

# The University of Kansas Law Review

## Legal History and the History of the Book: Variations on a Theme\*

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When I was an undergraduate student of history, I was told by my professor of medieval history that I should become a lawyer. He based this judgment on two simple facts. First, I was poor and, in his opinion, no one should become an academic historian without an adequate private income. Second, I was an obsessive reader and collector of books and, according to him, lawyers were, by inclination, "bookish men." As is obvious, I followed his advice. In the course of the past twenty years I have led a somewhat schizophrenic academic existence. On the one hand, I have endeavored to write on the history of legal traditions, particularly the Roman law tradition. On the other hand, I have always followed my first true love and written on the history of books and libraries. Based upon this, my colleagues have characterized me as a librarian manqué with a penchant for esoteric subjects. I have always viewed this not so much as a criticism but as the highest praise. Over the years I have come to realize, however, that I am neither a scholarly schizophrenic nor a librarian manqué. I am, in fact, a practitioner of what has now come to be an accepted subspecialty of history: the history of the book. I have come to recognize my intellectual kinship with Roger Chartier and Lucien Febvre.<sup>1</sup> At the same time, I have also come

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\* This paper was presented as the Fifty-First Inaugural Lecture for Distinguished Professorships at the University of Kansas on October 20, 1997.

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1. See, e.g., ROGER CHARTIER, *THE ORDER OF BOOKS* (Lydia G. Cochrane trans., 1994);

to acknowledge that my particular subspecialty within the history of the book, is the history of law books. In this I feel particular kinship with my heroes Frederic William Maitland and Theodor Mommsen.<sup>2</sup> But most importantly, I have gradually come to believe that any serious history of law must also be a history of law books and that my medieval history professor was far more correct than he ever dreamt. Lawyers are indeed "bookish." They are bookish not because they enjoy reading or because they are, by nature, book collectors. They are bookish of necessity. Just as there could be no medicine without the human body and the tools used to treat it, there could be no law without the means of disseminating it: books.

The importance of books as the basis for law and legal practice should be obvious to anybody interested in the law. Yet, as I look through most legal histories, I rarely see any discussion at all of books or libraries or the ways in which legal information is disseminated and spread. We read a great deal, for instance, about the transmission of legal ideas across national, linguistic, and cultural frontiers, but we rarely read about how this was accomplished. It is as if most legal historians are Platonists and believe that all legal ideas exist in some Platonic reality that somehow makes itself manifest to all those interested. In my opinion, we hear far too often that ideas are simply part of a *Zeitgeist*. To me, an essential question is precisely *how* a legal idea becomes part of a *Zeitgeist*. Without books, without the means to produce books, without libraries to hold books, the practice of law, the teaching of law, the very making and enforcement of law would be impossible in the modern sense. It is true that there was law in pre-literate societies, law that was passed on by oral tradition. And it may well be true that there will be law in post-literate society, when books have been replaced by computers. But, certainly, for at least the past one thousand years, law and books have gone hand in hand. My purpose today is quite simple. I want to point out the intimate relationship between books and the law, between the history of the law and the history of the book. I want to do so in a simple manner—by drawing your attention to three examples drawn from the legal history of the past millennium that illustrate how closely developments in the history of the book and libraries are related to developments in law and legal history.

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LUCIEN FEBVRE & HENRI-JEAN MARTIN, *THE COMING OF THE BOOK* (David Gerard trans., Geoffrey Nowell-Smith & David Wootton eds., Verso 1986).

2. On Maitland, see especially G. R. ELTON, *F. W. MAITLAND* (Yale Univ. Press 1985). On Mommsen, see ALFRED HEUSS, *THEODOR MOMMSEN UND DAS 19. JAHRHUNDERT* (1956). Interestingly, Maitland, but not Mommsen, has a separate listing in MICHAEL STOLLEIS, *JURISTEN: EIN BIOGRAPHISCHES LEXIKON: VON DER ANTIKE BIS ZUM 20. JAHRHUNDERT* 399 (1995).

The three examples I will use today involve very humble and simple aspects of book history and legal history. The first example is drawn from the twelfth and thirteenth centuries and concerns what is known as the "rediscovery" of Roman law and the growth of civil and canon law instruction in the universities and practice in the tribunals of Europe. The hero of this example is the index. The second example I will use is drawn from the history of the spread of Roman law in the eighteenth and nineteenth centuries. Here, the hero of the story is a special kind of book: the translation. The third example is drawn from American legal history in the nineteenth century and deals with the growth of law as a learned profession. The hero of this final saga is the law publisher John Livingston.

The Romans left two great monuments to the European peoples long after their political and military dominance had faded into memory. The first was their remarkable civil engineering infrastructure of roads, bridges, aqueducts, baths, and public buildings. The second was their legal system. Roman law has survived for over two thousand years. Its use has ebbed and flowed. It was a living, vital legal system from the first century B.C. until the sixth century A.D. During the early part of the sixth century, the Emperor Justinian decided to revitalize and purify Roman law by effecting a massive codification. Between 529 and 534, a group of lawyers and civil servants produced a comprehensive codification of more than six centuries of legal learning. The principal parts of this codification—known since the sixteenth century as the *Corpus Iuris Civilis*—consisted of the *Institutes*, designed to be an elementary textbook of Roman legal principles for use in law schools; the *Digest*, a compilation of legal writings by the classical jurists; and the *Code* and the *Novels*, compilations of imperial enactments and bureaucratic law. Of these three, it was the *Digest* which contained the overwhelming amount of Roman private law and virtually all of the Roman legal theory that survived.<sup>3</sup>

During the centuries that followed the sixth century codification and the increasing isolation of the residual empire now based in the Greek East, Roman law continued to play an important role in the developing legal systems of early medieval Europe, but it was Roman law as known from pre-sixth century sources, primarily the *Theodosian Code*, and from the actual practices then common. The learning of the *Digest* was hardly known at all from the British Channel to the Danube River.<sup>4</sup> During the

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3. On the history of Roman law, see generally FRITZ SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* (1953). See also O. F. ROBINSON, *THE SOURCES OF ROMAN LAW* (1997); ALAN WATSON, *THE SPIRIT OF ROMAN LAW* (1995).

