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GENRE AND AUTHORITY: THE RISE OF CASE REPORTING IN THE EARLY UNITED STATES

DENIS P. DUFFEY, JR.*

INTRODUCTION

> The common-law tradition continued; as a sphere of customary law rather than of positive, bureaucratic law, it required no original authority and could even be said to be authoritative *because* its origins lay beyond memory.
>
> —Michael Warner, *The Letters of the Republic*[1]

Although common law adjudication did continue after the American Revolution, it did so on a radically different basis. Rather than being a mechanism for the application of customs whose authority derived from immemoriality and shared usage, American adjudication increasingly came to be regarded as an instrument for promoting the public good whose authority derived from the will of the people.[2] The rise of this new conception of adjudication posed a substantial threat to common law authority, however; as demonstrated by the persistent calls for codification of the common law during the decades following the Revolution, many found judicial lawmaking to be inconsistent with the positivist, instrumentalist, and reformist enthusiasms that were coming to dominate the legal culture.

Out of this volatile new legal environment there emerged a new genre of legal literature: the printed American case report. Contemporary attitudes about the place of the reports in the changing legal landscape were articulated in prefaces to volumes of reports and in reviews of reports published in periodicals of the day. Based in part on these sources, this essay argues that the institutional conditions and formal characteristics of American case reporting helped protect

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1. MICHAEL WARNER, THE LETTERS OF THE REPUBLIC 99 (1990).
2. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 22-23 (1977).

common law authority against the potentially destructive effects of post-Revolutionary legal ideology. Case reporting, though initially motivated by a spirit of reform, soon came to operate as a mechanism for insulating common law authority from hostile reformist influences. This insulation was achieved in part through the growing prevalence of official reporting and judge-written opinions during the early nineteenth century. By affiliating the common law with the very kind of positive, bureaucratic authority that Warner identifies as alien to it, these developments provided adjudication with a degree of the legitimacy that statutes derived from their legislative authorization and from their textuality. Other changes that the rise of reporting worked upon the form of decisional literature also helped put common law authority on a more secure footing in the face of republican attacks.

I. EARLY DEVELOPMENT OF PRINTED REPORTS: THE IMPROVABILITY OF THE COMMON LAW

Printed case reports in the early Republic owed their origin to the efforts of attorneys and judges who, acting on their own initiative, sought to make the law of the country more certain and uniform. As noted by Ephraim Kirby, one of the very first American case reporters,[3] the English common law was not suited to this task because differing conditions in America had given rise to legal practices distinct from those in England.[4] Other early reporters implicitly distinguished American and English common law by similarly claiming that American case reports were necessary for the uniform administration of justice in America.[5] Without American case reports to make the points of difference visible, citizens and practitioners could not know the law. From early on, the printing of American case reports represented an acknowledgment of the substantive differences between American and English common law. Furthermore, case reporting itself was understood not solely as an aid to the profession, but also as a mechanism for reform. In Kirby's description, American courts began their period of independence in

3. *See* EPHRAIM KIRBY, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT (Litchfield, Collier & Adam 1789); *see also* FRANCIS HOPKINSON, JUDGMENTS IN ADMIRALTY IN PENNSYLVANIA (Philadelphia, T. Dobson 1789).

4. *See* KIRBY, *supra* note 3, at iii-iv.

5. *See, e.g.*, ALEXANDER ADDISON, REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT AND IN THE HIGH COURT OF ERRORS AND APPEALS OF THE STATE OF PENNSYLVANIA vii-viii (Philadelphia, Kay & Brother 1883); 1 Cranch iii-v (1804).

need of repair—repair which printed texts could effectuate.[6] Thus, from the outset of the Republican period, America's judicial institutions were seen as (1) different from those of England, (2) in need of reform, and (3) amenable to improvement through the efficacy of print.[7]

These early case reports thus reflect a shift from a view of common law as consisting of immemorial English customs to a view in which it consisted, at least in part, of new American practices improvable through intentional reform. While a notion of common law as custom persisted, the focus on improvement in judicial institutions hinted at the instrumental approach to adjudication which would soon arise. It is important to note that published reports were themselves put forth as the proper means of reform. As described more fully below, emphasizing the value of published reports posited textuality as the primary medium of common law authority—a strategy particularly congenial to American tastes. Thus, at the very beginning of American law reporting, print is identified as the means both to improve adjudication in the United States and to make it more American.

