and, thus, was the key to consistent search results:

Is it not the function and calling of the law publisher to supply the lawyers with mechanical aids toward answering the question in whatever connection it may arise? and does not the permanent business success or failure of the publisher mainly depend on the manner in which he performs this service? . . . I believe it to be the principal business of American law publishers, to enable the legal profession to examine the American case law on any given subject, as easily, exhaustively, and economically as possible.⁵⁴

The American Digest created a system that made it much easier for lawyers and judges to locate cases in the National Reporters.

By 1887, West had a national reporter system and a digest.⁵⁵ In 1908, West once again transformed the legal publishing industry by introducing key numbers.⁵⁶ Key numbers were designed to connect the National Reporters and the American Digest.⁵⁷ The key number system allowed West editors to create headnotes that summarized points of law in cases and connect them to a specific digest topic.⁵⁸ Each digest topic (Persons, Property, Contracts, Torts, Crimes, Remedies, and Government)⁵⁹ was subdivided and assigned a key number.⁶⁰ Key numbers functioned as a tool that allowed attorneys to locate additional cases on the same point of law. Thanks to West, lawyers could sift through the growing number of cases to find precedent. The significance of its products was not lost on West. The company saw its National Reporters and the American

53. John A. Mallory, *The Theory of the American Digest Classification Scheme*, 1 AM. L. SCH. REV. 184, 186–87 (1902).

54. Briggs, *supra* note 20, at 400–01.

55. See Eshleman, *supra* note 46, at 247.

56. See THOMSON REUTERS, WEST PUBLISHING TURNS 150, at 5 (Aug. 2022), <https://www.legalcurent.com/wp-content/uploads/2022/08/150th-Anniversary-Timeline-2022.08.pdf> [<https://perma.cc/577F-QJPR>].

57. See *id.*

58. See *Efficient legal research: Why you need the West Key Number System*, THOMSON REUTERS (May 20, 2025), <https://legal.thomsonreuters.com/en/insights/articles/using-the-west-key-numbers-system> [<https://perma.cc/AUV6-G49K>].

59. West consolidated digest topics after acquiring Little Brown's *United States Digest*. West's digest had seven topics rather than Little Brown's ten topics.

60. Fritz Snyder, *The West Digest System: The Ninth Circuit and the Montana Supreme Court*, 60 MONT. L. REV. 541, 542 (1999).

Digest as a “great public good.”⁶¹

West's system was not without its problems, however. Like all humans, West editors could make mistakes.⁶² West's index was complicated. Researchers may have been required to identify several terms before finding relevant cases.⁶³ The subjective judgment of the West editors was also baked into the system, which could impact where they placed cases within the digest's organizational structure.⁶⁴ West's digest was also inflexible. It was a monumental task to update the digest topics:

Naturally, the system developed by Mr. West in the 1880s that supposedly provided a discrete subject category for *every* potential legal issue could hardly have endured for a hundred years without showing some significant strains. But the size of the system argued against active adjustments to it. In order to update the system, the West Company introduced a number of entirely new topics, both at the issuance of each decennial cumulation and during the publication of the General Digest volumes. The introduction of such topics required a Herculean purge of the entire system of headnote classification in order to locate all relevant topics and cases and to rearrange them into the new subject order. The difficulty and expensiveness of this process caused West to be fairly reserved in its introduction of topical modifications.⁶⁵

The digest's size and rigidity made adaptation to it difficult. Any changes to the topics required lawyers to consult both the new and old digests to find cases.⁶⁶ As a result, updates to the digest decreased the usefulness of prior headnotes and key numbers and made cases potentially more difficult to find. Lawyers had to familiarize themselves with new terms while also considering the old terms.

B. West's Early Marketing Campaign

Even in its early years, West Publishing Company understood the value of marketing its materials to the legal community.⁶⁷ West engaged in a multifaceted marketing campaign that included lawyers, law students, judges, and the American Bar Association.⁶⁸ In 1901, West published one of its first promotional pamphlets titled *Law Books by the Million: An Account of the Largest Law-Book House in the World, the Home Establishment of the National*

61. See Davies, *supra* note 3, at 268.

62. See Berring, *supra* note 3, at 34.

63. See *id.* at 34–35.

64. See *id.* at 36–37.

65. *Id.* at 35–36.

66. See Eshleman, *supra* note 46, at 252.

67. See Davies, *supra* note 3, at 236–37.

68. Marks, *supra* note 3, at 383.

*Reporter System and the American Digest System.*⁶⁹ *Law Books by the Million's* audience was judges and lawyers.⁷⁰ The pamphlet discussed how the digest and national reporters simplified the legal process by providing lawyers with everything that they needed to reach a single, correct outcome:

And, from the professional standpoint, the immediate and full publication of decisions from all the scattered jurisdictions has led to the harmonizing of judicial rulings, and has saved much of that "conflict" which is the greatest embarrassment of the bar,— and of the bench.⁷¹

West's message reinforced the notion that the correct answer could be gleaned from the review of a small number of cases. It also highlighted many of the areas of legal publishing that were important to legal professionals. For example, the pamphlet discussed West's employees, many of whom were also lawyers, the company's state-of-the-art equipment, its commitment to high quality products, and extensive law library.⁷² In short, the message was that lawyers and judges were in good hands when they used West's products.

John B. West was a natural salesperson and took an active role in marketing the company's products. He traveled across the country selling the company's products and attending legal conferences.⁷³ Part of West's marketing strategy included what today would be called SWAG (stuff we all get) to attract customers.⁷⁴ The company's free giveaways included desktop thermometers, playing cards, and paperweights.⁷⁵ West's marketing efforts were so effective that many judges gave the company exclusive access to their opinions.⁷⁶

West also actively marketed its products to law students in creative ways. For example, West sent postcards to law students, asking them to vote in favor of or against an honor system in law school.⁷⁷ West also sponsored writing competitions for students and sent representatives to schools to lecture on research topics.⁷⁸ West's marketing campaign helped ensure that lawyers and future lawyers would purchase the company's products rather than the products of its competitors.

69. WEST PUBLISHING CO., *LAW BOOKS BY THE MILLION* (1901), reprinted in Ross E. Davies, *West's Words, Ho! Law Books by the Million, Plus a Few*, 14 GREEN BAG 2D 303 (2011). A shorter version of *Law Books by the Million* was published in the Cornell Law Journal in 1894. See *Home Establishment of the National Reporter System*, 1 CORNELL L.J. 99 (1894).

70. See Davies, *supra* note 3, at 248.

71. *Id.* at 271.

72. See *id.* at 255–59.

73. See Marks, *supra* note 3, at 383.

74. See Davies, *supra* note 3, at 241.

75. See *id.*

76. See Marks, *supra* note 3, at 383.

77. See Davies, *supra* note 3, at 240–42.

78. See Joyce Manna Janto & Lucinda D. Harrison-Cox, *Teaching Legal Research: Past and Present*, 84 LAW LIBR. J. 281, 282 (1992); Frederick C. Hicks, *The Teaching of Legal Bibliography*, 11 LAW LIBR. J. 1, 2–3 (1918).

Always the salesperson, John B. West also worked to convince the ABA to endorse the American Digest.⁷⁹ In 1898, the ABA did just that:

The American Bar Association was due to meet for their annual convention in August 1897, just after the editorial work on Volume 1 was completed. West Publishing Company was desperately anxious to exhibit a completed volume at this convention, to gain expected approval and publicity, but the chance seemed remote that they could meet the deadline of the convention . . . Suffice it to say, the volume was completed, taken to the convention by the then President, John B. West, and was the sensation of the meeting. The American Bar Association at its next annual meeting, 1898, formally endorsed the American Classification Plan as the model for modern digesting.⁸⁰

The ABA's endorsement had a significant impact on legal publishing. The endorsement shifted the function of reporting and digesting to commercial publishers like West:

[W]e [now] have uniform systems of reporting and digesting common to all, and a basis, at least, of a common system which shall be satisfactory to all . . . [I]t is better [for lawyers] to avail themselves of the labors of private publishers who make it their business to ascertain and satisfy the needs of the profession.⁸¹

The ABA's endorsement of the American Digest went a long way to establish West as the gold standard in legal publishing. West's targeted, multifaceted marketing and lobbying efforts to lawyers, judges, law students, and the ABA all but ensured that it was the preeminent legal publisher of the nineteenth century. "West's long program of self-promotion symbolizes and, to some extent explains, the evolution of the law-book publishing business and [West's] relationship to the bar."⁸²

C. West Is a Product of the Nineteenth Century

West is a product of the nineteenth century legal environment. When West began operations, cases dominated the law.⁸³ State and federal "judges were busier than ever before [and] had to work harder to keep up with their load."⁸⁴ The federal district courts disposed of 8,187 criminal cases in 1871 and 14,527

79. See Jarvis, *supra* note 3, at 8; MARVIN, *supra* note 3, at 68; Marks, *supra* note 3, at 383.

80. MARVIN, *supra* note 3, at 73–74.

81. Richard A. Danner, *Influences of the Digest Classification System: What Can We Know*, 33 LEGAL REFERENCE SERVS. Q. 117, 145 (2014).

82. Davies, *supra* note 3, at 246.

83. FRIEDMAN, *supra* note 4, at 335.

84. *Id.*

civil cases in 1873.⁸⁵ During this period, even the United States Supreme Court was in the business of deciding common law issues.⁸⁶ In 1875, more than 40% of the United States Supreme Court's caseload was related to common-law litigation.⁸⁷ While courts' workloads exploded, legislatures were not particularly active during the mid-nineteenth century.⁸⁸ It was not until the beginning of the twentieth century when federal and state legislatures began to enact more statutes.⁸⁹ The administrative law apparatus followed a few years later.⁹⁰

Thus, it is not surprising that West's top priority was to provide lawyers with access to cases during its early days. John B. West, always the entrepreneur, saw an opportunity that was not being addressed by the legal publishing industry.⁹¹ West entered a chaotic legal environment where only certain cases were published, the quality of legal publishing was inconsistent, and the publication of the much-needed cases was slow.⁹² West's customers needed fast, accurate, comprehensive, and inexpensive access to cases since case law reigned supreme.⁹³ West was eager to oblige.