4. See M.H. Hoefflich, *Law Beyond Byzantium: The Evidence of Palimpsests*, 104 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE*. GA 261 (1987); see also MAX CONRAT,

eleventh and twelfth centuries, a great deal of interest in law in general—and in Roman law in particular—began to arise in Northern Italy. This increase in interest in things legal was immensely accelerated by two things: the composition of a coherent, scholastic text of canon law by a monk, Gratian, and by the “rediscovery” of a sixth century manuscript of the *Digest*.<sup>5</sup> The combination of Gratian’s *Decretum* (as it was known) and the newly found *Digest* manuscript provided the two fundamental texts needed to foster the rebirth of a legal profession in western Europe, the rise of university law schools, and the growth of medieval legal systems throughout Europe, which, of course, are the progenitors of our modern systems of civil law.

The history of the rediscovery of the *Digest* and the role of Roman Law within this history, a part of what Charles Homer Haskins called the “renaissance of the twelfth century,”<sup>6</sup> is far too large a subject for my talk today. I want to focus on one, small point of legal and textual history. Virtually every scholar of medieval law believes that the rediscovery of the *Digest* manuscript was one of the most important events of the high middle ages. To this event the rebirth of legal science is ascribed. The manuscript is discovered, we are told, and suddenly Roman law is reintroduced in all its glory to western Europe. A marvelous vision, perhaps, but is it accurate?

I am, as you all know, a lawyer. As a lawyer, I tend to think in rather simplistic and practical terms. I have studied the *Digest* manuscript to which is attributed the rebirth of Roman law. I can tell you only one thing new about it. I can guarantee that manuscript alone could not have caused a rebirth of legal science. It could not have done so for a very simple reason. The *Florentina*, as the manuscript is commonly known, is a manuscript of enormous size. It does, after all, contain the accumulated wisdom of almost six centuries of Roman jurisprudence. Furthermore, its arrangement is not easy. It is, in fact, unbelievably confusing. The precise rationale behind the structure of the *Digest* as it has come down to us remains a subject of debate and controversy.<sup>7</sup> What

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GESCHICHTE DER QUELLEN UND LITERATUR DES RÖMISCHEN RECHTS (1963).

5. On Roman law sources, see *supra* note 3. On canon law and its development in the “classical period” following the publication of Gratian’s *Decretum*, see R.H. HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW* (1996) and JAMES A. BRUNDAGE, *MEDIAEVAL CANON LAW* (1995). On the “rediscovery” of the *Digest*, see Stephan Kuttner, *The Revival of Jurisprudence*, in *RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY* 299, 300-04 (Robert L. Benson & Giles Constable eds., 1982).

6. CHARLES HOMER HASKINS, *THE RENAISSANCE OF THE TWELFTH CENTURY* (1927); see also R.W. SOUTHERN, *SCHOLASTIC HUMANISM AND THE UNIFICATION OF EUROPE* 235-318 (1995); Kuttner, *supra* note 5, at 299-306.

7. See generally SCHULZ, *supra* note 3. There has been much discussion of whether the *Digest* was based upon earlier “pre-digests” or whether it was composed *de novo*. On “pre-digests,” see the

is clear is that it was not arranged for ease of use. It is arranged neither chronologically, which would be of maximum use to the historian, nor topically, which would be of maximum use to the lawyer. If one turns to the *Digest* to discover the Roman legal rule on a particular topic—validity of wills, for example—one cannot find the answer easily. In fact, without help, the only way to find the answer, if one wants to be thorough, is to read the whole thing. I would suggest that this unwieldy, difficult, and terribly long manuscript, written in Roman legal jargon, was not very helpful as a legal text to its discoverers. In modern terms, it was simply not easily accessible. Any historian who fails to understand this simple fact cannot possibly understand the renaissance of the twelfth century.

The renaissance of the twelfth century—at least in so far as the law was concerned—depended not only upon its fundamental texts, the *Digest* and the *Decretum*, it also depended upon the discovery of ways to access those texts. Indeed, I would suggest that the development of university legal education during the twelfth and thirteenth centuries was, to a large extent, the development of techniques and devices designed to make these two texts accessible and therefore useable. The whole format of early university education was, in essence, designed to provide tools for accessibility.<sup>8</sup> We can understand the importance of the development of mnemonic techniques, so wonderfully chronicled by Professor Mary Carruthers, in this light.<sup>9</sup> We should most certainly understand the development of the standard commentary or gloss to these texts, known as the *Glossa Ordinaria*, in this way as well.<sup>10</sup> These early glosses provide two things for the student and the reader. They provide definitional help in that they explain the technical terms, and they provide

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essays of Professor David Pugsley in DAVID PUGSLEY, *JUSTINIAN'S DIGEST AND THE COMPILERS* (1995) and David Pugsley, *Some Reflections on the Compilation of Justinian's Digest*, 19 *IRISH JURIST* 350-59 (1984). On the theory that the *Digest* was compiled *de novo*, see especially TONY HONORÉ, *TRIBONIAN* (1978).