II. OFFICIAL REPORTING AND WRITTEN OPINIONS

The early reporters' views about the value of printed American reports, however, were not shared widely enough for case reporting to thrive as a private enterprise in all jurisdictions.[8] Between 1804 and 1814, Massachusetts, New York, New Jersey, Kentucky, and Connecticut passed statutes that provided reporters with official status and financial support.[9] Legislation passed by Congress and the North Carolina and Virginia legislatures between 1817 and 1820 not only made reporters official and provided them with income, but also

6. *See* KIRBY, *supra* note 3, at v.

7. *See, e.g.*, ALEXANDER J. DALLAS, REPORTS OF CASES RULED AND ADJUDGED IN THE COURTS OF PENNSYLVANIA (Frederick C. Brightly ed., New York, Banks & Brothers 1889) (1790) (identifying an existing, uniform system of jurisprudence as one of the ends of his work).

8. That lack of sales was a problem for reporters is indicated by the cessation of the practice for that reason in Kentucky until after the state's official reporter statute was passed and also by reporters' statements of concern about sales in prefaces. *See, e.g.*, ADDISON, *supra* note 5, at 7; 1 JOHN GALLISON, REPORTS OF CASES ARGUED AND DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIRST CIRCUIT iii-iv (Boston, Wells & Lilly 1815).

9. *See* Act of May Session, 1814, ch. 25, 1814 Conn. Pub. Acts 25; Act of Feb. 20, 1808, ch. 15, 1808 Ky. Acts 15; Act of Mar. 1, 1806, ch. 115, 1806 N.J. Laws 105; Act of Apr. 7, 1804, ch. 68, 1804 N.Y. Laws. 68; Act of Mar. 8, 1804, 1804 Mass. Acts 68.

sought to control the speed and quality of their publications.[10] As official reporting became widespread, a new justification of the value of reporting became visible. Comments by reviewers and reporters indicate that case reporting was understood to be directed not only at improving judicial administration and aiding litigants by making the law known,[11] but also at controlling courts by making their decisions subject to public scrutiny.[12] As one reviewer noted:

> [Reporting makes judges] answerable, not only to parties and the power of the state, but to the tribunals of judicial and professional opinion. They cannot sin in defiance of the opinion of other judges and the profession of the law;—at least they cannot, unless their minds are of the lowest order, and unless they feel responsibility only to the power that may deprive them of office, and to the sympathetic opinion of the vulgar.[13]

From this perspective, reporting looks more like an instrument of discipline than an administrative reform.[14] And as the reviews indicate, published reports did indeed result in scrutiny and criticism of cases.[15]

By prompting a critical attitude toward adjudication, the official

10. *See* Act of Mar. 3, 1817, 3 Stat. 63 (1817); Act of Feb. 24, 1820, ch. 17, 1820 Va. Acts; Act of 1818, ch. 2, para. XIII, 1818 N.C. Sess. Laws 2. The passage of these statutes, as well as the passage of the Connecticut official reporter statute in 1814, may have been motivated in part by nationalism associated with the War of 1812.

11. *See* 1 Mill x-xi (1819); *Johnson's Reports, Vol. XIX*, 1 U.S. L.J. 174, 202 (1822) [hereinafter *Johnson's Reports*]; *Miscellaneous and Literary Intelligence*, 3 N. AM. REV. 433, 433-34 (1816); *Wheaton's Reports*, 5 N. AM. REV. 110, 111 (1817) [hereinafter *Wheaton's Reports*] (reviewing 1 HENRY WHEATON, REPORTS OF CASES, ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES (1816)); *Tyng's Reports of Cases Argued and Determined in the Supreme Judicial Court of Massachusetts*, 7 N. AM. REV. 184, 187 (1818) [hereinafter *Tyng's Reports*] (reviewing 14 DUDLEY ATKINS TYNG, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS (1818)).