West's quest to create an organizational system of case reports and a digest was also consistent with legal classicism, the legal theory of the day. During the nineteenth century, the legal community saw the law as a science where prior precedent controlled the outcome of new legal situations.⁹⁴ Lawyers and judges could apply the rules of law established in prior cases to new situations in a systematic fashion, resulting in correct answers.⁹⁵ Legal professionals saw the practice of law as a logical endeavor.⁹⁶ West reinforced the logical notion associated with the law by creating an index of legal topics and a key number system that helped lawyers find cases:

The key numbers system is a case in point, serving both the classification function of organizing information in judicial decisions in accordance with a conceptual scheme and the indexing function of assisting users to locate information they want. The most general conclusion to be drawn from this is that the taxonomic classification built into print research tools promote a view of the law as a

85. *Id.*

86. This may be why, even today, the United States Supreme Court requires cases to be listed first on any Table of Cited Authorities filed with the Court. *See* SUP. CT. R. 34.2.

87. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947).

88. *See* FRIEDMAN, *supra* note 4, at 335; Julius Stone, *The Twentieth Century Administrative Explosion and After*, 52 CALIF. L. REV. 513, 514 (1964).

89. *See* Stone, *supra* note 88, at 514.

90. *See id.*

91. *See* Marks, *supra* note 3, at 380.

92. *See* Woxland, *supra* note 24, at 115.

93. *See* Marks, *supra* note 3, at 380–81; Woxland, *supra* note 24, at 119.

94. *See* Feinman, *supra* note 4, at 3–4.

95. *See* Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 611 (2007).

96. *See id.*

hierarchically organized system based on general principles.⁹⁷

West's digests and key numbers provided structure and predictability that lawyers of this era desired. John B. West took advantage of his opportunities, and the company became the preeminent legal publisher of the nineteenth century. Snyder, referring to West, noted, "the stamp of the nineteenth century was indelibly placed on American Law."⁹⁸

D. The Digital Legal Research Age and West

West's print research apparatus remained virtually unchanged for over one hundred years. Lawyers used the print digest, key numbers, and headnotes to locate cases by topic in West's print reporters. In the mid-1970s, legal research companies, such as Mead Data Central, the company that launched Lexis, began to experiment with electronic databases.⁹⁹ Lexis saw early commercial success.¹⁰⁰ Executives at West understood that the launch of Lexis had changed the legal research landscape, and that the company needed to introduce its own electronic product.¹⁰¹ However, West's transition to the digital age was anything but smooth. The company made some noteworthy missteps as it struggled to adapt to a non-print environment. These missteps were due, at least in part, to West's continued confidence in its print digest, key numbers, and headnotes.

In 1975, West introduced Westlaw in response to Lexis' first electronic product.¹⁰² Unlike Lexis, which included the full text of all published cases, Westlaw provided only its case headnotes.¹⁰³ The decision to include only headnotes was made for the benefit of the product engineers. It was easy for West's team to convert its headnote and digest data to a computer readable format.¹⁰⁴ West simply converted its digest topics and headnotes to an online format and rebranded it as Westlaw.¹⁰⁵ West misjudged lawyers' interest in having access to full-text cases in electronic format. The company's decision is somewhat surprising since West was the first company to publish the full text of all reported appellate cases throughout the country. West eventually saw the error of its ways and provided access to the full text of all cases.¹⁰⁶

West stumbled again with its approach to Shepards. Shepards was the preeminent citator service during the late nineteenth and twentieth centuries.¹⁰⁷

97. Hanson, *supra* note 14, at 574.

98. Snyder, *supra* note 60, at 544.

99. See Xiaohua Zhu, *Innovation in Search of a Context*, 54 INFO. & CULTURE 220, 227–28 (2019).

100. See *id.* at 221.

101. See BILL VOEDISCH, WESTLAW: AN EARLY HISTORY 6 (Univ. Minn. Legal Publ'g 2015).

102. See *id.* at 5.

103. See *id.* at 1, 5.

104. See *id.* at 5.

105. See *id.*

106. *Id.* at 12.

107. See Laura C. Dabney, *Citators: Past, Present, and Future*, 27 LEGAL REFERENCE SERVS. Q. 165 (2008).

In 1980, West made Shepards available on Westlaw.¹⁰⁸ During the 1980s, West collaborated with Shepards to add more Shepards features to Westlaw.¹⁰⁹ Despite Shepards' availability on Westlaw, West failed to acquire exclusive rights to its electronic database.¹¹⁰ As a result, Shepards remained available on both Westlaw and Lexis for years.¹¹¹ In 1996, mergers within the legal publishing industry led Lexis to obtain exclusive access to the Shepards' content.¹¹² Westlaw was left out in the cold without a citator service. In 1997, Westlaw launched KeyCite, its answer to Shepards.¹¹³ KeyCite's initial reviews were positive, but "Shepard's [was] still the standard citator and is certainly an excellent product."¹¹⁴ There may be a couple of reasons why West failed to acquire Shepards. Shepards, as a citator service, did not advance West's priorities of reporting and digesting, nor was it a West creation. As such, West may have been reluctant to fully integrate Shepards into Westlaw.

In February 2010, West launched WestlawNext, the company's next large scale electronic product, to great fanfare.¹¹⁵ WestlawNext was different from its predecessor in two significant ways. First, WestlawNext introduced a single search bar that was similar to Google's search design.¹¹⁶ For the first time, users could search all of Westlaw's content by typing just a few keywords into the search bar.¹¹⁷ The search results identified what WestlawNext considered to be the most relevant documents with cases always being listed as the first results.¹¹⁸ Secondary sources were an afterthought and listed under the heading "Related Documents."¹¹⁹ West's lack of investment in or priority of secondary sources shows the company's neglect of secondary sources and demonstrates its continued focus on cases. WestlawNext's functionality that listed cases first demonstrated the company's continued focus on cases and signaled to users that cases remained the most important source of law. WestlawNext's second advancement was the use of algorithms.¹²⁰ The algorithm attempted to predict

108. Patti Ogden, "Mastering the Lawless Science of Our Law": *A Story of Legal Citation Indexes*, 85 LAW LIBR. J. 1, 37 (1993).

109. *See id.* at 38.

110. *See id.* at 37.

111. *See* James A. Sprowl, *The Latest on Westlaw, Lexis, and Dialog*, 70 A.B.A. J. 85, 90 (1984).

112. *See* Iver Peterson, *Times Mirror in Two Deals to Bolster Legal Publisher*, N.Y. TIMES, July 4, 1996, at 4.

113. Elizabeth M. McKenzie, *Comparing KeyCite to Shepard's Online*, 17 LEGAL REFERENCE SERVS. Q. 85, 85 (1999).

114. *Id.* at 98.

115. *See* THOMSON REUTERS, *supra* note 56, at 9; *Westlaw Next at Legaltech 2010*, PACE UNIV. L. LIBR. (Feb. 3, 2010), <https://lawlibrary.blogs.pace.edu/2010/02/03/westlaw-next-at-legaltech-2010/> [<https://perma.cc/8KAP-GAQA>].

116. *See* Robert J. Ambrogì, *More Than a Makeover: Westlaw's Great Leap Forward*, OR. ST. BAR BULL. (Apr. 2010), <https://www.osbar.org/publications/bulletin/10apr/legalonline.html> [<https://perma.cc/5RQV-WCJV>].

117. *See id.*

118. STEVEN M. BARKAN, ROY M. MERSKY & DONALD J. DUNN, *FUNDAMENTALS OF LEGAL RESEARCH* 523 (9th ed. 2009); Mart, *supra* note 18, at 400.

119. *See* Mart, *supra* note 18, at 401.

120. *See* THOMSON REUTERS, *supra* note 56, at 9.

researchers' search intent by eliminating stop words, considering synonyms and legal phrases, and citations.¹²¹ Significantly, the algorithm used West's digest topics, key numbers, notes of decisions, headnotes, and KeyCite.¹²² Ultimately, Westlaw remained tethered to West's print-based, case-focused digest system that it created in the late nineteenth century.

West introduced two subsequent versions of Westlaw. West launched Westlaw Edge in 2018, and it introduced Westlaw Precision in 2022.¹²³ Westlaw Edge was not a substantial upgrade from WestlawNext. Westlaw Precision's focus is on machine learning and generative AI.¹²⁴ Westlaw Edge and Westlaw Precision continue to encourage researchers to use the Google-like search bar to conduct broad keyword searches across all of Westlaw's databases. Cases are always listed as the first results when the Google-like search bar is used, even for legal issues controlled by statute or regulation. Researchers have some control over the search functionality on Westlaw Edge and Westlaw Precision, as they can limit their searches to particular databases (cases, statutes, regulations, text & treatises). Experienced lawyers who know what they are looking for are more likely to override Westlaw's default search functionality. This inclination may be less likely for newer lawyers or law students who have a lifetime of experience with Google. Many Google users believe that the first page of search results will answer their question.¹²⁵ The similarities between Google's and Westlaw's search functionality may send the wrong message to more novice researchers. Like Google, Westlaw requires researchers to identify only a few keywords. The algorithm does the rest. Westlaw's implicit message to researchers is that the finite list of cases identified in the search results, which are akin to Google's first page of results, provide the correct answer to most legal questions. In reality, the answers to many legal questions require more than just a small number cases.

Engaging in print research, including the use of West's print digest, has lost its utility and is likely unfamiliar to today's law students. Yet, West's digest lives on. The digest, headnotes, and key numbers are the common elements of all Westlaw versions.¹²⁶ For 150 years, West's search apparatus has included its original digest structure that made it easier for lawyers to find cases.¹²⁷ Westlaw's most recent systems continue to reinforce the notion that cases are the most significant source of law by identifying cases first in the search results,

121. See Mart, *supra* note 18, at 400.

122. See *id.*

123. See THOMSON REUTERS, *supra* note 56, at 10; *Thomson Reuters Debuts Westlaw Precision*, THOMSON REUTERS (Sep. 14, 2022), <https://www.thomsonreuters.com/en/press-releases/2022/september/thomson-reuters-debuts-westlaw-precision.html> [<https://perma.cc/WH6E-JHNC>].

124. See *Thomson Reuters Debuts Westlaw Precision*, *supra* note 123.

125. See Bing Pan et al., *In Google We Trust: Users' Decisions on Rank, Position, and Relevance*, 12 J. OF COMPUTER-MEDIATED COMM. 801, 816–18 (2007).