8. See MANLIO BELLOMO, *THE COMMON LEGAL PAST OF EUROPE 1000-1800*, at 112-25 (Lydia G. Cochrane trans., Catholic Univ. of Am. Press 1995) (1988) [hereinafter *COMMON LEGAL PAST*]; MANLIO BELLOMO, *SOCIETA' E ISTITUZIONI IN ITALIA DAL MEDIOEVO ED AGLI INIZI DELL'ETA' MODERNA* (Sebastiano Pace Giannotta ed., 4th ed. 1982) [hereinafter *BELLOMO*]; 1 SOUTHERN, *supra* note 6, at 198-200; see also DOROTHY M. OWEN, *THE MEDIEVAL CANON LAW 15-16* (1990) (discussing indices and finding aids for canon law students).

9. See generally MARY J. CARRUTHERS, *THE BOOK OF MEMORY* (1990) (discussing the workings and function of memory in medieval society). It is clear mnemonic devices were used to help lawyers remember cases. See, e.g., OWEN, *supra* note 8, at 15 (discussing Peterhouse Manuscript 42). Such mnemonics were also used to help common law students master the large number of case reports they had to learn. See, e.g., *THE REPORTS OF SIR EDWARD COKE, KT. IN VERSE* (London, H. Lintot 1742) (providing rhymed couplets for each of the cases reported by Coke in his *Reports*).

10. See BRUNDAGE, *supra* note 5, at 56-57.

cross-references to other passages in the text that permit the reader to find all of the necessary learning on a particular topic. Thus, if a lawyer can find one relevant passage in the text that is glossed, then he will, by using the gloss, be able to find other relevant passages. The gloss is, in effect, a dictionary and a finding aid. University law lectures, in which masters glossed particular sections of the fundamental texts, were, in the earliest period, specifically designed to provide these ancillary, but absolutely necessary, tools to their auditors. One needed to attend university lectures in order to acquire these tools necessary to practice law. Without the text and the finding aids, one simply could not look up the answers to questions as they arose.<sup>11</sup>

By the end of the thirteenth century, the glosses to the fundamental texts had become standardized and, even more importantly, sometime in the late thirteenth century, according to Professors Richard and Mary Rouse, somebody had invented the best finding aid of all: the alphabetical index.<sup>12</sup> While the evidence suggests that the first indices were made for biblical texts, there is also strong evidence that very soon after indices began to be made for the Bible, they began to be made for the *Digest* and the *Decretum*. If one wants to understand the true nature of the rebirth of legal science in the middle ages, one must not simply speak of the rediscovery of the *Digest* and the creation of the *Decretum*. The rebirth of legal science took place over a period of roughly 150 years and required a combination of the availability of the fundamental texts and the development of ancillary texts that made these texts accessible. Without the efforts of these early commentators and indexers, the Florentine manuscript of the *Digest* would have remained nothing more than an antiquarian curiosity, suspended in a cage in a Florentine church.<sup>13</sup> The rebirth of legal science required both a text and a means of accessing and understanding that text. In studying the history of the development of medieval finding aids—the gloss and the index—one can then and only then begin to understand what actually happened. Without the history of the book, there can be no accurate history of the development of the law and of legal doctrine in this situation. Put

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11. For further discussion, see especially Manlio Bellomo, *Der Text Erklärt den Text*, 4 REVISTA INTERNAZIONALE DI DIRITTO COMUNE 51 (1993). One should not be misled into thinking that the so-called "Florentine Index" found in early manuscripts of the *Digest* is, in fact, an index at all. See David Pugsley, *On Compiling Justinian's Digest (3): 'The Florentine Index'*, 14 J. LEGAL HIST. 94, 94 (1993). Instead, it is a listing of the authors whose works are extracted in the *Digest* put in chronological order. See *id.*

12. See Richard H. Rouse & Mary A. Rouse, *The Book Trade at the University of Paris, ca. 1250-ca. 1350*, in LA PRODUCTION DU LIVRE UNIVERSITAIRE AU MOYEN AGE 41 (Centre Régional de Publication de Paris ed., 1988); see also R.W. SOUTHERN, ROBERT GROSSETESTE 190-91 (1986) (attributing to Grosseteste an alphabetical index to the Bible ca. 1225-1230).

13. See Kuttner, *supra* note 5, at 301.

simply, without the development of the index, the gloss, and other finding aids, Roman law—and canon law to a degree—might well have remained a closed book.

The second example to which I will draw your attention also concerns the transmission of one legal system to another, not in the twelfth and thirteenth centuries, but in the eighteenth and nineteenth centuries. The rediscovery of Roman law during the middle ages set the groundwork for the development of national legal systems throughout western Europe. The legal systems of France, Germany, Austria, Spain, Italy, and Portugal, among others, all derived their substantive and procedural rules from a combination of Roman law and national custom. Indeed, as Professor Manlio Bellomo and others have argued, there developed throughout western Europe what may be called a *ius commune*, a common law, based upon Roman models.<sup>14</sup> Thus, from the middle ages on, the study of Roman law flourished throughout Europe as did the development of the systems based upon it. The one non-participant in this shared Roman-based system was England. In England, there developed, essentially in isolation, another system of jurisprudence that came to be called the common law.<sup>15</sup> This system spread to Ireland and to many of the English colonies, including the United States. At the time of the American Revolution, the Anglo-American common law was the common legal heritage of England and her colonies (with the exception of Scotland which had a hybrid common-civil law system).