One desired effect of making the laws known, of course, was to constrain the exercise of judicial discretion by educating judges about controlling precedents. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 324 (2d ed. 1985) (noting that preface to Cranch's first volume of reports in 1804 cited limiting judicial discretion as one of main values of printed reports). The idea that reports would subject judges' opinions to external scrutiny and criticism is a different one, and it appears to have arisen slightly later.

12. *See Wheaton's Reports*, *supra* note 11, at 112-13; *Wheaton's Reports, Vol. iii*, 8 N. AM. REV. 62, 67 (1818) (reviewing 3 HENRY WHEATON, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES (1818)).

13. *Wheaton's Reports, Vol. iii*, *supra* note 12, at 67.

14. *See also Pickering's Reports*, 20 N. AM. REV. 180, 182 (1825) (reviewing 1 OCTAVIUS PICKERING, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS (1823)).

15. *See, e.g.*, Nathaniel Adams, *Reports of Cases Argued and Determined in the Superior Court of Judicature of the State of New Hampshire, from September, 1816, to February, 1819*, 1 U.S. L.J. 510 (1819); *Johnson's Reports*, *supra* note 11, at 174-206; Thomas Sergeant & William Rawle, *Reports of Cases Adjudged in the Supreme Court of Pennsylvania*, 1 L. INTELLIGENCER 123 (1829); *Tyng's Reports*, *supra* note 11, at 188-94.

reporter statutes furthered the transformation of the common law from a bastion of immemorial custom to an ordinary governmental institution susceptible to regular, externally motivated reform. One reviewer, after criticizing a number of New York cases, noted the novelty of the activity:

> It has not been usual, as far as we know, to criticise judicial decisions in the manner we have now been doing; but we cannot imagine, as we have already observed, why it should not be done.... A fair and candid discussion of the principles that are from time to time adjudged in our courts of justice, appears to us to be perfectly admissible, and we think it is calculated to do much good....[16]

This reviewer exhibits an awareness of his critical attitude toward adjudication as a break with the past, but then sets forth a rhapsodic defense of the common law: "We have always been in the habit of regarding [the common law] ourselves, with a sort of holy reverence; our admiration of it, and our affection for it, are almost without limits, and it is our pride and pleasure to cherish these feelings...."[17] Cases could properly be criticized but, according to this reviewer, only to protect the common law from erosion by faulty decision-making. Even making allowances for the elaborate prose style of the period, however, this reviewer's extravagant defense of the common law suggests a reaction to anxiety about the continued force of common law authority.

Ironically, though, the reviewer's own activity in criticizing the cases points to how reports may have helped establish a new basis for adjudicatory authority. By making the actions of the court visible and subject to constant analysis and criticism, reports domesticated adjudication. No longer a matter of lawyers and judges applying alien, abstract, rigid doctrines in courtrooms, reports made the common law part of an ongoing, communal discussion conducted in the light of day.

The serial form of reports may have contributed to the impression of the common law as a flexible, participatory enterprise. Adjudication was not a matter of rigid, arcane doctrine; rather, it was a continual, active public process—a process whose character was represented in material form by the everflowing stream of reports. Furthermore, the practice of reviewing reports, and the attitude toward the courts that it implied, situated adjudication in a world of

16. *Johnson's Reports*, *supra* note 11, at 207.
17. *Id.* at 208.

ongoing political commentary in the public press. This literary environment had become associated with republicanism during the colonial period, as indicated by the popularity of serials such as *The Spectator* and *Cato's Letters*.[18] As serials, the reports could function not just as a topic but also as a participant in this kind of perpetual civic discourse. Because republicans saw this sort of ongoing political commentary as necessary to the political legitimacy of any society,[19] the fact that the common law was now engaged in such commentary may have helped undermine claims that it was incompatible with republican principles.

