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## Of Publication and Precedent: An Inquiry into the Ethnomethodology of Case Reporting in the American Legal System

Susan W. Brenner

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**OF PUBLICATION AND PRECEDENT: AN INQUIRY  
INTO THE ETHNOMETHODOLOGY OF CASE  
REPORTING IN THE AMERICAN LEGAL SYSTEM**

*Susan W. Brenner*

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# OF PUBLICATION AND PRECEDENT: AN INQUIRY INTO THE ETHNOMETHODOLOGY OF CASE REPORTING IN THE AMERICAN LEGAL SYSTEM

*Susan W. Brenner\**

## INTRODUCTION

There is no magic in parchment or in wax.<sup>1</sup>

Eighteenth century lawyers and judges used parchment and wax to memorialize their legal precedents.<sup>2</sup> This article is a sociological inquiry into the means that we use to memorialize our legal precedents and into the consequences that attend such memorialization. The inquiry analyzes rules that differentiate as to the precedential status of judicial decisions depending upon whether they have been "published," i.e., reduced to printed form and issued in bound volumes by law reporting services.

Such rules are known generically as "limited publication provisions." The empirical parameters of these provisions have been the subject of several law review articles.<sup>3</sup> This, however, is not another of those articles. Rather, this Article uses limited publication provisions as the occasion for examining the evolution of our assumptions about legal precedent and the extent to which those assumptions are likely to change with the availability of computerized research techniques. It focuses upon the peculiar empirical phenomenon that courts ostensibly adhere to limited publication policies while releasing "unpublished" decisions to legal databases such as LEXIS and WESTLAW. One would assume that decisions released to such databases are available for perusal and citation as precedent. That the former assumption is true, while the latter is not, illustrates how certain of our assumptions about the nature of "precedent" are being propelled into obsolescence by the proliferation of computer technologies.

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1. *Master v. Miller*, 2 Rev. Rep. 339, 403 (1791).

2. A "precedent" is "[a]n adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterwards arising." BLACK'S LAW DICTIONARY 1340 (Rev. 4th ed. 1968). Case reports are "the production of an adequate record of a judicial decision on a point of law . . . for the subsequent citation as a precedent." M. PRICE & H. BITNER, EFFECTIVE LEGAL RESEARCH 93 (1953) (quoting C. MORAN, THE HERALDS OF THE LAW (1948)). It is important to remember that there is a distinction between "case reports" and "precedents." Although a case report will almost certainly constitute a precedent, even though that precedent may have been overruled or otherwise invalidated, precedents are not confined to decisions that have been reduced to case reports. This proposition is elucidated in section III, *infra*.

3. See *infra* section I(C)(4).

In theoretical terms, this Article is a venture into the sociology of knowledge. Although it resists facile characterization, it is accurate to say that the sociology of knowledge explores "the relationship between human thought and the social context within which it arises."<sup>4</sup> According to this perspective, what we experience as a "society" is simply a sociological artifact consisting of the accumulated knowledge, or "understandings," and behavioral routines of a particular historical population.<sup>5</sup> And what is true of "society" is true of the "institutions" that comprise a particular society.<sup>6</sup> In this perspective, therefore, a particular social institution exists because it has accumulated a particular stock of knowledge and a particular inventory of behaviors, or roles, over a period of time. An institution assumes at least a patina of objective reality because the individuals who are indoctrinated with this stock of knowledge and who come to assume those roles believe in the existence of that institution.

The sociology of knowledge can be used to generate broad, macro-level theories about the structure and behaviors of particular societies,<sup>7</sup> or it can provide the basis for microsociological inquiry into the constitutive processes of particular segments of a society. Specifically, it can provide a framework for analyzing the behaviors that sustain and transform social institutions.<sup>8</sup> One variety of microsociological inquiry is known as "ethnomethodology."<sup>9</sup>

4. P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 4 (1966). "The sociology of knowledge understands human reality as socially constructed reality." *Id.* at 189.

5. See, e.g., J. DOUGLAS, *UNDERSTANDING EVERYDAY LIFE* (1971); T. LUCKMANN, *PHENOMENOLOGY AND SOCIOLOGY* (1978); A. PODGORECKI, W. KAUPEN, J. VAN HOUTTE, P. VINKE & B. KUTCHINSKY, *KNOWLEDGE AND OPINION ABOUT LAW* (1973); A. PODGORECKI & C. WHELAN, *SOCIOLOGICAL APPROACHES TO LAW* (1981). In this perspective:

[S]ocial rules and their meanings are created in interaction. Thus even if to the lawyer law seems fixed as a positive code or collection of rules, in reality . . . it operates through the negotiation of meanings in interaction between police and suspect, probation officer and delinquent, lawyer and client; negotiations which fix numerous informal rules about appropriate behavior and expectations which determine the 'real' effects and meaning of the formal rules in the law books.

R. COTTERRELL, *THE SOCIOLOGY OF LAW* 156-57 (1984); see also Van Zandt, *Commonsense Reasoning, Social Change, and the Law*, 81 *Nw. U.L. Rev.* 894 (1987).

6. See *infra* section I(B)(1).

7. See, e.g., K. MARX, *THE GERMAN IDEOLOGY* 48-90 (C. Arthur ed. 1947).

8. See Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 *U. PA. L. REV.* 685 (1985); Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW* 281 (D. Kairys ed. 1982); Van Zandt, *supra* note 5, at 894; see also section I(B)(1), *infra*.

9. See, e.g., A. CICOUREL, *THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE* (1976); R. COTTERRELL, *supra* note 5, at 156-57; H. GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* (1967); Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 *AM. J. SOC.* 420-24 (1956); see generally Cotterrell, *Professional Autonomy and the Construction of Professional Knowledge: Sociology in the Professional Practice of Law and Medicine*, in 1 *DEVELOPMENT AND DIVERSITY: BRITISH SOCIOLOGY 1950-1980* 280-96 (P. Abrams & P. Lewthwaite eds. 1981). "Ethnomethodology is concerned with penetrating what determines and constitutes 'common sense' in various situations; with understanding the taken-for-granted rules which define those situations and so with connecting the general problem of social order in sociology with the motivations and outlook of the individual." R. COTTERRELL, *supra* note 5, at 157.