When the English colonies in America declared their independence from England and formed the United States, the law, as it then existed, was English common law. This posed a number of difficulties for the new nation, its legislators, and its lawyers. First, there was quite a bit of hostility to the English following the Revolution. After the War of 1812 and the sacking of Washington, this hostility intensified until anything English, including its legal system, was anathema to many United States citizens.<sup>16</sup> Second, the English common law developed within the very peculiar circumstances of England. Many of the legal doctrines developed there were simply inapposite for the new United States. For instance, in the field of water law, the common law developed in an

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14. See generally COMMON LEGAL PAST, *supra* note 8. See also the very many works of Professor Reinhard Zimmermann, especially REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION (1990), a masterful survey of the development of a field of legal knowledge from its classical Roman origins to the present day civilian doctrines.

15. One should not confuse the English-originated "common law" with the Roman-based "ius commune" of the European continent. *But see* Reinhard Zimmermann, *Der europäische Charakter des englischen Rechts*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 4 (1993).

16. In spite of this, it was of course the English common law, somewhat modified that was adapted as the basis for American law. See generally WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW (1975).

environment in which water was relatively plentiful. In the United States, particularly in the West, circumstances were quite different and different law was needed. For these and other reasons, many Americans in the antebellum period sought alternatives to the English common law as a source for American law. They turned, not surprisingly, to the Roman and civilian systems of Europe.<sup>17</sup>

One would assume that the natural sources for the transmission of these systems would have been the fundamental texts rediscovered during the middle ages, such as the *Corpus Iuris Civilis*. In particular, one would expect to find the *Digest*, the primary source for Roman and civilian private law, cited most frequently by American jurists interested in Roman and civil law. Thus it is quite surprising to discover that the *Digest* was less frequently cited by antebellum American jurists than one would expect and that copies of the *Digest* were less frequently found in both the public or private libraries of the period.<sup>18</sup> Indeed, the American jurist who cited the *Digest* most often was Joseph Story.<sup>19</sup> Story sat as an Associate Justice of the Supreme Court of the United States and served at the same time as the Dane Professor of Law at Harvard. He possessed one of the most extensive private law libraries in the United States.<sup>20</sup> He also authored a number of extremely important treatises in which he stated his intention to integrate Roman and civilian legal principles into American law. What is so fascinating about Story's citations of the *Digest* is that they seem to indicate Story did not, in fact, use the *Digest* itself very often, but instead depended upon other

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17. See generally M. H. HOEFELICH, ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY (1997).

18. The *Digest* was not wholly unknown to Americans. For instance, William Byrd of Westover owned a copy of the entire *Corpus Iuris Civilis* in two volumes quarto (it was mostly likely a seventeenth century Elzevir edition). See KEVIN J. HAYES, THE LIBRARY OF WILLIAM BYRD OF WESTOVER 193 (1997). Jefferson, too, owned copies of the *Corpus Iuris Civilis*, which he undoubtedly used in writing his argument on the case of the *Batture*. See 2 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 399-400 (E. Millicent Sowerby ed., 1983). But these Virginia libraries were the exception, not the rule.

19. On Story's use of Roman law, see HOEFELICH, *supra* note 17, at 36-43.

20. Story's early personal library became one of the founding collections, along with the Library of the Harvard-trained, Louisiana lawyer Samuel Livermore, of the Library of the Harvard Law School. Story's books were already included in the first catalogue of the Harvard Law Library published in 1832, while Livermore's bequest was first catalogued in an 1835 supplement. See SUPPLEMENT TO THE CATALOGUE OF THE LAW LIBRARY OF HARVARD UNIVERSITY (Cambridge, Folsom 1835). The Livermore bequest included three editions of the *Corpus Iuris Civilis*, including a first edition published at Lyons in 1627, with the medieval gloss. See *id.* at 4. The remainder of Story's library was sold. See LAW AND MISCELLANEOUS BOOKS: CATALOGUE OF LAW AND MISCELLANEOUS BOOKS, BELONGING TO THE LIBRARY OF THE LATE MR. JUSTICE STORY (Boston, Mudge 1846).

secondary works for his *Digest* citations.<sup>21</sup> There is very strong evidence, in fact, that while the *Digest* was of course cited (along with the *Code*), it was not the ever-present citation that it was in European, civilian materials.

If the *Digest* was not frequently used as a primary source for Roman law in the antebellum United States, what was? The answer, clearly, is the *Institutes* and other secondary literature. Thus, a major primary source for Roman legal learning in antebellum America was a sixth century elementary textbook intended for first year law students. Why would serious legal scholars in nineteenth century America choose to use an elementary textbook rather than the acknowledged source of jurisprudence used by European scholars for more than half a millennium? The reason cannot be attributed to availability of texts. The *Digest*, and the *Corpus Iuris Civilis* as a whole, was one of the most frequently reprinted law books throughout Europe.<sup>22</sup> Copies were easily available on the continent and in England. They were not even particularly expensive. But the question of accessibility is not so easily disposed of. As I mentioned earlier, the *Digest* is an exceedingly difficult book to use and requires substantial ancillary helps, such as dictionaries (or glosses), finding aids, and indices. But, a far more fundamental part of its difficulty for American jurists in the antebellum period was the fact that it was written in legal Latin. Many of the lawyers who practiced and wrote during this period had some training in Latin and Greek, but it was the rare lawyer who was fluent in Latin. Further, even fluency in the classical Latin prose of Cicero or the poetry of Virgil and Horace, did not guarantee fluency in late ancient legal Latin. The fact of the matter is that the type of fluency required to be able to use the *Digest* with ease was unknown to all but a very select few American lawyers. Unless a lawyer had been trained in Roman law and legal Latin, the *Digest* would have been virtually impenetrable without a translation or without a modern treatise as a guide. And, alas, no translation of the *Digest* into English existed at this time period.<sup>23</sup>

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21. I base this statement upon a close reading of both text and notes in several of Story's treatises. It would appear that virtually all of his *Digest* citations may be found in other secondary sources he consulted. Further confirmation that Story's knowledge of primary sources of Roman law was weak on details is to be found in Alan Watson's provocative study of Story's readings of Roman legal sources on conflicts of laws. See generally ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS (1992). My suspicion is that many other citations to the *Digest* (and *Code*) found in American texts came directly from the secondary sources, in modern languages, cited within them. In effect, the *Digest* citations, where they appear, seem often to come from secondary sources rather than the *Digest* itself.