On another level, the rise of printed, authorized reports consisting largely of judge-written opinions[20] affected the authority of the common law by distributing responsibility for reporting in most jurisdictions[21] among legislatures, judges, and reporters. In England, the notions of immemoriality[22] and shared custom gave the common law special authority by making it theoretically independent of any particular individual or body. After the Revolution, however, immemoriality and shared custom could not provide American adjudication with the same degree of independent authority that the English common law had enjoyed. By making England into an Other, the Revolution asserted a cessation in the sharing of governmental practices and associated the common law with a particular—and alien—sovereign power. Nonetheless, some similar ground of authority would have been particularly desirable in the United States, given the acute suspicion with which Americans regarded the assignment of ultimate governmental authority to any particular body of humans.[23]

The adoption of provisions establishing the English common law as part of the law of the various states could arguably be seen as one

18. *See* WARNER, *supra* note 1, at 65.

19. *See id.*

20. Many states, starting with Connecticut in 1785, passed statutes requiring judges to issue their opinions in writing. As Surrency suggests, however, "statutes requiring the reduction of opinions to writing essentially formalized an existing practice." ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 43 (1990).

21. Pennsylvania is a notable exception to the trend in favor of authorized reports, and provided no official support for reporting prior to 1845. *See* Act of Apr. 11, 1845, No. 250, 1845 Pa. Laws 250; SURRENCY, *supra* note 20, at 41. The state did, however, pass an act in 1806 which required courts to produce written opinions at the request of either party. *See* Act of Feb. 24, 1806, ch. 122, § 25, 1806 Pa. Laws 25.

22. *See* WARNER, *supra* note 1, at 99 (describing common law as authoritative "*because* its origins lay beyond memory").

23. *See id.* at 103-04.

response to this problem.[24] In addition to providing clarity in an uncertain situation, these provisions buttressed the authority of the common law with explicit constitutional or legislative sanction. They may also have lent support to the common law by keeping it from becoming solely associated with the judiciary. The mere knowledge that these provisions were on the books, however, offered the courts scant assistance in the face of the hostility to the common law that developed in the decades that followed. The statutes authorizing reporting provided American decisional law with another infusion of the kind of "agency-obscuring"[25] authority upon which the English common law had been founded. By diffusing the responsibility for the dissemination of decisional law to the public among the legislature, the judges, and the reporters, American common law could present itself to the world as the product of American government, rather than the product of the judiciary alone. Comments in the reviews indicate that the role of the legislature was regarded as significant[26] and that official reporters were viewed as public trustees constrained by their duty to the government.[27]

The combined effects of authorized reporting and the rise of judge-written opinions may also have enhanced common law authority by altering the particular relation between adjudicatory authority and the public. By taking some of the responsibility of reporting away from reporters, these changes gave citizens regular and relatively direct access to American judicial pronouncements, thereby possibly reducing anxieties about the anti-republican character of common law adjudication. Judge-written opinions, in particular, put adjudicatory authority into a form likely to appeal to Americans' Protestant and democratic sensibilities, in that it gave them comparatively unmediated contact with authoritative texts. The reduced status of the reporter should not be exaggerated, however. Reporters appear to have had discretion over which cases to report in most instances, and reports were still largely referred to by the name of the reporter, producing, "a definite feeling . . . that the reporter was far

24. *See* HORWITZ, *supra* note 2, at 4.

25. *See* WARNER, *supra* note 1, at 106-07 (referring to the value of the Constitution's textuality).

26. *See Pickering's Reports*, *supra* note 14, at 183; *Tyng's Reports*, *supra* note 11, at 188.