126. See VOEDISCH, *supra* note 101, at 5; Maggie Keefe, *Free vs. Westlaw: Why you need the West Key Number System*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/using-the-west-key-numbers-system. #> [<https://perma.cc/Y7RP-2NZU>] (last visited Feb. 5, 2026); THOMSON REUTERS, *supra* note 23; Mart, *supra* note 18, at 400.

127. See THOMSON REUTERS, *supra* note 23; Mart, *supra* note 18, at 400.

despite the fact that many legal issues are controlled by other sources of law.

II. THE HISTORY OF LEGAL EDUCATION AND LEGAL RESEARCH

A. Legal Education: The Early Years (1700s–1800s)

During the eighteenth century, most aspiring lawyers served as apprentices to learn the skills, including research, that they needed to be competent lawyers.¹²⁸ During the late 1700s, private law schools emerged to formalize apprenticeships.¹²⁹ Formal legal education struggled to take hold through the early nineteenth century due, in part, to a perception of elitism.¹³⁰ Legal education was revived by the mid-1800s. By 1860, there were twenty-one law schools in the United States.¹³¹

During the early nineteenth century, treatises were important legal resources.¹³² Treatises served several essential functions. Treatises were viewed by lawyers as valuable resources, particularly as a finding tool.¹³³ Treatises were also cited by courts because published cases were difficult to obtain.¹³⁴ Early law school curriculum reflected the important role that treatises had in the legal profession. The first private law school included a course based on Blackstone's *Commentaries*.¹³⁵ Justice Joseph Story, who served on the United States Supreme Court and as the first Dane Professor of Law at Harvard, wrote several treatises while at Harvard.¹³⁶ Theodore Dwight, a professor at Columbia, developed a teaching method that utilized textbooks, which was adopted by most law schools.¹³⁷ It remained a popular teaching method for several decades.¹³⁸

In 1870, Christopher Columbus Langdell became the Dean of Harvard Law School.¹³⁹ One of Langdell's contributions to legal education was the creation

128. See FRIEDMAN, *supra* note 4, at 84.

129. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 3 (1985).

130. *Id.* at 7–8.

131. *Id.*

132. See Richard A. Danner, *Oh, the Treatise!*, 111 MICH. L. REV. 821, 826 (2013).

133. See *id.*; John Cannan, *Prologue's Past: What the History of the Treatise Tells Us About Legal Information's Future* 19 (May 17, 2022), <https://ssrn.com/abstract=4077303> [<https://dx.doi.org/10.2139/ssrn.4077303>].

134. See Cannan, *supra* note 133, at 8 (citing William H. Arnoux, *A Few Ideas on Text-Books*, 22 ALB. L.J. 341, 346 (1880)).

135. See STEVENS, *supra* note 129, at 3.

136. See Cannan, *supra* note 133, at 15 (citing Ronald D. Rotunda & John E. Novak, *Joseph Story: A Man for All Seasons*, 1990 J. SUP. CT. HIST. 17, 21 (1990); MacCormac Snow, *Joseph Story*, 5 OR. L. REV. 169, 179–81 (1926)).

137. See Theodore W. Dwight, *Columbia College Law School New York*, 1 GREEN BAG 141, 145 (1889); see also JOSEF REDLICH, *COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW* 7 (1914); Cannan, *supra* note 133, at 19.

138. See Cannan, *supra* note 133, at 19 (citing REDLICH, *supra* note 137, at 7).

139. See Thomas C. Grey, *The New Formalism* 1 (Stan. L. Sch., Pub. L. & Legal Series, Working Paper No. 4, 1999), <https://ssrn.com/abstract=200732> [<https://dx.doi.org/10.2139/ssrn.200732>].

of the first-year subjects at Harvard, which still form the basis of the first-year curriculum today.¹⁴⁰ Langdell's most significant contribution to legal education was the adoption of the case method at Harvard, which became and continues to be one of the primary teaching tools in law school.¹⁴¹ Like West, Langdell believed in the importance of cases. Langdell thought that cases were the best teaching tool for law students:

A settled conviction that law could only be taught or learned effectively by means of cases in some form. I had entertained such an opinion ever since I knew anything of the nature of law or of legal study; but it was chiefly through my experience as a learner that it was first formed, as well as subsequently strengthened and confirmed.¹⁴²

In 1871, Langdell published his first casebook, *Cases on Contract*.¹⁴³ Over the next few years, he wrote several other casebooks.¹⁴⁴ The case method of education became the standard in legal education.¹⁴⁵ Langdell's message to law students was clear—cases were the only source of law that mattered.¹⁴⁶ West's influence on the early days of legal education is evident. Many of the first-year course subjects, developed by Langdell, mirrored the digest topics.¹⁴⁷ It is impossible to know exactly why Langdell selected these topics for the first-year curriculum. What is known is that Langdell and West were contemporaries who were part of the same legal community. Little, Brown's digest, which first established the digest topics, received at least some attention within the industry, enough that West acquired it from Little, Brown. Whatever the reason, the overlap between Langdell's first-year subjects and West's digest topics likely gave West credibility in the early days of formal legal education.

In addition, West played a role in displacing treatises as the prominent teaching tool in legal education. Thanks to West's National Reporters, the number of published cases was expanding quickly. In fact, by 1900, West produced between 300 and 400 volumes of case reporters each year.¹⁴⁸ Lawyers and law students could use the American Digest to find those cases. Treatises no longer needed to serve as a case finding tool.¹⁴⁹ As John B. West said, "The profession have now the immense advantage of being able to turn to a single set

140. See Snyder, *supra* note 60, at 544.

141. See STEVENS, *supra* note 129, at 52; see also William Schofield, *Christopher Columbus Langdell*, 55 AM. L. REG. 273, 280 (1907) ("As a method of study the use of cases was not a discovery, nor even a novelty. English lawyers had been studying law in the cases for centuries.").

142. Schofield, *supra* note 141, at 278.

143. LANGDELL, *supra* note 5.

144. See Schofield, *supra* note 141, at 279.

145. See STEVENS, *supra* note 129, at 63.

146. See Hanson, *supra* note 14, at 571.

147. See Eshleman, *supra* note 46, at 244; Snyder, *supra* note 60, at 544.

148. See Davies, *supra* note 3, at 252.

149. West was not entirely responsible for the demise of the treatise. "Many treatises were seen as hack work—produced by publishers for commercial gain, not by knowledgeable scholars devoted to their subjects." Danner, *supra* note 132, at 832.

of reporters and digests, and be sure of finding *everything* which the courts have said on any given subject up to the last decision just rendered.”¹⁵⁰ The American Digest had become a new popular finding aid, supplanting the treatise’s primary role.¹⁵¹ West’s message to the law school community echoed Langdell’s message that cases were the only source of law that mattered.¹⁵² As a result, lawyers and law students saw treatises as reference materials rather than valuable case finding materials.¹⁵³

B. Legal Research: The Early Years (1900s–1930s)

During the early twentieth century, legal research theorists began to express their thoughts about legal research. Early legal research theorists believed that research should begin with an analysis of the facts and an understanding of the legal principles.¹⁵⁴ The early research process differed somewhat depending on who was offering the opinion. For example, West’s publications and its representatives encouraged the use of West’s digest.¹⁵⁵

In 1906, West published *Brief Making and the Use of Law Books*, the first legal research textbook.¹⁵⁶ *Brief Making* was intended to provide basic legal research information to law students and new lawyers on how to find the law, since law schools had yet to include legal research instruction in the curriculum.¹⁵⁷ It filled a void for those law students and new lawyers who lacked legal research and litigation experience.¹⁵⁸ *Brief Making* set forth a step-by-step process to approach legal research problems. It recommended that researchers should use West’s digest to find cases before consulting other secondary sources and highlighted that using the digest was a systematic exercise:

- (1) *The first step in looking up the law is to make a careful examination of the statement of facts submitted and a minute analysis of its component parts When the statement [of facts] has been studied and analyzed, it will be found that there is a least one general principle of law involved. The discovery of this general principle will depend largely upon the familiarity of the student or lawyer with the general classification of legal propositions*
- (2) *Having determined the controlling facts and the general principle of law involved in the case submitted, the investigator should ascertain whether any principle of constitutional or statute law is*

150. Briggs, *supra* note 20, at 403.

151. See Cannan, *supra* note 133, at 28.

152. See Hanson, *supra* note 14, at 571.

153. See Cannan, *supra* note 133, at 30.

154. See Cooley, *supra* note 9, at 2; see also DeWitt Andrews, *supra* note 19, at 15.

155. See Cooley, *supra* note 9, at 2.

156. See LILE ET AL., *supra* note 12.

157. See *id.* at 1–3.

158. See *id.*

involved. The first sources, therefore, in which to look for law, are the constitution and the statutes

- (3) *Next in importance as authorities are the decision of the courts of last resort of the state in which the case has arisen [A] systematic search should be made in the State Digests, Century Digest, and the American or General Digests, for cases involving similar facts and principles*
- (4) *As a secondary source of authority, reference should be made to text-books treating of the general subject to which the principle involved in the case under investigation belongs*
- (5) *Valuable material for the brief may often be obtained by tracing backward the judicial history of . . . the cases cited in the opinion.*¹⁵⁹

In 1909, Roger W. Cooley, a West representative,¹⁶⁰ addressed the American Association of Law Libraries, the national organization of law librarians, where he promoted a research process that centered around West's digest:

There are two or three sources of information to which we may resort to find these concrete cases. That is to say, there are two or three indexes to the case law contained in the reports. We may resort to a text book, to an encyclopedia or to a digest. Of these the digest is the only one that is designed to serve as an index exclusively. The other classes of books mentioned are primarily designed to serve another purpose; their use as an index to cases being merely secondary. For this reason, it seems to me, that we can run down the desired concrete authorities in the digest with greater facility, in less time, and with greater certainty than in either a text book or encyclopedia—a belief which personal experience has confirmed. For this reason, the method I propose to outline to you is based on the use of the digest.¹⁶¹

Legal research theorists, who were not affiliated with West, encouraged lawyers and law students to use treatises to find sources of law. James DeWitt Andrews, a practitioner, believed that research started with the facts of the case and legal topic.¹⁶² DeWitt Andrews, who also addressed the American Association of Law Libraries, acknowledged that determining the relevant area of law can be difficult.¹⁶³ To help, DeWitt Andrews suggested the use of treatises:

[T]he institutional treatise is the first aid, because somewhere within its

159. *Id.* at 173–76.