22. See generally E. P. J. SPANGENBERG, EINLEITUNG IN DAS RÖMISCH—JUSTINIANEISCHE RECHTSBUCH (Hannover, Hahn 1817).

23. The first complete English translation of the *Digest* was produced by Alan Watson as editor

The *Institutes*, on the other hand, are written in a far more comprehensible style. Furthermore, two English translations were widely available during this period. The first translation was made by an English barrister, George Harris, and first published in London in 1756 with several reprints thereafter.<sup>24</sup> A number of copies of this translation made their way to the United States during this period. More important, however, was the translation with commentary published by Thomas Cooper, an English emigré to the United States, in 1812. This was the first true American edition of the *Institutes* and was published first in Philadelphia and then frequently reprinted.<sup>25</sup> It is this translation (which, in fact, is a crib from Harris') that was found in virtually every American private and public law library of the period and was a frequently cited source for Roman legal rules. There is no doubt in my mind that the reason for this was its accessibility. If a lawyer or judge wanted to study a point of Roman law, he was inclined to do so in the most accessible form: the Harris/Cooper edition of the English translation of the *Institutes*.

The significance of this choice of source for much of the Roman law in the early United States cannot be overemphasized. A number of scholars—including Professor Alan Watson, who is perhaps the greatest of contemporary Roman legal historians—have commented upon the strangely elementary understanding of Roman law in the antebellum United States.<sup>26</sup> The profundity and breadth—or lack thereof—of Roman law learning in the antebellum United States is, in my opinion, directly attributable to the frequent use of the translated *Institutes* rather than the *Digest*. Why were European scholars more sophisticated in Roman law? The answer, at least in part, is that they were trained to read, understand, and use the *Digest* and did so. Many American scholars never really progressed beyond the first year of the law program as established in sixth century Constantinople. Once again, we must consider the issue of accessibility. In point of fact, the *Digest* was *not* accessible to many

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and published by the University of Pennsylvania Press. See generally THE DIGEST OF JUSTINIAN (Alan Watson Eng. trans. ed., 1985). Specific portions of the *Digest* (particularly on the *lex Aquilia*) were translated into English earlier by several scholars including by the English classicist C.H. Monro and the Harvard-trained J.B. Thayer, but no acceptable English translation of the whole was produced before Watson's. The translation by S. P. Scott is too flawed to be useful.

24. D. JUSTINIANI, INSTITUTIONUM QUATTUOR . . . TRANSLATED INTO ENGLISH, WITH NOTES BY GEORGE HARRIS (London, 1756). This was later reprinted at Oxford in 1811 and at Edinburgh in 1844, among others.

25. See THE INSTITUTES OF JUSTINIAN WITH NOTES BY THOMAS COOPER (Philadelphia, Byrne 1812). This was reprinted in New York in 1841 and Edinburgh in 1844, among others. On these editions of both Harris and Cooper, see M.H. Hoefflich, *Vinnius and the Anglo-American World*, 114 ZEITSCHRIFT D. SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE. RA 345 (1997).

26. See generally WATSON, *supra* note 21.

nineteenth century American lawyers and, thus, its influence upon the development of law and of legal doctrine was somewhat limited.

The third and final example of the ways in which the history of the law and the history of the book interact to which I want to draw your attention comes from nineteenth century America as well. When we think of lawyers and books in the nineteenth century, we tend to think of Abraham Lincoln. Lincoln, so the myth goes, was a homespun lawyer who trained for his profession by studying a borrowed copy of Blackstone's *Commentaries on the Laws of England* by firelight. According to William Herndon, one of Lincoln's law partners in Springfield, Illinois, Lincoln hardly ever read law books and had very little substantive knowledge of the law.<sup>27</sup> In fact, this image of Lincoln the lawyer is quite distorted and owes more to the populist, Jacksonian strain in nineteenth century American politics than it does to reality. While Lincoln was not what we might describe as a learned lawyer, as were some of his brethren at Harvard, Lincoln did own and use a library of law books, among which were such seeming esoterica as Phillimore's study of jurisprudence.<sup>28</sup> Lincoln, like every other successful American practitioner in the nineteenth century depended upon law books for the conduct of his profession. While a good homespun yarn might win over a jury in a criminal case, substantive legal knowledge was needed to draft a will or prosecute a divorce. As a result of the research done by the Lincoln Legal Papers Project in Illinois, we know that Lincoln carried on an extensive and wide-ranging practice in Central Illinois for over a decade.<sup>29</sup> Without treatises and form books, he would have been unable to do so.

This, of course, raises the question of what a typical lawyer's library of the period must have looked like. The answer to this question requires several comments. First, while the average practitioner needed some law books, it is clear that the libraries for which we have printed catalogues,

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27. See EMANUEL HERTZ, *THE HIDDEN LINCOLN: FROM THE LETTERS AND PAPERS OF WILLIAM H. HERNDON* 425-27 (1938); see also *id.* at 417 ("The truth about this whole matter is that Mr. Lincoln read less and thought more than any man in his sphere in America.").