Although it, too, is an elusive concept, ethnomethodology is essentially concerned with operationalizing the theoretical framework of the sociology of knowledge by applying its principles to a particular social activity so that the normally "taken for granted" aspects of that activity become problematic in and of themselves.<sup>10</sup> The purpose is to "treat the familiar and the obvious as 'anthropologically strange'"<sup>11</sup> in order to analyze familiar behaviors from a disinterested, presumably objective perspective. The purpose of analyzing familiar behaviors from such a perspective is to understand why it is, to use the vernacular, that we "do what we do" in a particular social context.

This Article is not a rigorous ethnomethodological exercise but, instead, applies the ethnomethodological perspective of treating the familiar and the obvious as "anthropologically strange" to the practice within the American legal system of limiting the precedential effects of "unpublished" opinions while releasing them to computer systems such as LEXIS and WESTLAW. This practice was chosen not for its intrinsic interest as a purely empirical phenomenon but because the author believes that it can provide some valuable insights into our assumptions about "precedent" and, indeed, about the law itself.

Section I examines the evolution of the Anglo-American conception of precedent and its relationship to printed reports of judicial decisions, and articulates the conceptual model that is applied in section III. Section II describes the origins and operation of LEXIS and WESTLAW, while section III applies the model that was articulated in section I to the empirical information that is presented in that section and in section II.

#### I. THE DEVELOPMENT OF WRITTEN REPORTS OF JUDICIAL DECISIONS AND OF THE CONCEPT OF PRECEDENT

All things which are now regarded as of great antiquity were once new, and that which we maintain today by precedents will be among the precedents.<sup>12</sup>

In order to understand the contemporary American process by which a judicial decision comes to represent a "precedent," it is necessary to understand the process by which Anglo-American law developed its conception of written case reports as "precedent." Subsection A summarizes the evolution of this conception in English law, while subsection B provides a digression on the sociological import of this phenomenon. Subsection C describes the American experience in this area.

##### A. *Case Law as Precedent—England*

The first written "legislation" appeared around 597 A.D., drafted by missionaries who were establishing Christianity in what would later become

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10. See R. COTTERRELL, *supra* note 5, at 157.

11. *Id.*

12. TACITUS, *ANNALS* c. 110.

England,<sup>13</sup> and was soon followed by legislation on other topics.<sup>14</sup> "Legislation,"<sup>15</sup> however, comprised but a small fraction of English law, as it dealt only "with matters of national importance."<sup>16</sup> Matters of less than national importance were consigned to local laws, or "customs."<sup>17</sup> These customs were said to be of an antiquity sufficient that "man's memory runneth not to the contrary."<sup>18</sup>

The process by which the common law replaced these customs began when William the Conqueror undertook the creation of a centralized legal authority.<sup>19</sup> His immediate successors desultorily continued this effort, but in 1178, Henry II took a dramatic step toward the achievement of a "common law" by creating a new court. This court, which would become known as "the Court of Common Pleas," embarked upon the articulation of a "law common to the whole land."<sup>20</sup>

### 1. Glanvill

In 1178, the "customs which prevail[ed] in the local courts [were] . . . so many, so various, so confused" that there really was no "English law."<sup>21</sup>

13. See, e.g., F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND I* (1908). Christianity disappeared from the island with the collapse of the Roman occupation and the invasion of various barbarian tribes, to return in 597 A.D., with the arrival of St. Augustine, who was followed by a stream of missionaries. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 6-9 (5th ed. 1956). The romans had brought with them their tradition of written laws. *Id.* at 8.

14. See, e.g., T. PLUCKNETT, *supra* note 13, at 8-9.

15. *Id.* at 315-27.

16. F. MAITLAND, *supra* note 13, at 4.

17. A "custom" is "[a] usage or practice of the people which, by . . . long and unvarying habit, has become compulsory, and has acquired the force of a law." *BLACK'S LAW DICTIONARY* 461 (4th rev. ed. 1968). See F. MAITLAND, *supra* note 13, at 4-23; T. PLUCKNETT, *supra* note 13, at 15-16. "Law was transmitted by oral tradition and the men of one shire would know nothing and care nothing for the tradition of another shire." F. MAITLAND, *supra* note 13, at 4.

18. C. REMBAR, *THE LAW OF THE LAND* 32 (1980).

If we want the view of a lawyer who knew from experience what custom was, we can turn to Azo (d. 1230), whose works were held in high respect. . . . 'A custom can be called *long*,' he says, 'if it was introduced within ten or twenty years, *very long* if it dates from thirty years, and *ancient* if it dates from forty years.'

T. PLUCKNETT, *supra* note 13, at 307-08.

19. F. MAITLAND, *supra* note 13, at 7.

The word 'common' of course is not opposed to 'uncommon' rather it means 'general,' and the contrast to common law is special laws. Common law is in the first place unenacted laws; thus it is distinguished from statutes and ordinances. In the second place, it is common to the whole land; thus it is distinguished from local customs. In the third place, it is the law of the temporal courts; thus it is distinguished from ecclesiastical law. . . . Common law is in theory traditional law—that which has always been law and still is law, in so far as it has not been overridden by statute or ordinance.

*Id.* at 22-23.