160. *See Hicks, supra* note 78, at 2.

161. *See Cooley, supra* note 9, at 2.

162. *See DeWitt Andrews, supra* note 19, at 15.

163. *See id.*

compass the subject of your case must lie. And here I will illustrate, taking the [treatise] *classics of their day*, Blackstone and Kent. An impression has arisen that elementary books are not practical books, but a moment's reflection will suggest and the facts of history prove the contrary No books in the English tongue have been more cited in briefs and more quoted in decisions than these books Why? Because the principles and rules taught as elemental were, of course, practically applicable to some state of fact. Every case must involve some or other of these rules, and turn upon the application of the great cases which were cited as establishing the rule.¹⁶⁴

Despite this early discussion of legal research, law schools struggled to incorporate formal legal research instruction into the curriculum. Law schools took a laissez-faire approach to legal research instruction. Most early legal research instruction was informal and sporadic. For example, Harvard's first method of legal research instruction was through student-run clubs.¹⁶⁵ Lectures were the only other method of legal research instruction in the early days of legal education.¹⁶⁶ Columbia Law School was one of the first law schools to incorporate formal legal research instruction into the curriculum. In 1912, Frederick C. Hicks and his librarian colleagues began one of the first legal research programs, which started modestly with a few legal research lectures.¹⁶⁷ Hicks's lectures were so popular with students that he expanded the instruction to weekly research seminars.¹⁶⁸ Legal research instruction continued to gain momentum. "By 1922, twenty-two of the over fifty member schools in the Association of American Law Schools offered legal research courses."¹⁶⁹

By 1920, Hicks was a prominent figure in legal research instruction and scholarship. He is credited with developing legal bibliography, one of the first research methods that explained where and how to find the law.¹⁷⁰ Hicks's legal bibliography method consisted of three parts: (1) legal bibliography proper, which explained the "repositories of the law," (2) methods of finding the law, and (3) brief-making, which addressed the organization of legal arguments and conformity of briefs with the rules of court.¹⁷¹ Hicks's discussion of legal research rejected the classical approach to legal research, which was popular during the early 1920s: It is a mistake to speak of any of the processes of finding the law as mechanical processes, for one has not truly found the law until one understands it, and this requires a knowledge of substantive

164. *See id.*

165. Janto & Harrison-Cox, *supra* note 78, at 282.

166. *See id.*

167. *See id.* at 283.

168. *See id.*

169. *See id.* at 282–83.

170. *See Hicks, supra* note 78, at 1.

171. *See HICKS, supra* note 9, at 16–18.

law which comes only with the passage of time and much experience.¹⁷²

In 1923, Hicks published *Materials & Methods of Legal Research with Bibliographic Manual*, a legal research textbook for law students and legal professionals.¹⁷³ Hicks encouraged researchers to use treatises during the research process. Specifically, Hicks noted that treatises “may be and often are used (and I believe should be used) by lawyer and judge as helpful restatements and interpretations of the law, lending sometimes to confirmation of opinion as to what the law is, and sometimes to notable developments in the law.”¹⁷⁴ Hicks’s discussion of certain topics was consistent with the period in which he wrote the textbook. While Hicks’s textbook began with a chapter on statutes, it was followed by several chapters on cases where Hicks noted that “[c]ase law, in Anglo-American jurisdictions, preponderates over statute law for several reasons.”¹⁷⁵ In the coming years, the legal landscape changed as legislatures became more active and statutes governed many more legal situations.¹⁷⁶ Future legal research instruction and textbooks would reflect these changes to the law.¹⁷⁷

West minimized the importance of treatises in legal research. Rather, West continued to focus on case reporting and encouraged legal professionals to use its digest to find cases. Digests also reinforced the organization and structure that was popular during the classical legal thought period. Ultimately, treatises were supplanted by digests as the primary finding tool due, in part, to the fact that West’s products reinforced the popular view that legal research was simply the mechanical application of case law.¹⁷⁸

C. Legal Research: Mid-Twentieth Century (1940s–1950s)

Legal research instruction continued to evolve during the 1940s and 1950s. During this period, lectures became a less favored teaching tool.¹⁷⁹ Law schools began to experiment with “research and writing” courses.¹⁸⁰ These courses took various forms.¹⁸¹ Some combined legal writing with bibliographic instruction (i.e., how to use law books).¹⁸² Other courses focused more on legal writing.

172. *Id.* at 17.

173. *See id.* at 7.

174. *Id.* at 160.

175. *Id.* at 76.

176. *See* Stone, *supra* note 88, at 514.

177. *See* WILLIAM T. FRYER & CARVILLE D. BENSON, CASES AND MATERIALS ON LEGAL METHOD AND LEGAL SYSTEM 454 (1950).

178. HICKS, *supra* note 9, at 160.

179. *See* William R. Roalfe, *Some Observations on Teaching Legal Bibliography and the Use of Law Books*, 1 J. LEGAL EDUC. 361, 364 (1949).

180. *See* Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 539 (1972).

181. *See id.* at 539–40.

182. *See id.* at 540.

Legal method courses were also developed and became part of the curriculum.¹⁸³ Legal method courses focused on problem-based writing assignments with some research instruction. The goal of legal method courses was for students to grapple with legal questions, conduct legal research, and produce a written product that explained the relevant law and answered the question at issue. Law librarians saw legal method courses as an opportunity to practice legal research at various points throughout the course.¹⁸⁴ Legal research and writing courses became the preferred first-year course to teach practice-oriented skills.¹⁸⁵

Legal research textbooks during this period tended to focus on the mechanical use of legal materials.¹⁸⁶ There are a few noteworthy exceptions, however, that explained a legal research process. In 1950, West published *Legal Method and Legal System*, which was designed as a companion to legal method courses.¹⁸⁷ The authors, Fryer and Benson, explained that an effective legal research process should begin with treatises, stating “Once you are clear as to the field of law in which your problem falls, consultation of a treatise, even in advance of resort to the digest or encyclopedia, may well serve to orient you, and thus simplify your search.”¹⁸⁸ *Legal Method and Legal System* reflects a change for West, publishing a textbook that encouraged the use of treatises rather than the digest exclusively.

Legal Method and Legal System was also noteworthy in that it reflected the new legal environment where statutes and regulations were important sources of law. The authors noted that statutes should be examined first before cases “because much of the body of our law today is controlled by statute.”¹⁸⁹ They also recognized the increased importance of administrative law:

In the past few years, the growth of administrative law, both federal and state, has been tremendous. New agencies have been created, all of which issue rules and render options or interpretative decisions. All of this material may at some time become important to the lawyer. How to find the law in this field is a difficult task.¹⁹⁰

Up to this point in time, many textbooks remained focused on the importance of case law. Statutes and administrative law had taken a back seat to cases.¹⁹¹ The legal landscape was changing, and those changes were reflected in *Legal Method and Legal System*.

Legal Bibliography and Legal Research by Rebecca Laurens Love Notz

183. See Harry Kalven, Jr., *Law School Training in Research and Exposition: The University of Chicago Program*, 1 J. LEGAL EDUC. 107 (1948); Donald Kepner, *The Rutgers Legal Method Program*, 5 J. LEGAL EDUC. 99 (1950).

184. See Roalfe, *supra* note 179, at 366–68.

185. Rombauer, *supra* note 180, at 542.

186. *Id.* at 539.

187. See FRYER & BENSON, *supra* note 177, at VII.

188. *Id.* at 481.

189. See *id.* at 454.

190. See *id.* at 483–84.

191. See HICKS, *supra* note 9, at 160.

was another important legal research textbook.¹⁹² Notz emphasized the importance of a legal research method.¹⁹³ Notz encouraged researchers to use secondary sources, particularly in situations where a lawyer is unfamiliar with an area of the law. Notz explained “If the lawyer is unfamiliar with a general principle of law involved, he must consult a good textbook on the subject, or if there is no good textbook, a legal encyclopedia, such as *American Jurisprudence* or *Corpus Juris Secundum* . . . and for very recent developments in law, legal periodicals.”¹⁹⁴

Fryer’s and Notz’s textbooks served as a bridge to modern legal research textbooks, which almost universally advocated for a legal research process that began with treatises or other secondary sources.

D. Legal Research: The Modern Era (1980s–2020s)

In the 1980s, law schools used Legal Analysis Writing and Research (LAWR) or Legal Research and Writing (LRW) courses to teach students practice skills.¹⁹⁵ These courses have taken various forms throughout the years, but they usually require students to write a memorandum during the fall semester and a brief during the spring semester of the first year. Legal analysis is the primary focus of these courses with research instruction as a supporting skill.¹⁹⁶ During this period, librarians began to call for more legal research instruction apart from the first-year LAWR course.¹⁹⁷ Many law schools have added Advanced Legal Research to their course offerings.¹⁹⁸

During the 1980s, several noteworthy legal research textbooks were published. Modern legal research theorists adopted the core elements of the legal research method that was first articulated in the early 1900s while also making small adjustments to reflect new types of legal publications. Legal research theorists promoted a legal research process that began with treatises or other types of secondary sources, such as legal encyclopedias and practice guides.¹⁹⁹ This broad view of acceptable secondary sources reflects the high-quality, diversified, and specialized nature of modern legal publications. In addition, modern textbooks began to emphasize the use of secondary sources

192. See REBECCA LAURENS LOVE NOTZ, *LEGAL BIBLIOGRAPHY AND LEGAL RESEARCH* (3d ed. 1952).

193. *Id.* at 13.

194. *Id.* at 15.

195. See Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 VT. L. REV. 371, 376–77 (2003).

196. Cassie DuBay, *Specialized Legal Research Courses: The Next Generation of Advanced Legal Research*, 33 LEGAL REFERENCE SERVS. Q. 203, 209–10 (2014).

197. See S. Blair Kauffman, *Advanced Legal Research Courses: A New Trend in American Legal Education*, 6 LEGAL REFERENCE SERVS. Q. 123, 124–26 (1986).