28. JOHN GEORGE PHILLIMORE, *PRINCIPLES AND MAXIMS OF JURISPRUDENCE* (London, Parker 1856). These and other volumes from Lincoln's Library are currently owned by the Illinois State Historical Society and are kept in Lincoln's secretary desk, now part of the Society's holdings in the Old State Capitol Building in Springfield, Illinois.

29. The Lincoln Legal Papers Project, a division of the Illinois State Historical Society under the direction of Professor Cullum Davis, is in the process of editing the vast mass of materials relating to Lincoln's law practice that were deliberately excluded from the Basler edition of Lincoln's *Collected Writings*. On Lincoln's association with the Illinois Central Railroad, see especially C.J. CORKSS, *ABRAHAM LINCOLN AND THE ILLINOIS CENTRAL RAILROAD* (Pvt. Prtd., Ill. Cent. R.R., n.p., n.d.). See also HENRY C. WHITNEY, *LIFE ON THE CIRCUIT WITH LINCOLN* (Boston, Estes & Lauriat 1892).

such as those of Justice Joseph Story or United States Attorney General Hugh Swinton Legare, were not typical. These extensive—and expensive—libraries were the exception and not the norm. Similarly, the institutional libraries that were built up at Harvard, the Charleston Bar Association, and the Atheneum in Boston were also far larger and richer than the average practitioner could ever have hoped to amass. The best means by which we can reconstruct the average lawyer's library is by looking at the records of booksellers who specialized in law books and by looking at probate records for average lawyers to see what books, if any, were inventoried at their deaths.

The catalogues and other records of American law booksellers in the nineteenth century are a treasure trove of intellectual history that has hardly been noticed by legal historians and bibliographers.<sup>30</sup> Most of the catalogues are technically classed as ephemeral, short-lived, unbound, cheaply printed texts intended for only casual and transient use. Most of these catalogues have long ago been destroyed. Few scholarly libraries have preserved them. Yet, from looking at the catalogues of such noted nineteenth century booksellers as Little-Brown in Boston or Banks, Gould in Albany, New York, one can gain a thorough understanding both of the cost of law books and of their availability to the average practitioner. I will not, here, attempt such a survey of nineteenth century American law booksellers and their wares. I will tell you, however, that law books were not nearly as expensive as we might today imagine.<sup>31</sup> It was well within the means of most successful lawyers to put together a reasonable library of legal reference works.

Second, law books were readily available from any number of regional and national law booksellers. Furthermore, these booksellers not only sold and—in some cases—printed law books, they also actively imported law books from England, Ireland, and the European continent. Rather than survey these materials, however, I wish to introduce you to one law bookseller and publisher in particular and to describe to you not only what he published and sold, but also what he deemed to be the proper library for an American lawyer.

Not a great deal is known about John Livingston personally. Professionally, we know that he was active in New York City from the early 1850s until the later 1860s. He is perhaps best known as the publisher of the first national legal directory in the United States.<sup>32</sup> He also published *Livingston's Law Magazine*, to which his directory was,

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30. See generally M.H. Hoeflich, *Legal Ephemera*, AB BOOKMAN'S WEEKLY, Mar. 1997.

31. See *infra* notes 39-43 and accompanying text.

32. See ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 205-06 (1990) (identifying the 1852 edition of *Livingston Law Register* as the first legal directory in the United States). According to Surrency, the *Register* ceased publication in 1868. See *id.* at 206.

on occasion, appended.<sup>33</sup> He was the author and publisher of what may well be the first illustrated, biographical encyclopedia of American lawyers, which he published in parts during the early 1850s.<sup>34</sup> He was, put plainly, a publishing entrepreneur in the legal field—and quite successful. In addition to his various publishing ventures, Livingston was one of the principal legal booksellers in the United States during the 1850s and 1860s and made his home in the then thriving commercial city of New York.<sup>35</sup> New York, during this period, was not the legal center it was to become in the latter part of the nineteenth century. It had not yet achieved legal dominance over Boston or Philadelphia, let alone Albany, Charleston, or New Orleans. But it was a thriving metropolis, had a reasonably large number of lawyers in an active Bar, and was a good place from which to launch a national law bookselling and publishing empire. And this was precisely what Livingston set out to do when he began his career in the 1860s.

Livingston was probably the first law bookseller to understand the value of combining a law magazine, published on a regular basis, with a bookselling operation. Livingston's magazine gave him the perfect outlet for selling his books. He could use the magazine to publish reviews of new books which he had on offer, he could use the magazine to publish case reports which cited books he had on offer, and he could even use the magazine to offer advice to lawyers on what books they ought to purchase and own in order to stay current in their profession. Livingston did all of these things and did them well.

In March of 1856, Livingston not only published an issue of his *Monthly Law Magazine*, but he also published a special supplement that he entitled *A Catalogue of Law Books, Comprising a Catalogue of a Select Law Library*.<sup>36</sup> In the preface to this work, Livingston expressed

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33. Apparently a predecessor, the *U.S. Monthly Law Magazine*, was published until 1852 when its title and ownership was changed. *Livingston's Monthly Law Magazine* was published in volume 1, number 1 beginning in January 1853. This first issue was sold for \$3.00 per year. In publishing this magazine, Livingston was following the success of his *Law Register* and other publishing successes. In 1853, he published also his *American Portrait Gallery* and his *Biographical Sketches of Distinguished Americans Now Living*. He also published the *Manual of the North American Legal Association* in 1849, which appears to be a precursor of the 1852 *Register*. All of these publications bear the New York City address of 157 Broadway.

34. See JOHN LIVINGSTON, *BIOGRAPHICAL SKETCHES OF EMINENT AMERICAN LAWYERS NOW LIVING* (New York, Livingston 1852). Each sketch was accompanied by a steel engraving drawn from a daguerreotype making this publication also quite significant from the art historical perspective.