27. *See, e.g.*, *Pickering's Reports*, *supra* note 14, at 191 (criticizing Pickering for questioning whether a case not found by the court or the reporter would have affected the decision in one case, and noting that there are "many reasons why a reporter, more especially an official one, should confine himself in the original publication of decisions recently made, to a report and references").

more important than the judges who rendered the decisions."[28]

At the same time, the reduction of the reporters' responsibilities made it possible for them to take a laissez-faire approach to their work. Instead of being individual entrepreneurs or craftsmen with sole control over whether and how they would produce their products, authorized reporting and written opinions permitted reporters to operate as state employees assigned to package a largely preexisting product for distribution. Some reporters were criticized harshly for simply reporting whatever the court handed down without selecting, editing, or usefully annotating the opinions:

> The truth appears to be, that Mr. Cowen, as Mr. Johnson did before him, finds the mechanical labour of copying *cases*, and *special verdicts*, and *pleadings*, & c. much easier, as well as more profitable, than the intellectual exertion of making abstracts of their most material parts. His general practice is to insert them entire . . . . This is not a fair and faithful discharge of his duty.[29]

Certainly most reporters were more selective than Johnson and Cowen, but they may nonetheless have been subject to similar influences to a lesser degree. The ventriloquistic approach to reporting taken by Johnson and Cowen implied that everything the court did or said was, like legislation, a matter of public record which ought to be disseminated in print. Insofar as this approach shaped reporting practice, it may thus have contributed to the assimilation of adjudication with other forms of governmental activity described above. This more deferential attitude toward reporting may also help account for the vastly greater proliferation of reports in America than in England. By reducing the reporters' level of responsibility, American reporting practices took reporters out of the courtroom and study and placed them on a case report assembly line.

Official reporting and written opinions thus fortified common law authority in several ways. The rise of official reporting enhanced adjudicatory authority by exposing the American common law to public scrutiny, thereby enabling it to participate in characteristically American and republican civic discourse. Authorized reporting may also have helped mitigate hostility to common law authority by associating adjudication more closely with the government as a whole. The growing use of written opinions during the period contributed to

28. SURRENCY, *supra* note 20, at 44-45.

29. *Reports of Cases Argued and Determined in the Supreme Court, and in the Court for the Trial of Impeachments and the Correction of Errors, of the State of New York: Esek Cowen, Counsellor at Law, Vols. 1st, 2d, 3d, and 4th*, 2 U.S. L.J. 1, 4-5 (1826) [hereinafter *Cowen's Reports*].

the domestication of the common law by putting adjudicatory authority in a form appropriate to American political preferences. Furthermore, written opinions together with official reporting gave Americans the kind of direct access to authoritative texts that their history had disposed them to regard as a central feature of legitimacy. Finally, by reducing the responsibilities of reporters, official reporting and written decisions began to turn the dissemination of cases into a standardized process of government publication akin to the established practice of publishing statutes. The form of adjudicatory authority was thus further assimilated to that of statutory authority, thereby underscoring the identification of adjudication as a product of positivist government, not custom. All these developments cast common law authority in a form which enabled it to thrive despite opposition.

III. CHANGES IN THE FORM OF REPORTS

American adjudicatory authority also protected itself against democratic or reformist incursions through changes in its material form. Chief among these changes was the increasingly common appearance of American decisions in writing. As Warner has argued with respect to the Constitution, Americans required that fundamental authority be created through the issuance of an authoritative writing by a body, which, like a constitutional convention, was not already an established source of sovereign power.[30] Similarly, adjudicatory authority—another kind of fundamental authority—acquired needed legitimacy through the establishment of a system in which authoritative writing (case reports) was issued by a body which was not already an established source of authority (the affiliation of legislature, reporters, and judges).

American confidence in the power of writing was strong,[31] particularly when compared to attitudes toward custom. Indeed, one review states that one of the main purposes of reporting is "to rescue [legal doctrines] from the fallacious and uncertain guardianship of tradition."[32] Tradition, from this perspective, was not the ground of

30. *See* WARNER, *supra* note 1, at 103-04.

31. *See, e.g.*, LARZER ZIFF, WRITING IN THE NEW NATION: PROSE, PRINT, AND POLITICS IN THE EARLY UNITED STATES 93-94 (1991).