20. F. MAITLAND, *supra* note 13, at 13; T. PLUCKNETT, *supra* note 13, at 148.

21. See F. MAITLAND, *supra* note 13, at 13.

Rather than deal with this confusion, the Court of Common Pleas set about creating its own "uniform rules," thereby initiating the development of a "common law."<sup>22</sup> This development produced the first law treatise,<sup>23</sup> "*Glanvill*," which seems to have been intended to provide guidance for those who found themselves overwhelmed by the rapid changes that were then occurring in the legal system.<sup>24</sup>

## 2. Bracton

Bracton sat for twenty years on a royal court that was assigned the task of applying the new common law.<sup>25</sup> This court travelled from place to place, hearing cases as the need arose, carrying the new law "through the length and breadth of the kingdom."<sup>26</sup>

"Sometime between 1250 and 1260," this itinerant justice wrote a treatise on English law which followed the format that *Glanvill* established, presenting writs with commentary appended to each.<sup>27</sup> But Bracton also cited cases that had involved these writs.<sup>28</sup> This was an incredible innovation in a time when legal artisans did not cite cases in support of their observations but, instead, seldom included "anything more definite than a vague 'It is so in our books.'"<sup>29</sup> Bracton, on the other hand, cited "no less than 500 decisions of the king's judges."<sup>30</sup>

22. *Id.* *Glanvill* was only concerned with the law of this court: "[A]ll the tangled masses of local custom . . . he completely ignores. . . . He is . . . the first exponent of the new common law. . . ." T. PLUCKNETT, *supra* note 13, at 257. An earlier treatise, LEGES HENRICI PRIMI, appeared in 1118 and represents the first effort to write a "legal text book." *Id.* at 155-56. The author of the LEGES, however, was "overcome by the confusion of competing systems of law, none of which alone was adequate. Even in England he had to recognize three territorial laws, the Dane Law, the Law of Mercia and the Law of Wessex, but in order to make sense out of them, he had to appeal to Roman, canon and Frankish law." *Id.* at 257. *Glanvill* introduced a style that "settled the method of legal writing for many centuries to come." *Id.* at 256. It presented a writ that was being used in the royal court and offered a commentary on its nature and use and, in this regard, *Glanvill* seems to have invented the "form books" that are utilized by contemporary practitioners. *See id.*

23. Authorship is generally attributed to Ranulf *Glanvill*, who became prime minister and chief justice of England in 1180. F. MAITLAND, *supra* note 13, at 13.

24. *See, e.g.*, T. PLUCKNETT, *supra* note 13, at 256.

25. "The king's court ha[d] been steadily at work evolving common law." 1 F. MAITLAND, BRACTON'S NOTE BOOK 14 (1887) [hereinafter BRACTON'S NOTE BOOK]; *see also* T. PLUCKNETT, *supra* note 13, at 111, 259.

26. F. MAITLAND, *supra* note 13, at 17; T. PLUCKNETT, *supra* note 13, at 259.

27. F. MAITLAND, *supra* note 13, at 17. Bracton died in 1268; it appears that he never completed his great work and, indeed, "seems to have stopped working upon it in 1256," perhaps as the result of the civil war which followed soon thereafter. T. PLUCKNETT, *supra* note 13, at 259; *see also* BRACTON'S NOTE BOOK, *supra* note 25, at 42-43.

28. BRACTON'S NOTE BOOK, *supra* note 25, at 10-12; T. PLUCKNETT, *supra* note 13, at 259-60.

29. BRACTON'S NOTE BOOK, *supra* note 25, at 11.

30. F. MAITLAND, *supra* note 13, at 18. In BRACTON'S NOTE BOOK, Maitland writes that Bracton actually cited four hundred and ninety-four cases in his treatise. BRACTON'S NOTE BOOK, *supra* note 25, at 52-53.

This development was absolutely extraordinary when one realizes that lawyers were not given access to the "plea rolls," which were the case records of this era.<sup>31</sup> Bracton gained access to them only because he was a judge in a royal court, and even then, it required a great deal of effort on his part.<sup>32</sup> Having gained access to the plea rolls, Bracton had two thousand cases copied into a "note book" and used it to write his treatise.<sup>33</sup> In order to understand why the "note book" was necessary,<sup>34</sup> one must appreciate the format of case records at this time:

Imagine fifty rolls, each composed of twenty or thirty membranes, each membrane as long as one's arm, as broad as one's span, each membrane covered back and front with writing, whereon are no headnotes, no catchwords, nothing to guide the eye save the name of counties in the margin. Such was the raw material; to have transplanted five hundred cases directly out of this disorderly mass into their proper place in a systematic exposition of the law, would surely have been beyond the power of any man.<sup>35</sup>

Although Bracton used decisional law, he did not use it in any modern sense. "[H]is cases are carefully selected because they illustrate what he believes the law ought to be, and not because they have any binding authority; he freely admits that at the present moment decisions are apt to be on different lines."<sup>36</sup> Bracton wanted to restore the law to the state that it had occupied approximately a generation before.<sup>37</sup> His "use of cases, therefore,

31. T. PLUCKNETT, *supra* note 13, at 260.

32. *Id.* at 260-61. It appears that Bracton's work was never finished because he received an order requiring that he "surrender the rolls which were in his possession." BRACTON'S NOTE BOOK, *supra* note 25, at 79; T. PLUCKNETT, *supra* note 13, at 260.

33. BRACTON'S NOTE BOOK, *supra* note 25, at 71-117; T. PLUCKNETT, *supra* note 13, at 260-61. Bracton apparently gave very specific directions as to which cases he wanted copied, for Maitland discovered notations indicating that:

[H]e was collecting cases and had various categories in his mind. Thus he writes—*De recto* (A Writ of Right), *De dote* (An action for Dower), *Ass' no'* (An Assize of Novel Disseisin), *Quis adnoc'* (An Assize of Darrein Presentment), *De Sum' et attach'* (Summonses and Attachments, Mesne Process), *De communibus* (Common Form). Occasionally he even writes *Error* on the roll.

BRACTON'S NOTE BOOK, *supra* note 25, at 68.

34. [T]he reader may ask, What need had Bracton of any transcripts of cases if the very rolls themselves were in his hands? The answer is, that, even with the aid of a note book, his feat of citing some five hundred cases scattered about in some fifty rolls was a gigantic feat of patience, industry, memory, and that without some such aid the feat would have been impossible.

BRACTON'S NOTE BOOK, *supra* note 25, at 79.

35. *Id.*

36. *Id.* at 40; T. PLUCKNETT, *supra* note 13, at 260.