198. DuBay, *supra* note 196, at 212.

199. See CHRISTOPHER G. WREN & JILL ROBINSON WREN, *THE LEGAL RESEARCH MANUAL: A GAME PLAN FOR LEGAL RESEARCH AND ANALYSIS* (1983); CHRISTINA L. KUNZ ET AL., *THE PROCESS OF LEGAL RESEARCH: SUCCESSFUL STRATEGIES* 13 (Richard A. Epstein et al. eds., 3d ed. 1992).

particularly when researchers are unfamiliar with an area of the law²⁰⁰—a view that was advocated by Notz's book several decades before.²⁰¹

In 1983, Christopher G. Wren and Jill Robinson Wren authored *The Legal Research Manual: A Game Plan for Legal Research and Analysis*.²⁰² *The Legal Research Manual* reflected the standard approach to legal research that began with secondary sources, especially when researchers are unfamiliar with an area of the law:

If you have little or no general knowledge of the areas of law involved in your research problem, however, you will be at a disadvantage in developing an informed research approach because you won't know what points of law to look for as you search through the primary legal authorities. Therefore, before you begin your search in primary sources, you may find it helpful to obtain some generalized background on the areas of law your problem involves. Several kinds of secondary legal sources exist to help you gain this initial overview.²⁰³

In *The Process of Legal Research: Successful Strategies*, Christina L. Kunz and her co-authors created a process map with secondary sources as the first step in the research process.²⁰⁴ The authors then explained their research process:

- (1) *Analyze the facts of the situation to ascertain what topics you need to research.*
- (2) *Use dictionaries, glossaries, and thesauri to clarify the meaning of the terms generated from factual and legal analysis and also to generate additional research vocabulary.*
- (3) *Take accurate and efficient research notes, including citation information*
- (4) *Begin to formulate an outline or flowchart of the topic.*
- (5) *Locate and read commentary sources [i.e., secondary sources] to give yourself an overview of the topics involved.*
- (6) *Revise and add to your outline or flowchart to reflect your new knowledge.*
- (7) *Pinpoint areas of intersection between fact and law and phrase them as issues for your research.*
- (8) *Locate and read mandatory primary authority that resolves or yields good points on those issues*
- (9) *Revise your outline or flowchart, reevaluate the issues, and do additional research as needed.*

200. See WREN & WREN, *supra* note 199, at 65; BARKAN, MERSKY & DUNN, *supra* note 118, at 16.

201. See NOTZ, *supra* note 192.

202. See WREN & WREN, *supra* note 199, at 4.

203. *Id.* at 65.

204. See KUNZ ET AL., *supra* note 199, at 13.

(10) *Quit researching when you are no longer coming across new relevant information . . .*²⁰⁵

In 2009, Steven M. Barkan, a leading legal research scholar, authored *Fundamentals of Legal Research*, in which he discussed a four-step research process.²⁰⁶ Barkan's research process highlighted the use of secondary sources:

To assist in formulating issues, it is useful to consult general secondary sources for an overview of relevant subject areas. These sources can include national legal encyclopedias, a state encyclopedia, treatises, looseleaf services, or one or more subject periodical or journals These secondary sources can provide valuable background information and can direct a researcher to issues and to primary sources At this preliminary stage of research, these secondary sources provide background information and help formulate issues; they are the tools, not the objects of research.²⁰⁷

In the latest edition of *Fundamentals of Legal Research*, Barkan and his co-authors revisited the research process and explained how secondary sources should be used to increase a researcher's understanding of new or confusing areas of the law:

What are the recommended sources? Before you start researching, think about the best places to look. When the problem involves an unfamiliar area of the law, as most problems do for new researchers, the first thing you must do is get context from an overview of the subject in a treatise, practice guide, law review article, or encyclopedia entry For each legal problem you research, using recommended resources and getting context and an overview as a beginning step will make the research process efficient and less confusing.²⁰⁸

In 2020, Kent C. Olson, Aaron S. Kirschenfeld, and Ingrid Mattson authored *Principles of Legal Research*, which highlighted the importance of secondary sources when using electronic resources:

Researchers forced to work only with an uncontrolled mass of electronic data can quickly find themselves drowning in unsorted information. Most online keyword searches can find only those documents that match their terms and will never discover related documents that use different wording . . . or involve slightly different

205. *Id.* at 14–15.

206. *See* BARKAN, *supra* note 118, at 15.

207. *Id.*

208. STEVEN M. BARKAN, BARBARA A. BINTIFF & MARY WHISNER, *FUNDAMENTALS OF LEGAL RESEARCH* 17 (10th ed. 2015).

facts. Some of the more sophisticated platforms use algorithms that can find some relevant documents even if they do not use the same terms, but relying on algorithms is a poor substitute for exercising your own judgment about the particular facts and issues of your case. Secondary sources such as treatises and encyclopedias, online or in print, are still invaluable starting points for understanding the terminology and parameters of an area of law.²⁰⁹

Legal research methods were first discussed over 115 years ago.²¹⁰ Legal research instruction and textbooks have evolved over time. For the last forty years, legal research theorists have articulated a consistent legal research process that begins with secondary sources, particularly for those who, like law students, are unfamiliar with the law.²¹¹

III. CONNECTING THE DOTS: HOW WEST'S HISTORY INFLUENCED LEGAL RESEARCH AND LEGAL EDUCATION AND IMPACTED THE LAW

The West Publishing Company became an industry leader because of many factors, including its national scope, high-quality publishing, products that were relatively easy to use, overlap of the digest topics and the first-year law school subjects, and a strong marketing campaign.²¹² John B. West was vital to the company's early vision. He was most interested in case reporting and digesting.²¹³ The West Publishing Company has never strayed far from these priorities. The examination of West's products that follows demonstrates the company's continued focus and priority on cases over all other legal sources. West has been so dedicated to its digest and case reporter system that its approach to legal research is inconsistent with the standard legal research process that begins with secondary sources. An exploration into why West and Westlaw operate in the manner that they do requires a discussion of the company *vis-à-vis* prominent legal theories. A legal theory analysis helps explain West's impact on the law.

A. West's System Was Created to Find Cases

West's priority has always been cases.²¹⁴ West started the company to provide lawyers with access to cases.²¹⁵ Cases were in high demand by members of the bar because most legal disputes during the late nineteenth and early twentieth centuries involved common law issues that were decided by the

209. KENT C. OLSON, AARON S. KIRSCHENFELD & INGRID MATTSON, *PRINCIPLES OF LEGAL RESEARCH* 14 (3d ed. 2020).

210. *See* Cooley, *supra* note 9, at 2; DeWitt Andrews, *supra* note 19, at 15.

211. *See supra* Part II.D.

212. *See generally supra* Part I.

213. Briggs, *supra* note 20, at 401.

214. *See id.*

215. *See* Woxland, *supra* note 24, at 118–19; Marks, *supra* note 3, at 380.

courts.²¹⁶ West's products leveled the "playing field" because lawyers and judges had access to the same cases to develop their legal arguments.²¹⁷ West's system of finding cases was so valuable that it became the industry leader.²¹⁸

B. Westlaw Prioritizes Cases Over Other Sources of Law

Like West's print-based digest system, Westlaw also prioritizes cases. Westlaw's search functionality incorporates West's digest topics, headnotes, and key numbers, which were designed to help lawyers find cases.²¹⁹ West's first electronic product included only case headnotes.²²⁰ Robert C. Berring notes that "At a basic level, [Westlaw] added nothing new; [it] simply took information that had been contained in books and transferred it to electronic form."²²¹ West considers the digest topics, key numbers, and headnotes to be an advantage for Westlaw. The company has said as much in its marketing materials. West champions that Westlaw includes "[t]he master classification system of U.S. caselaw for over 100 years [that] helps you easily find and move between relevant cases addressing a specific point of law in any jurisdiction."²²² West has touted that Westlaw incorporates digest topics, key numbers, and headnotes into its algorithm, stating that "WestSearch combines sophisticated information retrieval, natural language processing, and machine learning to take maximum advantage of the *editorial enhancements West editors have added to legal documents since 1876*."²²³ West's marketing materials convey the message that Westlaw's algorithm, which incorporates West's digest system, improves Westlaw's search process and results.

An important study by Susan Nevelow Mart showed just how significant algorithms are in shaping search results.²²⁴ Mart compared the search results from identical search queries on several electronic research platforms, including Lexis Advance and WestlawNext.²²⁵ Mart identified three null hypotheses to

216. See FRIEDMAN, *supra* note 4, at 335.

217. See Hanson, *supra* note 14, at 580 ("[O]pposing attorneys would tend to develop their arguments on the basis of the same cases, nearly all of which were familiar to judges and experts in that field of law.").

218. See Berring, *supra* note 3, at 29 ("[T]he power of the [West] system made it the primary method of case retrieval.").

219. THOMSON REUTERS, *supra* note 23, at 3; Mart, *supra* note 18, at 400.

220. VOEDISCH, *supra* note 101, at 5.

221. Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9, 28 (1994).

222. *Making once nearly impossible legal research tasks possible*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/products/westlaw-edge/features> [https://perma.cc/8XAX-AS47] (last visited Feb. 23, 2026).

223. THOMSON REUTERS, *supra* note 23, at 1 (emphasis added); see also Mart, *supra* note 18, at 400.

224. See Mart, *supra* note 18, at 387, 420.

225. *Id.* at 390. Mart's study also included Bloomberg Law, Fastcase, and Google Scholar. I will not be discussing these other legal research platforms here since my focus is on Westlaw and its primary competitor, Lexis. The primary goal of Mart's study was to advocate for more

test the potential similarities and differences in WestlawNext's and Lexis Advance's algorithms:

- (1) Each algorithm would find the same cases;
- (2) The top ten cases on all of the databases would be the same; and
- (3) Research assistants who conducted the relevancy coding would not agree.²²⁶

Mart conducted fifty identical case law searches across the legal research platforms.²²⁷ The results of her study can be summarized as follows:

- (1) Each search included irrelevant cases in the top ten results.
- (2) Seventy percent (28 of 40) of the cases were unique to one vendor's search results.
- (3) Of those unique cases, slightly more than half (16 of 28) were both relevant and unique to a particular vendor's search results.²²⁸

Mart emphasized the impact that a platform's algorithm had on search results:

More generally, the study shows that every algorithm starts with a different set of biases and assumptions. Even for returning results from searches in a specific case database, every algorithm draws on a different set of sources and processes, whether those sources and processes are classification systems, secondary sources, citation networks, internal case analyses, mined user search history, or machine learning deployed in the unique environment each legal database provider offers. These algorithmic variations in worldview lead to substantial variations in the unique and relevant results each database provides. The knowledge of this variability expands the opportunities for researchers to find relevant cases that can play "some cognitive role in the structuring of a legal argument."²²⁹

Mart concluded that WestlawNext had the edge in terms of relevant search results over Lexis Advance and attributed the outcome to the company's distinct algorithm.²³⁰ Mart's study was insightful for identifying the role that algorithms play in producing relevant search results. More analysis is needed to determine

algorithmic accountability around electronic legal research platforms since vendors claim trade secret protection for much of their algorithms.