35. Livingston's location at 157 Broadway would have put him at the center of both the legal and bookselling trades in New York City.

36. JOHN LIVINGSTON, *CATALOGUE OF LAW BOOKS COMPRISING A CATALOGUE OF A SELECT LAW LIBRARY INCLUDING THE DATES AND PRICES OF THE LATEST EDITIONS OF THE MOST APPROVED WORKS IN EVERY DEPARTMENT OF THE LAW, CAREFULLY REVISED AND CORRECTED UP TO MARCH, 1856* (New York, Livingston 1856).

his sympathy for the plight of the average lawyer who not only had to purchase law books for his practice, but was forced to do so without adequate bibliographical knowledge of the best editions and texts. Similarly, he expressed concern that the average lawyer was forced to pay retail prices for these works, which, according to Livingston, often ran between twenty and fifty percent higher than the wholesale price.<sup>37</sup> To remedy these difficulties, Livingston included in this catalogue a list of what he considered to be a select library, which would be of use to any practitioner. He further included the retail prices of the books listed, but offered to sell them to any lawyer at a discount of twenty to thirty percent. He also explained in the preface that he assumed that every lawyer would possess the elementary treatises and reports from his own state, so that Livingston's list was intended as a supplement to these. He included, as an appendix to the list of the select library, a listing of all published American reports, statutes, and digests, both state and federal. The list of books that Livingston deemed to constitute a select law library for the average practitioner fills over nine pages and runs to more than 250 titles. This cost of this library approached \$2,000. Livingston realized that while such a library was the "ideal" library for the average American practitioner, it was also probably well beyond the intellectual and fiscal means of most of them. Thus, he identified those volumes that he considered to be absolutely crucial with an asterisk. These asterisked works numbered 130, nearly half of the list, and would have cost more than \$1,000.<sup>38</sup>

Livingston's select library was divided into subject categories. It began with abridgements, those key volumes which summarized the case law, moved on to general treatises, indices and digests, and then special treatises on real property, persons and personal property, commercial and maritime law, pleadings and actions, the law of evidence, practice and *Nisi Prius* proceedings, equity, equity pleadings, criminal law, the law of nations and prizes, and civil and foreign law. This list, and the books it contains, provide an intellectual history of the American legal profession in the nineteenth century. It is notable, for instance, that Livingston assumed that every American lawyer ought to know something about the law of nations, of admiralty law, and of civil (*i.e.*, Roman) and foreign law. We see also the importance of the divided profession and courts in the inclusion not only of common law sources, but also those for equity and equity practice.

If one looks at the asterisked works first, meaning those identified by Livingston as most important for a lawyer to own, there are some

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37. *See id.* at 1.

38. *See id.* at 3-10.

expected titles and some surprises. Two law dictionaries, Bouvier's and Burrill's, are included. Blackstone's *Commentaries* makes the list, of course. So does the *Commentaries on American Law* by Chancellor James Kent, the work that led him to be called the "American Blackstone." More interestingly, included is a legal textbook written by David Hoffman, one of the first written for American law students and used as the primary text in the law school run by Hoffman at Baltimore, Maryland.<sup>39</sup> Notably, an edition of Daniel Webster's speeches is also included. We must assume that it is there because of his reputation for oratory and the importance placed upon oratorical eloquence for lawyers. Among the specialized treatises we also encounter a number of familiar names. The works of Justice Joseph Story are found in abundance. Also found are the works of Story's Harvard colleague, Simon Greenleaf, the first great American evidence expert.<sup>40</sup> Many of the volumes recommended by Livingston are not American, but English. By a rough reckoning, I would suggest that books by English authors amount to one-third of those included.

In terms of the intellectual depth of the American legal profession during this period, it is interesting to note that Livingston included works on international and comparative law as well as on foreign and civil law in his list. It seems relatively certain that no legal educator or bibliographer would dare to make such a suggestion in the late twentieth century. Yet we know, as I mentioned earlier, that even Abe Lincoln, in the frontier town of Springfield, Illinois, possessed such books. Not surprisingly, Thomas Cooper's translation of Justinian's *Institutes*, in the third edition of 1852 and priced at \$5.00, was included amongst the asterisked works. So were translations of the works of the French jurist, Domat,<sup>41</sup> and of the Dutch jurist and international lawyer, Bynkershoek.<sup>42</sup> This latter translation was done by a French emigré, Philadelphia lawyer Peter S. DuPonceau. Also included on this list were the works of the great French commercial jurist, Pothier.<sup>43</sup> Equally interesting, no edition

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39. See DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* (Baltimore, Neal 2d ed. 1836) (two volumes, \$5.00); see also DAVID HOFFMAN, *LEGAL OUTLINES* (Baltimore, Neal 1836) (\$3.50), reprinted in 27 *HISTORICAL WRITINGS IN LAW AND JURISPRUDENCE* (R.H. Helmholz & Bernard D. Reams, Jr., eds., 1981) (\$3.50).

40. See SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* (Boston, Little, Brown & Co. 1867) (three volumes, \$16.50).

41. See, e.g., JEAN DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* (William Strahan trans., Luther S. Cushing ed., Boston, Little 1850) (two volumes, \$11.00).

42. See, e.g., CORNELIUS VAN BYNKERSHOEK, *A TREATISE ON THE LAW OF WAR* (Peter Stephen DuPonceau trans., Philadelphia, Farrand & Nicholas 1810) (\$1.25).