37. T. PLUCKNETT, *supra* note 13, at 259-60.

At the beginning of his book he explains . . . that the contemporary bench is not distinguished by ability or learning, and that his treatise is . . . a protest against modern tendencies. He endeavours to set forth the sound principles laid down by those whom he calls 'his masters' who were on the bench nearly a generation ago;



is not based upon their authority as sources of law, but upon his personal respect for the judges who decided them, and his belief that they raise and discuss questions upon lines which he considers sound."<sup>38</sup> Bracton's treatise, therefore, clearly establishes that no modern conception of precedent existed since, if decisions had been a binding source of law, his work would have been futile because it relied upon decisions that had been "overruled" by more recent entries upon the plea rolls.<sup>39</sup>

Bracton's use of cases was instrumental in the emergence of such a conception. Although the lawyers and judges of his time could not have accessed the plea rolls even if they had wanted to do so,<sup>40</sup> it does not appear that it had ever occurred to any of them to want to do so. "[Bracton] was undertaking research into the present and former condition of the law by a novel method which he had devised, namely, the search of plea rolls, which was a new discovery in his day."<sup>41</sup> But he set an example which they would

hence it is that his cases are on the average about twenty years older than his book. *Id.* at 259; accord BRACTON'S NOTE BOOK, *supra* note 25, at 40-41.

[H]e tells us that . . . [t]he judges . . . are perverting the law, they are too often ignorant and partial; we must go back to the wisdom of the men of old time. . . . [So] it was to old judgments that he went for his law. This may seem strange to us brought up in the belief that the latest decision of a court is of more value than any previous determination. But we have Bracton's word for it; he deliberately chose old judgments, judgments of judges no longer on the bench, as the best authorities.

BRACTON'S NOTE BOOK, *supra* note 25, at 40-41.

38. T. PLUCKNETT, *supra* note 13, at 260. Bracton relies almost exclusively on the decisions of two judges, Martin Pateshull and William Raleigh; it is not clear what prompted this reliance, although Maitland suggests that it may have been simple expediency, i.e., these were the rolls to which Bracton was given access. See BRACTON'S NOTE BOOK, *supra* note 25, at 45-60.

39. T. PLUCKNETT, *supra* note 13, at 344.

In other words, Bracton has no hesitation in using cases which we should call out of date or overruled, in order to maintain that the law ought to be something different from what it is. From this it is clear that the whole of Bracton's position would fall if decisions . . . were in any modern sense a source of law.

*Id.* Bracton's plan seems simply to have been to "state in logical order a series of legal propositions, and then to illustrate their working from cases." *Id.* "In Bracton's hands a case may illustrate a legal principle, and the enrolment may be historical proof that that principle was once applied, but the case is not in itself a source of law." *Id.*

40. *Id.* at 343. Indeed, it appears that none of his contemporaries could have undertaken similar research even if it had occurred to them to do so:

Any use of cases on Bracton's lines by the profession at large, or even by the bench alone, would have been manifestly impossible. The plea rolls are immense in number and there was and still is no guide to their contents; they have to be read straight through from beginning to end without any assistance from indexes or head-notes.

*Id.*

41. He alone of all the lawyers in England sought and obtained access to the plea rolls; he used the originals, and there were no copies until he made one for his own convenience. . . . None of his contemporaries attempted such a thing. Bracton . . . was the only lawyer of his day who chose to exert a good deal of court influence in order to obtain the loan of numerous plea rolls, and who was ready

follow: rudimentary "case reporters" began to appear after the issuance of his treatise.<sup>42</sup>

### 3. *The Year Books*

The most successful of the rudimentary reporters were the Year Books, which began in 1292 as guides to court procedures. The Year Books were periodically updated, and these updates came to include case annotations:<sup>43</sup>

In the end it must have occurred to several minds at once that such reports need not necessarily be interspersed through one of these treatises, and that a small separate collection could be made consisting only of cases. As a result the . . . case material will become a separate class of literature.<sup>44</sup>

The earlier Year Books "resemble not so much the modern law report as a professional newspaper which combines matters of technical interest with the lighter side of professional life."<sup>45</sup>

They did share one feature with modern reporters. Case reports were noted on slips of parchment and copied into pamphlets that circulated as "advance sheets." The materials in the advance sheets were later recopied into permanent volumes which became the "Year Books."<sup>46</sup> Because reports were prepared by a number of individuals, "there were frequently found to be two, three, four, or even more versions of one case, so different that collation was impossible."<sup>47</sup> However, between 1377 and 1399, the variation in reports disappeared and consistent reporting was a standard feature until the Year Books were replaced by "modern" case reports.<sup>48</sup>

The Year Books "did not exist for the same reason as the modern law report," that is, they were not "collections of precedents whose authority

to devote immense pains and labour in searching hundredweights of manuscript and having his discoveries copied in a very substantial volume.

*Id.*

42. *Id.* at 344; BRACTON'S NOTE BOOK, *supra* note 25, at 53-54. Although it was the custom "on the continent . . . for a clerk of the courts to prepare a collection of interesting cases from the documents in his custody," this practice did not exist in England. T. PLUCKNETT, *supra* note 13, at 261.

43. See F. MAITLAND, *supra* note 13, at 22; T. PLUCKNETT, *supra* note 13, at 261, 268. Since written pleadings did not exist and since lawyers were not given access to the plea rolls, the only way that they could "keep current" on court procedures was either to compare notes with their colleagues or to consult the Year Books. T. PLUCKNETT, *supra* note 13, at 268 n.2.

44. T. PLUCKNETT, *supra* note 13, at 268; see also F. MAITLAND, *supra* note 13, at 22 ("from 1292 onwards we have law reports").

45. T. PLUCKNETT, *supra* note 13, at 270.

46. *Id.* at 269-70.

47. *Id.* at 270 (quoting T. PLUCKNETT, Y.B. 13 Richard 2, xiii (1929)). This variation also resulted from the fact that judges delivered their opinions orally and that "[s]ome of the bench in that day, as in this, . . . spoke indistinctly, or without capacity of being heard." J. WALLACE, THE REPORTERS 109 (4th ed. 1882).