226. *Id.* at 411.

227. *Id.* at 408–09. Mart used three test searches: (1) "special relationship constitutional duty protect public from crime (N.D. Cal.);"; (2) "job performance racial classification constitutional (D.D.C.);"; and (3) "administrative search 4th amendment warrant requirement (S.D.N.Y.)."

228. *Id.* at 407.

229. *Id.* at 420 (quoting Stuart A. Sutton, *The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis*, 45 J. AM. SOC'Y INFO. SCI. 186, 187 (1994)).

230. *Id.* at 416.

why Westlaw produces the most relevant results, however. It may be because Westlaw's algorithm is better at identifying a researcher's intent or perhaps, more likely, it is because West's digest system has established what is considered the law.²³¹

While Mart's study is significant and provides insights into the interworking of legal research algorithms, the foundation of Mart's study—her search queries—was based on her prior work with digests and citators.²³² Mart's viewpoint is important because it indicates that there may be at least some bias embedded in the study in favor of West's digest system.

*C. West's Digest with Its Focus on Cases Is Ingrained in
the Way Lawyers View the Law*

In the early days of West, lawyers were attracted to the company's high-quality, timely, comprehensive, and relatively inexpensive products.²³³ Lawyers found the company's products useful, as they made searching for cases easier in the ever-expanding case reporters.²³⁴ It was more than just the quality, coverage, and timeliness of West's products, however, that solidified West as the preeminent publisher of its time. West's extensive marketing effort played a role in the company's success, dominance, and longevity. West marketed its products to lawyers, judges, law students, and the ABA. The company's marketing campaign kept the West brand at the forefront of lawyers' minds.²³⁵ Through West's marketing efforts, the ABA endorsed the company's digest, which gave it credibility.²³⁶ As a result, case reporting and digesting became a commercial enterprise with West replacing many official state reporters.²³⁷ Judges took notice and often gave the company exclusive access to case opinions.²³⁸ West also understood the need to attract future customers. Its marketing campaign targeted law students through sponsored competitions and other gimmicks.²³⁹ Ultimately, West captured the entire legal community as customers through its marketing campaign. West's large customer base²⁴⁰ helped contribute to the company's dominance in the legal publishing industry, as well as the company's influence on the law.

West's dominance in legal publishing was forged in the nineteenth century, but its impact on the law has continued for 150 years. The West digest system

231. See Berring, *supra* note 16, at 3–4; Berring, *supra* note 17, at 192–93.

232. Mart, *supra* note 18, at 408.

233. Woxland, *supra* note 24, at 119.

234. See Eshleman, *supra* note 46, at 238.

235. See Davies, *supra* note 3, at 238–44.

236. See Jarvis, *supra* note 3, at 8; see also MARVIN, *supra* note 3, at 68; Marks, *supra* note 3, at 383.

237. See Marks, *supra* note 3, at 381; Woxland, *supra* note 24, at 118; Danner, *supra* note 81, at 145; Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 815 (2006).

238. Marks, *supra* note 3, at 383.

239. See Davies, *supra* note 3, at 241; Janto & Harrison-Cox, *supra* note 78, at 282.

240. See Davies, *supra* note 3, at 268.

has become so ingrained in the consciousness of lawyers that it colors how they view the law. West's digest system replicates itself, permeating most aspects of the law.²⁴¹ The replication of West's system starts with legal education. Law students are first exposed to West's digest topics during their first year where the course subjects mirror many of West's major digest topics.²⁴² West continues to market its products to law students through giveaways, as well as having a presence on campus and in the classroom.²⁴³ A large percentage of legal research instruction during the first year is conducted by West representatives who teach students about the functionality of Westlaw.²⁴⁴ Recent law school graduates are again exposed to West's digest topics during the bar exam where first-year subjects are tested.²⁴⁵ By the time lawyers enter practice, they are well versed in the West system. "[P]ractitioners and researchers internalized the West structure."²⁴⁶ Lawyers use the West digest system to find cases, craft arguments, and resolve legal issues.²⁴⁷ The legal concepts in the headnotes identify the universe of legal arguments, and the legal terms or phrases used by West determine all other relevant cases.²⁴⁸ Over time, West's digest system has become so ingrained that it is now the lens through which lawyers, judges, and law students view the law.

*D. Westlaw Functionality Is Inconsistent with the Accepted
Legal Research Process*

The seeds of a standard legal research process were planted by legal research theorists in the early 1900s. Practitioners and librarians encouraged law students to use treatises because of their concise summary and reference to cases.²⁴⁹ Legal research textbooks in the modern era convey the same message to researchers—secondary sources are invaluable.²⁵⁰ They provide background information for newer researchers, like law students, who may be unfamiliar with an area of law, and direct researchers to primary authority.

Yet, West's print digest system and Westlaw's search functionality do not encourage researchers to use secondary sources at the beginning of the research process. Rather, West's research apparatus highlights cases. One explanation for West's approach to legal research is that the company predates the development of a standard legal research process. At the turn of the twentieth

241. Delgado & Stefancic, *supra* note 15, at 208.

242. See Eshleman, *supra* note 46, at 244.

243. See Davies, *supra* note 3, at 244–46.

244. See Genevieve B. Tung, *Collaboration between Legal Writing Faculty and Law Librarians: Two Surveys*, 23 LEGAL WRITING 215, 235–36 (2019).

245. See Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*, 99 LAW LIBR. J. 307, 318 (2007).

246. Berring, *supra* note 23, at 25.

247. Delgado & Stefancic, *supra* note 245, at 308.

248. See Berring, *supra* note 23, at 25.

249. See DeWitt Andrews, *supra* note 19, at 15; see also HICKS, *supra* note 9, at 160.

250. See WREN & WREN, *supra* note 199, at 65; KUNZ ET AL., *supra* note 199, at 19; BARKAN, MERSKY & DUNN, *supra* note 118, at 522–23.

century, when legal research theorists began to discuss how legal research should be conducted, West had been in business for decades and was well on its way to becoming the most recognizable legal publishing company in the country.²⁵¹ Another possibility for West's approach to legal research is that the company has resisted change. West believes in its products and their value to customers.²⁵² The company saw its products as "a great public good."²⁵³ In addition, the size of West's digest is so large that making changes to it is difficult. "The difficulty and expensiveness of this caused West to be fairly reserved in its introduction of topical modifications."²⁵⁴

Changes to the digest also affected the way lawyers searched for cases and complicated the research process. When West revised the digest, lawyers were required to consider more terms (the old and new) and consult two sets of digests to find the same concept:

West separated out federal procedural headnotes into new topics in the 1930s—a decision made because of the enactment of the various federal rules of procedure at that time—it kept assigning state cases to the old topics even as most states adopted the federal rules and federal and state procedures converged. That decision forces searchers to look in two places for the same concept.²⁵⁵

For a company that prided itself on making research easier for its customers, these issues were problematic, perhaps adding to West's reluctance to make changes to its digest system.

When West introduced Westlaw, it had the opportunity to align its search functionality with the accepted legal research process. West did not seize this opportunity. The design and functionality of Westlaw continued to focus on cases. The skeleton of Westlaw is the digest topics, key numbers, and headnotes, which were created to help lawyers find cases.²⁵⁶ The proverbial saying "if it ain't broke, don't fix it" comes to mind. West knew its place in the hierarchy of legal publishers. It believed in its products, which had been used by thousands of lawyers for over 150 years. The company simply did not see a need to change the functionality of Westlaw to be more consistent with accepted legal research methods.

E. The Intersection of West's Digest System and Legal Theory

Thus far, I have discussed the history of West, how it became the prominent legal publisher, its focus on cases, and the disconnect between West's approach to legal research and the standard legal research process. This is not the end of

251. See Marks, *supra* note 3, at 382; see also Davies, *supra* note 3, at 267–68.

252. See Davies, *supra* note 3, at 236.

253. *Id.* at 268.

254. Berring, *supra* note 3, at 36.

255. Eshleman, *supra* note 46, at 252.

256. See Berring, *supra* note 3, at 24–25.

the story, however. West Publishing Company, as a publisher of legal material, may not have been interested in jurisprudential theory, but the company's impact on legal theory is significant.²⁵⁷ Framing the story of West within the context of prominent legal theories shows how West has impacted the law.

Classic legal thought reigned as the predominant legal theory between the 1870s and 1920s.²⁵⁸ "At the end of the nineteenth century, classical legal thought envisioned a highly systematic body of law through which courts could mechanically apply abstract legal concepts to reach determinate results."²⁵⁹ Thomas Grey defined classical legal thought as having three characteristics: (1) determinate where rules are applied to facts without discretion or judgment, (2) systemic in terms of creating a coherent structure, and (3) autonomous based on legal norms.²⁶⁰ Langdell is a famous example of someone who was instrumental in the development of classical legal thought. He viewed law as a science that must be mechanically applied to the facts of any given legal situation.²⁶¹ Langdell explained his belief about law as a science at his 1886 address to the Harvard Law School Association:

"All the available materials" of the science of law . . . "are contained in printed books" "[T]he library is . . . to us all what the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists."²⁶²

Langdell believed that cases contained certain legal principles and, regardless of the seemingly complex and messy nature of case law, held the answers.²⁶³ It was the job of the lawyer to "infer principles and doctrines from the particular decisions of the courts . . . by *induction*."²⁶⁴ Thus, one goal of legal education was to teach induction to students using Langdell's case method.²⁶⁵

West's products also reflect classical legal thought. John B. West began the West Publishing Company when legal classicism was popular and cases were the most important source of law.²⁶⁶ One of West's primary goals was to provide lawyers with access to the all-important cases.²⁶⁷ John B. West also saw legal

257. See Marks, *supra* note 3, at 378.

258. Feinman, *supra* note 4, at 3.

259. *Id.* at 2.