32. *Law Reports*, 18 N. AM. REV. 371, 374 (1824) (reviewing 8 HENRY WHEATON, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE UNITED STATES (1823); 20 WILLIAM JOHNSON, REPORTS OF CASES ARGUED AND DETERMINED IN THE STATE OF NEW YORK (1823); and 17 DUDLEY ATKINS TYNG, REPORTS OF CASES

common law legal authority or the prerequisite of legal certainty but rather the abyss into which common law principles were liable to fall in the absence of the preservative powers of writing. Writing, not custom, was thus the best guardian of the common law.

The material embodiment of authority in written form may have had an even more powerful effect with respect to adjudication than it did with respect to the Constitution. First, the location of native legislative and executive power in writing had a long history in America, while written public embodiments of American adjudicatory authority were few prior to the publication of the first American case reports. Presenting the acts of American courts to the public in writing constituted a radical change in the public face of American adjudication.

Furthermore, members of the legal profession, particularly those most influential in shaping the conception of the common law in America, must have experienced a marked alteration in their physical and psychological relationship to American adjudication upon the appearance of American case reports in print. While lawyers had always produced notes of decisions for personal use and while some manuscript collections of reports were circulated,[33] the dissemination of standard volumes of reports gave the legal profession a truly common literature of American decisional law for the first time. The sense of a common literature and a common legal community that the availability of reports produced was not restricted to each individual jurisdiction; rather, as indicated by the frequency with which out-of-state cases were cited in decisions during the early nineteenth century,[34] reporting permitted lawyers and judges to conceive of a national common law in a way that they could not have done before. The reports may thus have worked to counteract that portion of anti-common law feeling which derived from the view that a unitary American common law could not exist.[35] Furthermore, the reports may have allowed common law adjudication to benefit from nationalistic and anti-English sentiments, particularly strong after the War of 1812, which had earlier served to undermine common law

ARGUED AND DETERMINED IN MASSACHUSETTS (1823)).

33. *See* FRIEDMAN, *supra* note 11, at 323.

34. *See id.* at 325; SURRENCY, *supra* note 20, at 39; *Law Reports*, *supra* note 32, at 374 (noting that reports of Johnson and Tyng are cited where they have no authority as legal precedent and that "they have thus exercised a useful influence far beyond the limits of the states which they control").

35. *See* HORWITZ, *supra* note 2, at 11.

authority.

The character of American common law was also shaped by the fact that case reporting was predominantly a print genre. Manuscript reporting certainly persisted at least into the Republican period,[36] but it seems likely that it was considered a vestige of the subordinate position that American decisional law had occupied prior to the Revolution. Furthermore, due to the ideological role of print in the revolution and (again as Warner has argued) in the legitimization of the U.S. Constitution, it seems unlikely that manuscript reports could have been considered to be fully legitimate embodiments of American legal authority. Warner, describing the special significance of print in the early United States, explained that "the social diffusion of printed artifacts took on the investment of the disinterested virtue of the public orientation, as opposed to the corrupting interests and passions of particular and local persons."[37] Thus, in the particular environment of the early Republic, print helped fortify the claim of American decisional law to being "common" at a time when the traditional meaning of that component of "common law" had been undermined by the break with England. Print involved a different meaning of commonality; instead of a commonality based on shared historical practices, the printed character of the reports identified American common law as something devoted to the public benefit. By putting caselaw into a form which affiliated it with the public good, the rise of reporting may have contributed to the instrumentalist conceptions of common law decision-making that developed in the decades after the Revolution.

Another matter of reporting form involved the status of arguments of counsel. Reviewers frequently addressed this question,[38] and one summarized the various approaches to the problem:

> Some have doubted the expediency of giving much space to [the arguments of counsel], saying that the case and the opinion of the court present all that is decided, together with the authorities, and the grounds of the decision. In many cases, in some reports . . ., on

36. *See* FRIEDMAN, *supra* note 11, at 323.