48. T. PLUCKNETT, *supra* note 13, at 33-34. For this era, "all our manuscripts give the same portions of the discussion, even the same repetitions. . . . The conclusion is irresistible: there was but one report—perhaps only one reporter." *Id.* at 272; see also *id.* at 272-74, 280.

should be binding in later cases.”<sup>49</sup> It was custom rather than “precedent” that controlled. “[C]ases are used only as evidence of the existence of a custom of the court. It is the custom which governs the decision, not the case or cases cited as proof of the custom.”<sup>50</sup>

In the sixteenth century, “modern” case reports replaced the Year Books and references to “precedent” began to appear. Although decisions were not yet accorded binding precedential effect, they were recognized as having some value, and this recognition created a market for volumes which reported the decisions that the judges were making.<sup>51</sup>

#### 4. Law Reporters

The Year Books were replaced by “something which was at first not so very different, namely, the early reporters.”<sup>52</sup> These reports issued “under the name of some distinguished lawyer or judge, with the implication that he was in some way concerned with their composition.”<sup>53</sup> This was true for some reports<sup>54</sup> but others had little or no connection with the individuals under whose name they appeared.<sup>55</sup> Many reports were mediocre or worse.<sup>56</sup> Among the most admired were those issued by Lord Coke, who was “so highly regarded by the profession that his work is cited simply as *The Reports*.”<sup>57</sup> However, even Coke’s reports bear little resemblance to modern “case reports”:

In his hands a law report takes the form of a somewhat rambling disquisition upon the case in question. He frequently gives the pleadings, but less often . . . the arguments. As for the decision, it is often impossible

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49. *Id.* at 272; *see also id.* at 345-47.

50. *Id.* at 347. “A single case was not a binding authority, but a well-established custom (proved by a more or less casual citing of cases) was undoubtedly regarded as strongly persuasive.” *Id.* This conception of law survived into the nineteenth century and surfaced in the Supreme Court’s decision in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842):

[I]t will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not themselves laws. . . . The laws . . . are . . . the rules and enactments promulgated by the legislative authority . . . or long established local customs having the force of laws.

41 U.S. (16 Pet.) at 18.

51. T. PLUCKNETT, *supra* note 13, at 280-81, 348-50.

52. *Id.* at 280.

53. *Id.*

54. Most notably, the reports issued by Moore, Dyer, Plowden and Coke. *See id.* at 280; *see generally* J. WALLACE, *supra* note 47, at 122-96.

55. *Id.* at 13-15.

56. Wallace’s description of the *Savile* reports, which were issued between 1580 and 1594: “This book seems to be pretty much in the condition of Pope’s ‘most women,’ and to have ‘no character at all.’” J. WALLACE, *supra* note 47, at 197.

57. T. PLUCKNETT, *supra* note 13, at 280 (citing Plucknett, *The Genesis of Coke’s Reports*, 27 CORNELL L.Q. 190 (1942)); *see also* J. WALLACE, *supra* note 47, at 165-96. Coke issued his first reports while he was Attorney General, and continued to publish them after he became Chief Justice of the Common Pleas court and later of the King’s Bench. *Id.* at 166-67.

to distinguish the remarks of the judge . . . from the comments of the reporter. There was no clear boundary in his mind between what a case said and what he thought it ought to say, between the reasons which actually prompted the decision, and the elaborate commentary which he could easily weave around any question. A case in *Coke's Reports*, therefore, is an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recondite legal history.<sup>58</sup>

Coke was succeeded by reporters whose accounts were "frequently short and inaccurate, and sometimes unintelligible."<sup>59</sup> Consequently, there was little technical or doctrinal development in precedential authority during the remainder of the seventeenth century and the early part of the eighteenth century.<sup>60</sup> Cases were cited as "precedent," but "precedent" was used to prove "custom" rather than as authority in its own right.<sup>61</sup> Furthermore, because reporters were erratic and unreliable, judges could blame them for inaccurately reporting a decision which they disliked and chose not to follow.<sup>62</sup>

This was no longer possible after Sir James Burrow began publishing his reports in 1756.<sup>63</sup> Burrow eschewed Coke's editorials and confined himself to recounting:

1st. The case or statement of the facts . . . 2d. Arguments of counsel on that case. 3d. The opinion or judgment of the court upon it;—each of the parts being separate and pure, the statement . . . being pure fact, the argument of counsel argument merely, the opinion of the court opinion simply on the case . . . This makes a full, formal, and correct report, and such as properly instructs and enlightens the bar.<sup>64</sup>

58. T. PLUCKNETT, *supra* note 13, at 281.

Lord Redesdale declared . . . that while he had a great respect for the memory of Sir Edward Coke, he was yet ready to accede to an assertion, made by some of Sir Edward's contemporaries, that 'he was too fond of making the law, instead of declaring the law, and of *telling untruths* to support his own opinions.'

J. WALLACE, *supra* note 47, at 172 (emphasis in original) (quoting Case of the Earldom of Banbury, *reported in* NICOLAS ON ADULTERINE BASTARDY 461 (1836)).

59. T. PLUCKNETT, *supra* note 13, at 281; J. WALLACE, *supra* note 47, at 248-446.

60. T. PLUCKNETT, *supra* note 13, at 281, 349.

61. *Id.* at 348-49. Even during the eighteenth century, "the function of citations [was] merely that of proving a settled policy or practice." *Id.* at 349.

62. *Id.* at 349; J. WALLACE, *supra* note 47, at 251-52:

[Judge Rolle's] Reports . . . have always been deemed authoritative; although, when Mr. Justice Eyre cited a case from [them], Mr. Justice Dolben answered that '*that was but the opinion of Rolle;*' and although on another occasion a very accurate Judge said to counsel, citing Rolle, that a good many cases which are reported by him are reported in other books, which do not always bear him out: the first observation going, I suppose, *only to the technical point of 'authority,'* and the last not involving as of logical necessity inaccuracy in Rolle, since 'other books' may be in error, rather than he.

J. WALLACE, *supra* note 47, at 251-52 (emphasis added).

63. J. WALLACE, *supra* note 47, at 446.

64. *Id.* at 447.