260. See Grey, *supra* note 139, at 5.

261. See LANGDELL, *supra* note 5, at vi.

262. WILLIAM R. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* 103 (1978).

263. See FORSYTH, *supra* note 5, at 110.

264. *Id.* at 111.

265. See *id.* Another holdover of this scientific notion of law are course outlines. Law students are encouraged to create outlines that set forth the legal rules and exceptions. This teaching method gives the impression that the law is logical and can be distilled down to an outline of rules.

266. See Feinman, *supra* note 4, at 3.

267. See Briggs, *supra* note 20, at 400.

publishers' role to provide organization to the law through "mechanical aids," which were designed to help lawyers find the cases that would answer legal questions.²⁶⁸ West's acquisition of Little, Brown's digest, one such mechanical finding aid, showed John B. West's interest in bringing structure to a chaotic legal publishing industry.²⁶⁹ The digest provided organization and structure by dividing all legal topics into seven major categories, which were further subdivided. It created a system where the "law as a rational and discrete body . . . [could] be divided into separate, non-overlapping subject categories."²⁷⁰ The structure of West's digest allowed lawyers to find a finite number of cases by topic. Those cases could then be systematically applied to resolve any given legal situation.

Almost as soon as classical legal thought became popular, critics emerged. Most prominent among them was Oliver Wendell Holmes. Holmes challenged whether questions of policy were beyond the common law and, thus, required legislative action.²⁷¹ Holmes articulated his ideas as follows:

Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless.²⁷²

Holmes authored other works that expressed these ideas.²⁷³ Holmes's ideas laid the foundation for the legal realist movement. During the 1920s and 1930s, the legal realists revolted against classic legal thought. The revolt centered around the rejection of the classic legal ideas regarding logic and precedent and the desire to reflect changes in society, including the prominence of government and the administrative state.²⁷⁴ The legal realists also rejected the notion that law could be mechanically applied. Instead, they believed that judges had much more flexibility when deciding cases, relying on each particular fact situation:

268. *Id.* at 400–01.

269. See Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 LAW LIBR. J. 285, 287 (2001) ("The [West] digest scheme is a product of the era of the legal formalists.").

270. See Snyder, *supra* note 60, at 544 (internal citation omitted).

271. See Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894). Holmes's examples mostly related to privilege but also discussed various reasons why cases are decided and competing considerations or values that are relevant to case outcomes.

272. *Id.* at 7.

273. See OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 180 (1920) ("So in the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the [law] schools, but it is not confined to them.").

274. See DAVID KAIRYS, *THE POLITICS OF LAW* 26–27 (1st ed. 1982).

The realists pointed out that no two cases are ever exactly alike; there will always be some difference in the multitude of facts surrounding them. Thus, the “rule” of a former case can never simply be applied to a new case; rather, the judge must *choose* whether or not the ruling in the former case should be extended to include the new case. That choice is essentially a choice about the relevancy of facts, and those choices can never be logically compelled. Given shared social assumptions, some facts might seem obviously irrelevant . . . , but decisions about the relevance of other distinguishing facts are more obviously value-laden and dependent on the historical context.²⁷⁵

The legal academy embraced legal realism, but their ideas were also reflected in how lawyers thought about the law.²⁷⁶ As a result of the realist movement, few, if any, legal scholars, judges, or lawyers today think of the law as a science where the rules from prior precedent are mechanically applied to new situations. Most legal professionals acknowledge a shift to a more flexible system where statutes and regulations have greater authority, and the law, in many situations, allows for more than one outcome.

The 1920s and 1930s were a relatively quiet period for West with one important exception. In 1927, West introduced the United States Code Annotated (USCA),²⁷⁷ which may have been the company’s nod to changing times. However, West did not fundamentally change its approach to legal publishing. West enveloped the USCA with its digest, key numbers, and headnote system so that the USCA was another case finding tool.

For all of the signal virtues of annotated codes, they are still dominated by case law. With their annotations they immediately took the researcher into relevant *cases*. Indeed, the hooks that linked the statutes to relevant annotations were produced as a by-product of case production at West. Thus the point of the enterprise remained cases. As years passed and statutory law become more and more important, annotated codes came to be great research tools in their own right. But the organizing principle still hearkened back to cases.²⁷⁸

West’s print digest, key numbers, and headnotes otherwise remained unchanged during the 1920s and 1930s. There are a few possible reasons why. The shift towards legal realism and its rejection of the mechanical application of the law did not fundamentally alter how lawyers found cases. Lawyers continued to use the digest, headnotes, and key numbers as they had in the past. The USCA only added to the usefulness of the digest system as lawyers could

275. *Id.* at 27.

276. See Feinman, *supra* note 4, at 11–12.

277. See THOMSON REUTERS, *supra* note 56.

278. Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1694 (2000).

use it to find cases related to statutory law. As a practical matter, it was difficult to make changes to the digest, which may have prevented West from modernizing its system. In addition, as mentioned previously, revisions to the digest created research problems for lawyers. Lawyers must consider both new and old terms, as well as use two editions of the digest to find relevant cases.²⁷⁹

Post-realist legal theory has been described as a “hodge-podge of policy, situation-sense, and leftover doctrine.”²⁸⁰ This description aptly explains the middle ground of legal thought that emerged during the 1940s and beyond. The determinacy that was present in classical legal thought but rejected by the realists has become a system of “*flexibility* required for sensible, policy-oriented decision making.”²⁸¹ The realist’s discussion of the collapse of rights is now accurately described as requiring “enlightened judicial *balancing*.”²⁸² Examples of a post-realist, middle ground approach have been incorporated into the law school curriculum. For example, contract law now operates in terms of “fair play and substantial justice” and the “balancing” of the various interests of the parties.²⁸³ Likewise, in legal research and writing courses, professors often talk in terms of the bullseye case or the case that is on all fours with the hypothetical fact pattern. The bullseye is in line with the mechanical application of the law that was popular with classical legal theory. Current instruction does not end with the bullseye, however. Professors also discuss the post-realist notion that the law extends to the rings surrounding the bullseye. This expanded view of the law allows law students to use persuasive authority or make policy-driven arguments that may lead to more than one outcome. In addition, many law schools offer policy-oriented courses where students draft legislation or lobby legislators for legal change. These examples illustrate that legal theory has settled on a middle ground approach in terms of the law, which is also reflected in law school curriculum.

On a chronological timeline, Westlaw is a post-realist invention.²⁸⁴ However, it does not reflect post-realist tenets. Westlaw’s skeleton continues to be its digest system, which was created during the heyday of classical legal thought.²⁸⁵ The mechanical application of cases to new legal situations was a key aspect of legal reasoning when John B. West began his publishing company.²⁸⁶ Westlaw’s design and functionality continue to reflect these classical ideals. Westlaw prioritizes cases over other sources of law through the use of a Google-like search bar where cases are always listed first. Moreover, Westlaw continues to operate in ways that are consistent with legal research as a mechanical exercise. Westlaw gives the impression that legal research can be distilled down to a process that involves a few keywords, algorithmic magic,

279. See Eshleman, *supra* note 46, at 252.

280. KAIRYS, *supra* note 274, at 34.

281. *Id.* at 29.

282. *Id.*

283. *Id.* at 31.

284. See VOEDISCH, *supra* note 101, at 5; KAIRYS, *supra* note 274, at 26.

285. See Berring, *supra* note 23, at 15.

286. See FRIEDMAN, *supra* note 4, at 356.

and a finite list of cases that will answer most legal questions. As a result, Westlaw perpetuates the determinacy of law. However, the answer to a legal question may not be reflected in Westlaw's list of cases.

West's case-focused, print-based system worked well when it was created in the late nineteenth century. It allowed lawyers to find cases by providing much needed structure to unorganized legal publications. What worked well 150 years ago, however, does not meet the needs of today's legal researchers. The legal environment has changed. Legal research theorists have established a standard legal research process, which is inconsistent with West's case-first approach to legal research. Moreover, statutes and regulations have become much more important sources of law and modern legal theory has rejected the mechanical application of the law.

F. Why We Care

1. The Illusion of Legal Reasoning, Indeterminacy, and the West Digest.—A critical part of legal education is teaching students to think like lawyers.²⁸⁷ The case method, used by Langdell, is a primary tool through which law students learn legal reasoning and begin to think like lawyers.²⁸⁸ Students learn legal reasoning by applying rules from prior precedent to new situations.²⁸⁹ Students also practice legal reasoning by analogizing or distinguishing cases based upon the facts of each case.²⁹⁰ The case method of legal reasoning instruction gives the impression that there are a limited number of possible outcomes. Cases are decided “logically” based on similar or different facts or through the application of established rules of law.²⁹¹ A doctrinal approach to legal reasoning that focuses only on so-called logical outcomes conveys the illusion of determinacy.²⁹² Much of law school instruction gives the law a “sheen of legitimacy and enhances its apolitical reputation; judges are not deciding cases based on their own policy preferences, but on the logical outcome of this law applied to this set of facts.”²⁹³ Legal curriculum that repeatedly reinforces the notion of legal determinacy maintains the status quo. Legal reasoning instruction “tends to deaden a student's imagination as to what is possible.”²⁹⁴ Law students are boxed-in by a century's old idea of legal reasoning.²⁹⁵

Classification systems, like West's digest, are much more than a tool to find

287. See Susan A. McMahon, *What We Teach When We Teach Legal Analysis*, 107 MINN. L. REV. 2511, 2517 (2023).

288. See *id.* at 2523; Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 7 (1951).

289. See McMahon, *supra* note 287, at 2517.

290. See *id.*

291. See *id.* at 2524.

292. See *id.* at 2529.

293. *Id.* at 2519.

294. *Id.* at 2529.