43. See, e.g., ROBERT JOSEPH POTHIER, *A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS* (William David Evans trans., Philadelphia, R.H. Small 3d ed. 1853) (two volumes, \$8.00).

of the whole of Justinian's codification appears on the asterisked list, but an abridgement of it appears on the expanded list. Even more interesting, the works of the greatest German jurist of the nineteenth century, Friedrich Karl von Savigny, appear on the expanded list but not the asterisked list.<sup>44</sup> This is so even though Savigny's works were available in translation and had taken the European legal world by storm. In fact, the preponderance of foreign works other than English tend to be French, not German, even though today we consider the nineteenth century German jurists to have been far superior to their French counterparts. To what may we attribute this bias in favor of the French? My suspicion is that it is attributable to the closer ties enjoyed by the United States with France as a result of French assistance in the Revolutionary War and to the easier American-French trade that was a result of these close ties. But we cannot forget the affinity of many early nineteenth century Americans with French Enlightenment thought and, as a corollary, all things French—an affinity not felt as strongly to German scholarship or philosophy.<sup>45</sup>

What is altogether clear from looking at Livingston's little work of 1856 is that the intellectual world of the nineteenth century American lawyer was neither parochial nor small in scope. The average American lawyer in the nineteenth century was expected to be a "bookish man." Much in contrast to the homespun, unlearned myth of Lincoln the lawyer, the reality was of a learned professional, steeped in books. In fact, there is much evidence from the visual arts, including prints and photographs, to confirm this popular image of the lawyer as a "bookish man." The most common portrait convention for lawyers was to have the lawyer pictured among his books and papers. This is how we see John Marshall, James Kent, Joseph Story, and other prominent lawyers portrayed in prints.<sup>46</sup> In early photographs, too, we see this same convention, though

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44. Livingston lists two of Savigny's works, the *History of Roman Law* (presumably *Geschichte der römischen Rechts in Mittelalter*) and the *System of Roman Law* (presumably the *System des heutigen römischen Rechts*). On translations of Savigny's works in the Anglo-American world, see generally Michael H. Hoeflich, *Savigny and his Anglo-American Disciples*, 37 AM. J. COMP. L. 17 (1989). On the distribution of civil law books in America generally, see Michael H. Hoeflich, *Bibliographical Perspectives on Roman and Civil Law*, 89 L. LIBR. J. 41, 48-53 (1997).

45. Thomas Jefferson, of course, comes first to mind as the premier Francophile among the Founding Fathers. See HOWARD C. RICE, JR., *THOMAS JEFFERSON'S PARIS 77-79* (1976) (discussing Jefferson's French book purchases). Nevertheless, many Americans, particularly in the South, were attracted to Germany and German cultures, among them, Hugh S. Legaré. On Legaré and his interest in Savigny, see Hoeflich, *Savigny*, *supra* note 44, at 28-29, and HOEFLICH, *supra* note 17, at 76. See generally JOHN T. KRUMPELMANN, *SOUTHERN SCHOLARS IN GOETHE'S GERMANY* (1965); Michael H. Hoeflich, *Transatlantic Friendships & the German Influence on American Law in the First Half of the Nineteenth Century*, 35 AM. J. COMP. L. 599 (1987).

46. This portraiture convention is most notable in a number of the biographical sets published in this period (including Livingston's). See, for instance, the relevant portraits in JAMES B.

the lawyer subject is often seen sitting at a table, with a pile of papers, a law book or two, and a pen.<sup>47</sup> Indeed, I would cite to you, in order to emphasize the importance of this vision of the legal profession as a learned profession, something closer to home than Livingston's book catalogue or even these traditional lawyer portraits. In the border town of Nebraska City, Nebraska, there is a most remarkable cemetery. The Wyuka cemetery is justly famed for its memorial stones. Many of these stones are elaborate sculptures designed to symbolize what was most important to the deceased. Thus, the memorial to an insurance agent is a model of his roll-top desk, covered by insurance policies. But it is the memorial to a mid-nineteenth century lawyer and Justice of the Nebraska Supreme Court to which I draw your attention. His memorial is a flat slab—intended I think to be his work table—covered with large tomes, some open, some closed, in studied disarray, just as if he had been snatched by death as he was studying them.<sup>48</sup> Perhaps some of these were, in life, the very books recommended and sold by John Livingston. Here again, book history gives us a unique perspective on the history of law and the legal profession.

Let me conclude this lecture with some simple facts. One cannot fully understand the law and the legal profession without understanding its history. One cannot understand that history without understanding the intimate connections between law, lawyers, books, and libraries. No one can truly call themselves a legal historian without also acknowledging that they are historians of the book, of publishing, of bookselling, and of libraries. And, thus, we can say that the history of law is also the history of the law book.

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LONGACRE & JAMES HERRING, *THE NATIONAL PORTRAIT GALLERY OF DISTINGUISHED AMERICANS* (James Herring ed., Philadelphia, J.B. Longacre 1846) (four volumes). On this set, see G.M. Marshall, *The Golden Age of Illustrated Biographies*, in *AMERICAN PORTRAIT PRINTS 76-83* (Wendy Wick Reaves ed., 1984).

47. See my two forthcoming studies of lawyer portraiture, JOHN PULTZ & MICHAEL H. HOEFLICH, *THE FACE OF THE LAW IN KANSAS FROM TERRITORIAL DAYS TO THE PRESENT* (forthcoming 1999) and MICHAEL H. HOEFLICH, *THE SPIRIT OF THE LEGAL PROFESSION* (forthcoming 1999).

48. On the Wyuka Cemetery, see JOHN GARY BROWN, *SOUL IN THE STONE: CEMETERY ART FROM AMERICA'S HEARTLAND 77* (1994). Unfortunately, Brown does not discuss lawyers' and judges' gravestones.