Unlike many of his predecessors, Burrow was concerned with "the correctness of the *'states of the case'* and his report of the judgment."<sup>65</sup> The opinions in his reports were not, however, "written by the court, nor ever printed in the exact form in which they were delivered."<sup>66</sup> Instead, as Lord Mansfield noted in his preface to a volume of these reports, Burrow edited oral opinions "into the form that was requisite to make them the proper component of a report."<sup>67</sup> This let Burrow eliminate the elaboration and repetition that were unavoidable when opinions were delivered orally without sacrificing the accuracy of his presentation.<sup>68</sup>

The concern for accuracy eventually produced a system of law reporting in which "judges adopted the practice of looking over the draft reports of their decisions, and in this way certain reporters were regarded as 'authorized.'"<sup>69</sup> England finally established a system of standardized, "modern" reports in 1865.<sup>70</sup>

### B. *Significance of the Evolution of the Rule of Precedent in English Common Law*

Although the term "precedent" was being used in the sixteenth century,<sup>71</sup> the jurisprudence of that era did not accord authoritative effect to judicial decisions.<sup>72</sup> Indeed, as is noted above, the contrary was true.<sup>73</sup> This state of affairs continued until the modern conception of precedent finally emerged in the nineteenth century.<sup>74</sup> Having emerged, this conception proceeded to extinguish the use of custom as legal authority by gradually restricting the areas in which custom could operate.<sup>75</sup>

65. *Id.* (emphasis in original).

66. *Id.*

67. *Id.*

68. "[T]hat is, to strike out . . . statement[s] . . . very proper to have been in the opinion as *delivered* from the bench . . . but unnecessary . . . to be stated or presented in the same way" in the reporter. *Id.* at 447-48. "Let me, once for all," he says, "caution the reader. . . . I pledge my credit and character only that the case and judgment and the outlines of the *grounds* or reasons of the decision are right." *Id.* at 448 n.2 (quoting from page x of the preface to one of Burrow's reports).

69. T. PLUCKNETT, *supra* note 13, at 281.

70. *Id.* at 281 (creation of the "official series of Law Reports in 1865"); see also M. PRICE, H. BITNER & S. BYSIEWICZ, *EFFECTIVE LEGAL RESEARCH* 331-36 (4th ed. 1979).

71. When we come to the sixteenth century we get a little nearer the modern point of view, although even such a reporter as Dyer thought it worth while to report what the judge said privately and what was said in mock trials in Lincoln's Inn. If he uses the word 'precedent' in 1557 (which Sir Carleton Allen thinks is the first occurrence of the word) it is merely to tell us that in spite of two 'precedents' the court adjudged the contrary.

T. PLUCKNETT, *supra* note 13, at 348 (footnote omitted).

72. *Id.* at 348-49.

73. See *supra* sections I(A)(3) and I(A)(4).

74. T. PLUCKNETT, *supra* note 13, at 349-50.

75. This was done by confining the operation of custom to those areas in which it "was,

Those who have been trained by a legal system in which precedent reigns unchallenged<sup>76</sup> cannot understand why medieval and post-medieval England were so slow to abandon customary law for case law, as we are assured of the superiority of the latter.<sup>77</sup> The more interesting inquiry, however, is why our predecessors chose to abandon it at all. In order to understand this choice and thereby understand the dilatoriness with which it was finally implemented, it is necessary to understand the sociological context from which it emerged.

Prior to the Norman invasion, "courts" were simply assemblages of the male populace in a particular community,<sup>78</sup> the deliberations of which were guided by local custom rather than any generalized conception of "law."<sup>79</sup> These courts did not issue "decisions" in any modern sense, although they may have kept records of their actions.<sup>80</sup> After the conquest, the effort to develop a central political organization resulted in the creation of the Court

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or seemed to be, immemorably old," which meant that a custom could be enforced only if it were proven to have been in existence "right back to the time of legal memory". *Id.* at 312. The "time of legal memory" was arbitrarily established as "3d September, 1189." J. WALLACE, *supra* note 47, at 62. Although the purpose was to provide a means for curtailing the influence of custom in what was rapidly becoming a modern legal system, it may have had the unintended effect of encouraging the destruction of legal records prepared prior to it: "[W]hen it was declared that legal memory extended not beyond the first year of Richard's reign, the earlier judicial records, deprived of their practical utility, were cast aside and neglected, and ultimately destroyed either by neglect or design." *Id.*

76. Precedent, of course, reigns unchallenged in the modern world except insofar as it conflicts with legislative authority. The possibility of such a conflict is omitted from the discussion above for purposes of simplicity and clarity.

77. The dominance of precedence in English and American law is a phenomenon which can be attributed to the twentieth century with no dispute, to the nineteenth century with little dispute and to the eighteenth century with some significant dispute. T. PLUCKNETT, *supra* note 13, at 342-50. This means that customary law was the dominant force in Anglo-Saxon law at least from the time that the Roman occupation of the British Isles ended in the fifth century A.D. until the seventeenth century, and possibly even until the eighteenth century. This, in turn, means that customary law has dominated Anglo-Saxon jurisprudence for some twelve centuries, as opposed to the almost-three centuries that can reasonably be characterized as being governed by the rule of precedent. When one considers the remarkable longevity of customary law, it is more remarkable that precedent triumphed at all than that it took several centuries to do so.

78. *Id.* at 83-89; F. MAITLAND, *supra* note 13, at 45, 105. Indeed, it appears that the word "court" developed from the practice of summoning these assemblies, which often met in the interior spaces, or "courts" of medieval buildings. T. PLUCKNETT, *supra* note 13, at 142-43. Plucknett writes that "[t]he original sense of the word is the rectangular open space around which the mediaeval house was built." *Id.*

79. See T. PLUCKNETT, *supra* note 13, at 86-94. For a theoretical discussion of customary law and its relationship to other types of law, see N. TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW 310-12 (1939).