295. See *id.* at 2530.

the law. At best, classification systems are subjective.²⁹⁶ At worst, “all such schemes are lies.”²⁹⁷ In either case, the “very existence of historically legitimated doctrinal categories gives the law student, the teacher, and the practitioner a false sense of the orderliness of legal thought[.]”²⁹⁸ West’s digest created an orderly structure:

[Cases] are arranged under [digest] headings with more or less minute subdivisions, the order of arrangement being alphabetical or analytical or a combination of the two; the alphabetical order is usually preferred for the main heads, and for their subdivisions some analytical basis is oftenest adopted.²⁹⁹

Classification systems give the misleading impression that law is determinate:

Existing classification systems serve their intended purpose admirably: They enable researchers to find helpful cases, articles, and books. Their power is instrumental; once the researcher knows what he or she is looking for, the classification systems enable him or her to find it. Yet, at the same time, the very search for authority, precedent, and hierarchy in cases and statutes can create the false impression that law is exact and deterministic—a science—with only one correct answer to a legal question.³⁰⁰

West’s digest, the dominant legal classification system, is a conduit of legal determinacy. The orderly nature of West’s digest gives the false impression that there are only a limited number of controlling precedent and, thus, possible outcomes to any given situation. The digest system marginalizes legal outcomes that rely on sources other than cases, including statutes, regulations, or policy-related advocacy. Classification systems, like digests, mask the indeterminate nature of the law.³⁰¹ As a result, law students and lawyers are left without a complete and accurate understanding of the law.

2. *West’s System Confines the Universe of Legal Thought.*—West’s digest system imposes artificial boundaries on the law. West’s digest created a system where its editors placed every case within its organizational structure.³⁰² Over

296. See Steven M. Barkan, *Deconstructing Legal Research: A Law Librarian’s Commentary on Critical Legal Studies*, 79 LAW. LIBR. J. 617, 630–31 (1987).

297. Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 215 (1979); see also Barkan, *supra* note 296, at 631; Nicholas F. Stump, *Following New Lights: Critical Legal Research Strategies as a Spark for Law Reform in Appalachia*, 23 AM. U. J. GENDER SOC. POL’Y & L. 573, 604 (2015).

298. Kennedy, *supra* note 297, at 215.

299. Mallory, *supra* note 53, at 184.

300. Delgado & Stefancic, *supra* note 15, at 216.

301. See Barkan, *supra* note 296, at 631.

302. See Berring, *supra* note 3, at 32.

time, the digest's structure became invisible, and lawyers began to think according to the digest topics.³⁰³ As a result, the digest's authority grew.³⁰⁴ Lawyers saw the digest as encompassing the universe of available law.³⁰⁵ Lawyers were less aware of the limits or boundaries that the digest system created. Westlaw suffers from the same constraints because it incorporates the digest topics and key numbers.

West's digest influences lawyers' view of the law. The explicit and implicit features of digest systems become ingrained in the thought process of lawyers. Specifically, "since classifications are actively imposed, not passively imbibed, they shape our thoughts and deeds in ways that we scarcely perceive because we view our categories as 'obvious' and 'natural'""³⁰⁶ Robert Berring discussed the influences that the West's digest has on lawyers' view of the law:

Over the 110 years of the West era, the West System became so embedded in legal thought that it became invisible. We thought in West terms, we discussed law in West categories. . . . Without realizing it, we all depended on West for giving us ways to think coherently about the hundreds of thousands of cases that were stuffed into the reporters.³⁰⁷

Ultimately, West's digest became the lens through which lawyers view the law. The digest has influenced arguments, rules of law, and solutions.³⁰⁸ In fact, lawyers are rewarded for conforming their legal arguments to the digest topics. "By sticking with preexisting ideas, . . . the researcher is rewarded by quick and easy searches, and a wealth of information."³⁰⁹

Moreover, West's digest limits progressive legal reform:

The categories contained in current indexing systems are like eyeglasses we have worn a long time. They enable us to see better, but lull us into thinking our vision is perfect and that there may not be a still better pair. Even when we discover a better pair, it, like the old, again sets limits on what we see. This process is inherent in our condition. We move from one set of limitations to another, finding only slightly greater freedom in our new condition. The beginning of wisdom is to understand and, insofar as we may, work around our limitations.³¹⁰

Furthermore, the digest hinders true legal reform due to its static and

303. See Berring, *supra* note 16, at 3–4.

304. See Berring, *supra* note 221, at 22.

305. See Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 310–11 (2000); see also Berring, *supra* note 3, at 33.

306. Stephen Jay Gould, *Taxonomy as Politics: The Harm of False Classification*, 37 DISSENT 73, 73 (1990).

307. Berring, *supra* note 16, at 3–4.

308. See Stump, *supra* note 297, at 605.

309. Jill Anne Farmer, *A Poststructuralist Analysis of the Legal Research Process*, 85 LAW LIBR. J. 391, 399–400 (1993).

310. Delgado & Stefancic, *supra* note 15, at 209.

inflexible nature. Researchers may be unable to see legal solutions where the digest is silent on a particular legal issue or when the researcher's search query does not yield helpful results.³¹¹ In addition, the digest does not adapt well to changes in society due to its inflexibility and, as a result, perpetuates outdated notions. A survey of the changes to West's digest shows that only a handful of topics are revised each year.³¹² For example, from 1907 to 1916, "automobiles" was the only topic that was added to the digest.³¹³ Many of the changes to the digest simply consolidate terms without fundamentally changing the topics themselves.³¹⁴ Other changes to the digest have merely updated terminology to more politically appropriate terms.³¹⁵ As of 2020, most of the West digest subtopics under the topic of "Criminal Law" have remained unchanged since 1912.³¹⁶

Digest systems also create technical limitations to finding the law. If information is not indexed or is mis-indexed, it is lost forever.³¹⁷ In the legal research context, cases must be indexed and in the expected place within the index to be found. In other words, if cases are not properly indexed, they do not exist for all intents and purposes. The West digest helped lawyers find cases, but certain features of the system likely prevented researchers from finding at least some cases. West editors made choices about where to place cases within the digest structure.³¹⁸ It is conceivable, due to the digest's enormous size, that the editors placed cases under inaccurate digest topics. In addition, most lawyers were not experts at using the digest, and, thus, may not have used it to its fullest capacity.

Few people ever truly mastered the Digest System. Like many great finding systems, the Digest system became staggeringly complex and soon was understandable only to its makers. This seems to be an unavoidable dilemma. As a finding system grows more sophisticated, more nuanced, and more focused in order to be comprehensive, it grows harder and harder to use. This trade-off between comprehensiveness and ease of use has never been resolved.³¹⁹

There is also a level of subjectivity involved in using a digest. Two researchers may associate different terms or keywords with the same legal concept. If a case is indexed under only one topic, then the other researcher will be unable to find

311. *See id.* at 217–22.

312. *See* Gotschall, *supra* note 10.

313. *See* Snyder, *supra* note 60, at 558–59.

314. *See id.*

315. *See id.*

316. *See* Gotschall, *supra* note 10.

317. *See* Berring, *supra* note 23, at 25.

318. *See* Berring, *supra* note 3, at 36–37.

319. Berring, *supra* note 278, at 1693.

it.³²⁰

For decades, scholars have alleged that electronic research will free researchers from the boundaries created by West's digest.³²¹ Robert Berring, among them, even described electronic research as the "death" of the digest.³²² Berring's prediction was premature, however. In the early 2000s, when Berring wrote about electronic research's impact on the digest, he simply did not have the perspective to fully appreciate the impact that Westlaw's algorithm would have on modern legal research. The digest topics and key numbers continue to be prominent parts of Westlaw's algorithmic functionality. Westlaw Precision includes a link to the key numbers so that researchers can use the key numbers and digest topics to find cases. West's digest continues to connect Westlaw to the system that was created to find cases over one hundred years ago.

3. *Starting the Conversation for Change.*—The goal of this Article is to bring awareness to how the history of West impacts legal education and the practice of law. With awareness comes the ability to think about how the legal academy should educate law students so that they have a better understanding of the external forces impacting the law.

In the research context, frank conversations about the history of legal research and how this history influences the modern-day design and functionality of electronic legal research platforms should be standard in all research courses. Part of this important conversation is to advocate for more librarian-led legal research instruction, rather than simply leaving the research instruction to vendor representatives. Legal research is so much more than a rote exercise where researchers simply place keywords in a search box and the algorithm generates a finite list of cases. The research process that I have described implies that a researcher's only task is to read the cases listed, as those cases will likely provide the answer to the given legal issue. Confining the legal research process in this way has real world implications. A first-year law student recently stopped by the reference desk to lament the fact that his LAWR professor was unsatisfied with the list of cases included on his research log. As we talked, it became clear to me that the student's primary research strategy was to simply list the first ten Westlaw search results on his research log. It was difficult for him to understand that the list of cases may not provide a complete answer to the legal question. This student, and all students, would benefit from a discussion of West's digest system and the limits that it imposes. If students gain a better understanding of how electronic research platforms, like Westlaw, function and the origins of the company's print-based, case-focused research system, they will be in a better position to think critically about research. Students will be better prepared to answer questions about how a search query impacts search results or what sources may be missing from those results. Understanding the history of legal research and engaging in critical analysis will

320. See Daniel P. Dabney, *The Curse of Thamus: An Analysis of Full-Text Legal Document Retrieval*, 78 LAW. LIBR. J. 5, 9 (1986).

321. See Stump, *supra* note 297, at 608.

322. Berring, *supra* note 305, at 311.

help us teach law students about effective legal research and the law. Librarians are in the best position to provide such instruction as legal research experts.

Moreover, acknowledging that traditional legal reasoning instruction masks the indeterminacy of law is important. Providing opportunities for students to make more creative arguments in the classroom is also helpful. Susan McMahon provides examples of how this can be accomplished in doctrinal courses.³²³ Her suggestions can also be applied to legal research instruction. McMahon contends that professors should ask students to develop new rules and not be limited by existing rules.³²⁴ McMahon also maintained that legal solutions should not be limited to litigation. Instead, students should be encouraged to think creatively about alternative solutions, including legislative action and advocacy work.³²⁵ Now that we are more aware of this important story, it is time to continue the conversation so that law students and future lawyers will have a better understanding of legal research and the law.

CONCLUSION

Whether we realize it or not, the West Publishing Company has had a significant impact not only on legal research, but on legal professionals' view of the law. Learning more about certain aspects of West's history will help inform our understanding of West's broad influence. We owe it to today's law students to have robust conversations about what we should be teaching them about legal research so that they will have a more complete understanding of the law.

323. See McMahon, *supra* note 287, at 2551–52.

324. See *id.* at 2551.

325. See *id.* at 2555–56.