37. WARNER, *supra* note 1, at 108; *see also* Michael Warner, *Franklin and the Letters of the Republic*, 16 REPRESENTATIONS 110, 116 (1986) (stating that the public nature of print makes it "the ideal and idealized guardian of civic liberty, as print discourse exposes corruption in its lurking holes but does so without occupying a lurking hole of its own"); ZIFF, *supra* note 31, at 102 (noting Warner's generalization that the relation of print to civic liberty is "acute").

38. *See* Adams, *supra* note 15, at 510 (praising reports in part on ground that "arguments of counsel are sparingly given"); *Judge Yeates' Reports*, 1 J. JURISPRUDENCE 413, 415 (1821) (reviewing JASPER YEATES, REPORTS OF CASES ADJUDGED IN THE SUPREME COURT OF PENNSYLVANIA (1817-1818)) (praising Yeates' "condensation of arguments of counsel").

> the contrary, the arguments of counsel are given, and the opinion of the court omitted; the reporter tells us that such and such were the arguments of counsel on each side, and such was the decree of the court, and leaves the reader to conjecture the grounds of decision. The opinion is certainly to be preferred to the arguments, if one only is to be given; but it is better to report both where the question is difficult or important . . . .[39]

The rise of the written opinion probably contributed to the uncertainty noted here about the value of reporting arguments of counsel. Detailed accounts of the arguments at bar must have been much more useful in the absence of a comprehensive determination of the case from the pen of a judge. Further along in the same review, the reviewer addresses a practice repeatedly complained of: the inclusion of "a great deal of the declamation of the counsel, including rhetorical flourishes, flights of fancy, and *appeals* from the understanding to the imagination, all literally recorded with as great fidelity, as if the reporter were a sworn stenographer."[40] The lengthy, elaborate performances characteristic of oral argument during the period had little appeal in print, especially for the practitioner whose time, patience, and pocketbook were already being taxed by the expansion in legal publishing. Again, the inevitable juxtaposition of the arguments and the opinions probably worked to the detriment of the former; one reviewer complained that the arguments sometimes included "language [which] does not seem to be rigidly forensic and juridical."[41] The implicit standard for appropriate juridical language, of course, was that of the surrounding print-oriented material, dominated by the opinions.

These concerns regarding the arguments of counsel reflect the increased emphasis on the opinion and on textuality that the rise of written decisions produced. Adjudication had taken yet another step in the long march away from the oral, collaborative process recorded in the Year Books and toward the overwhelmingly text-based juridical culture that Americans inhabit today. In accordance with the legal and political ideology of the early nineteenth century, reports of the period portrayed adjudication as centering upon authoritative written statements rather than discussions among experts. Analysis in

39. *Pickering's Reports*, *supra* note 14, at 187. The reviewer goes on to explain that reporting the arguments is valuable because it forces judges to issue more thorough opinions, because it gives attorneys credit for their contributions to the law, and because it clarifies the meaning of the opinions. *See id.* at 188.

40. *Id.*

41. *Recent Reports*, 3 AM. JURIST 314, 317 (1830).

periodicals and treatises was thus able to begin replacing courtroom discourse as the main medium of public conversation about common law rules in America. Both these developments helped transform the common law from an institution focused on the relation between a body of knowledge and its guardians to one that focused upon the relation between authoritative texts and the public they governed.

CONCLUSION

Begun as a nationalistic effort directed at improving judicial functioning, the rise of American reporting helped transform the common law from an institution theoretically based on the application of immemorial custom to one based on the production of authoritative texts for public dissemination. By reconstructing itself in a form which appealed to the American preference for authority constituted in print and which minimized fears of arbitrary, antidemocratic judicial power, the common law in America was able not only to protect itself against the codifiers, but also to establish conditions under which courts could exercise more power than common law courts ever had before. Freed from the conservatism of custom, empowered by the authority to hand down written law, and insulated by the republican connotations of print, courts could take an instrumental approach to adjudication without suffering serious consequences. Administered in a form resembling statute, judicial legislation was easier to swallow. Adjudicatory authority thus succeeded not by defending its established principles but by adopting the attitudes and some of the trappings of the institutions and movements that threatened it.