80. See T. PLUCKNETT, *supra* note 13, at 83-100. It also appears that particular localities assembled and maintained records of their unique customs. These records were known as costumals or customaries. See MAX WEBER ON LAW IN ECONOMY AND SOCIETY 73 n.19 (M. Rheinstein ed. 1954).

of Common Pleas—the “king’s court.”<sup>81</sup> The creation of this court had two immediately apparent consequences: The articulation of a “common law”<sup>82</sup> and the emergence of the belief that judges should be “learned, professionally learned in the law of the land.”<sup>83</sup> By Bracton’s time, “there were in the royal court learned judges, most of them ecclesiastics, who were making for themselves fame . . . as great judges.”<sup>84</sup>

The necessity for a cadre of professionally trained jurists resulted from the shift from a local to a common law: as long as law was guided by local custom, there was no need for judicial officers who were trained in the manipulation of principles of an abstraction transcending routine.<sup>85</sup> As law replaced custom, however, new skills were required<sup>86</sup> because this shift represented a sociological revolution. To understand the significance of this revolution, it is necessary to refer to a classificatory scheme that was developed by Max Weber.<sup>87</sup>

Weber concluded that law is a social institution the purpose of which is to secure obedience to certain rules, or norms, which have been articulated by a particular society.<sup>88</sup> The viability of a particular legal system depends

81. In the discussion that follows, the phrase “the king’s court” will be used to refer to the Court of Common Pleas. The discussion makes no effort to distinguish the respective roles which this court and the Court of King’s Bench played in the evolution of the English common law and its reliance upon precedent. For a discussion of the contributions made by each of these courts and their older predecessor, the Exchequer, see T. PLUCKNETT, *supra* note 13, at 146-56.

82. The creation of this court began the process of developing a common law; this process was not, of course, completed in an instant but, instead, continued throughout the reigns of Henry II’s successors. See F. MAITLAND, *supra* note 13, at 10-18. The previous discussion collapses this evolution into a relatively short period of time in order to illustrate the effects which Bracton’s work must have had upon the conception of law that would emerge.

83. BRACTON’S NOTE BOOK, *supra* note 25, at 4. “[I]t was felt that study and book-learning, something more special than an ordinary experience of public life, were needful for those who term after term were to sit in a certain place . . . and declare the law.” *Id.* at 4-5.

84. *Id.* at 5. Bracton himself was an ecclesiastic, as were the judges whom he revered and upon whose decisions he places his greatest reliance. *Id.* at 17, 45-48.

85. See, e.g., T. PLUCKNETT, *supra* note 13, at 231-41. Indeed, no judicial officer was required under the practice that prevailed during the Anglo-Saxon era: “The central figure of a court to-day is the judge, but . . . it required some time before English law developed this office. Feudal courts seem generally to have consisted not of judges but of a number of ‘suitors’ with whom rested the decision.” *Id.* at 143.

86. This development was also responsible for the evolution of the legal profession: “There is no convincing evidence of a legal profession in the Anglo-Saxon period.” *Id.* at 215. By the time of Henry II, however, England was experiencing “the growth of a legal profession, for the public could hardly be expected to understand the newly invented office machinery of the King’s Court.” *Id.* at 216.

87. Weber, of course, has been one of the most influential sociologists of the twentieth century. See, e.g., 2 R. ARON, *MAIN CURRENTS IN SOCIOLOGICAL THOUGHT* 219-336 (1970). “To me, Max Weber is the greatest of the sociologists; I would even say that he is *the* sociologist.” *Id.* at 294.

88. Weber defined law as “an ‘order system’ endowed with certain specific guarantees of the probability of its empirical validity.” MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra*

upon the extent to which it is able to "legitimate" its exercise of coercive authority so as to ensure obedience to the appropriate rules, or norms.<sup>89</sup>

A legal system can legitimate its exercise of coercive authority by relying upon tradition, faith or rationality.<sup>90</sup> In a traditional legal system, "valid is that which has always been";<sup>91</sup> in a rational legal system, legitimacy is predicated upon "logically deduced propositions."<sup>92</sup> By creating the "king's court," Henry II initiated the transition from a traditional legal system to a rational legal system<sup>93</sup> and Bracton is an integral part of this transition.

Bracton wrote his treatise approximately seventy-five years after the King's court was created.<sup>94</sup> During those years, the new court was inventing "common law" and discarding local law with equal rapidity.<sup>95</sup> This process must

note 80, at 13. He concluded that each society includes a "legal order" which is composed of a set of "legal norms" and of the coercive machinery for ensuring compliance with those norms. *Id.* at 11-13. For Weber, the enforceability of legal norms derives not from their "logically demonstrable correctness" but rather from the availability of "legal coercion." *Id.* at 13-14.

Sociologically, the question of whether or not . . . law exists . . . depends on the availability of an organized coercive apparatus for the nonviolent exercise of legal coercion. This apparatus must also possess such power that there is in fact a significant probability that the norm will be respected because of the possibility of recourse to such legal coercion.

*Id.* at 14.

89. "Conduct . . . [is] oriented on the part of the actors toward their *idea* . . . of the existence of a *legitimate order*. The probability of such an orientation shall be called the *validity* of the order in question." *Id.* at 3. Weber notes that although a legal order can be predicated upon simple, coerced obedience to social norms, "more stable is the conduct oriented toward a [norm] which is endowed with the prestige of exemplariness or obligatoriness or, in other words, of 'legitimacy.'" *Id.* at 4; *see also id.* at 7-15.

90. MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 8-9.

91. *Id.* at 8.

92. *Id.* at 8-9. Legal systems are rarely predicated upon faith; when such systems do exist, they tend to derive their legitimation from the unique characteristics of an individual who has been recognized as a "prophet." *Id.* at 337 (charismatic authority "rests upon that authority of a *concrete individual* which is based neither upon rational rules nor upon tradition").

93. *See, e.g.,* BRACTON'S NOTE BOOK, *supra* note 25, at 5:

And the 'gladsome light of jurisprudence' (to use Coke's fine phrase) had dawned in England as elsewhere, an idea of law as of a reasonable system of connected principles, providing in advance for all possible cases, a proper subject for doubt, disputation, proof,—and yet no mere ideal existing only in the speculations of doctors and scholars, but the very law of the land, of which ordinances, charters, writs, decisions, ancient custom, wonted procedure, were authoritative though partial manifestations. . . . The concentration of justice in the king's court, the evolution of common law, were but one process. That the development of legal doctrine was rapid, we may easily see as we pass from that strange dark book the *Leges Henrici Primi*, through Glanvill to Bracton.

*Id.*

94. F. MAITLAND, *supra* note 13, at 17; T. PLUCKNETT, *supra* note 13, at 259.

95. In one sense, of course, the invention of the common law was merely the creation of a new system of customary law, one in which "custom" became the practice in the king's court. *See, e.g.,* T. PLUCKNETT, *supra* note 13, at 342. "The common law in its ultimate origin



have generated a great deal of discomfort with regard to the "legitimacy" of the new law. The old system of law was "legitimate" because it consisted of customs the pedigree of which extended back into an unfathomable antiquity. The new system, however, was replacing customs with law that was being created "on the spot."<sup>96</sup> In order to survive, the new system had to legitimate its law, and this law was clearly *not* the product of immemorial custom. Legitimation therefore had to come from some source other than tradition. It was Bracton who provided this source.

Bracton wrote his treatise, of course, to criticize the decisions that were being handed down by his contemporaries. Nevertheless, he did not argue for a return to customary law but, instead argued that the older decisions upon which he relied were correct statements of the "new" law and asserted that recent decisions erred insofar as they departed from the rationale of these decisions. The substance of his arguments is irrelevant, but the technique that Bracton utilized in making them is of profound importance for modern law. By referring to earlier judicial decisions, Bracton provided the predicate for legitimating the "new law" that had been articulated by the king's court. That is to say, that by providing a means for legitimating what had already been articulated, Bracton also provided a device for legitimating the law that would be articulated in the future.

Although the "new law" could not be legitimated by reference to immemorial custom because it very clearly departed from that custom, by the time Bracton was writing, the "new" law had existed for at least seventy-five years. This longevity provided the basis for a mode of legitimation that superficially resembled the prior mode of legitimation, reference to custom, insofar as it relied upon reference to past practice, that is, judicial decisions that had been rendered in the past.<sup>97</sup>

It is this aspect of Bracton's work that was revolutionary in a sociological and jurisprudential sense. Eventually, cases would be used to fill the void that had been left by the rejection of custom. Case law, like custom, could

was merely the custom of the King's courts; the regular routine which they developed in the administration of justice became settled and known, and therefore served as the basis upon which people could forecast with some certainty the future decisions of the courts." *Id.*

96. The king's court has been steadily at work evolving common law. . . . As yet the judges have a free hand—they can invent new remedies to meet new cases. *Towards the end of the reign indeed complaints of this grow loud. It is more and more seen that to invent new remedies is in effect to make new laws; that the judges while professing to declare the law are in reality making law.*

F. MAITLAND, *supra* note 13, at 17 (emphasis added). Maitland is describing the reign of Henry III, but his comments seem equally apropos to what was occurring during the reign of Henry II, as well. See T. PLUCKNETT, *supra* note 13, at 17-26.

97. Bracton, of course, was not using cases that dated from the very beginning of that court but was, instead, using more recent cases that had been decided by those jurists whom he had known and for whom he had especial regard. See *supra* section I(A)(2). These cases were decided roughly between 1216 and 1240. See, e.g., BRACTON'S NOTE BOOK, *supra* note 25, at 63.

provide a basis for predicting what action a court might take in a case that was before it and for making arguments on behalf of a particular outcome.<sup>98</sup> Even more important, however, was the fact that the judiciary could use its prior decisions to legitimate its actions in present and future litigation.<sup>99</sup>

To the modern observer, it seems that the advantages of case law should have been immediately apparent, so that the shift should have occurred at once. Even a cursory examination of history, however, reveals that the transition took approximately five hundred years before it was complete.<sup>100</sup> Why did it take so long to establish the rule of precedent, a doctrine the desirability of which is obvious to a modern lawyer?

The answer is derivable from two propositions. The first proposition is that the transition from customary to case law represented a sociological revolution. The second proposition is that, unlike political revolutions, sociological revolutions do not occur overnight. The sections immediately below develop these propositions and apply them to resolve this question.

### 1. *Sociological Revolution*

“Sociological revolution” denotes a fundamental alteration in the fabric of social and conceptual relationships within a society. The term refers to micro-social changes within a particular segment of a given society, not to the type of macro-social changes that are subsumed under the term “revolution” or the phrase “political revolution.”

In order to understand this phenomenon, it is necessary to understand the nature of social reality. “Social reality” is a modern construct. Historically, those who studied the phenomenon of social life tended to conceptualize “society” as a unitary, even mechanistic entity, a macro-organism the existence of which was objectively real and impervious to the influence of its constituent parts.<sup>101</sup> In the last fifty years or so, however, sociologists have

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98. The ability to predict the consequences of one's actions with some degree of certainty is an essential element of a stable social system. *See, e.g.*, P. BERGER & T. LUCKMANN, *supra* note 4, at 50-72. The older system of customary law clearly included the first of these virtues but may have had neither need nor regard for the second, since it did not develop the concept of law as a “profession” and never recognized the role which is played by attorneys in modern society. *See, e.g.*, T. PLUCKNETT, *supra* note 13, at 215-17.

99. Weber notes that judges will utilize “in a later case a norm” which they have used “in an earlier similar decision” because “then . . . every decision, regardless of how it came into existence, appears as being derived from” rational principles and is, thereby, legitimated. MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 74. Although this use of precedent may superficially resemble the operation of customary law, the two are really quite different. *Id.* at 65-67.

100. Bracton's treatise appeared at the end of the thirteenth century, but the modern conception of precedent had not become fixed in English law until sometime in the nineteenth century. *See supra* section I(A).

101. *See, e.g.*, 1 H. BECKER & H. BARNES, *SOCIAL THOUGHT FROM LORE TO SCIENCE* 43-404 (1961).

developed a far more fluid conception of what they prefer to call "social reality."<sup>102</sup>

"Social reality" is our experience of "society." "Empirically, human existence takes place in a context of order, direction, stability. The question then arises: from what does the empirically existing stability of human order derive?"<sup>103</sup> The answer is that:

[S]ocial order is a human product, or, more precisely, an ongoing human production. It is produced by man in the course of his ongoing externalization. Social order is not biologically given or derived from any biological *data* in its empirical manifestations. . . . Social order is not part of the 'nature of things,' and it cannot be derived from the 'laws of nature.' Social order exists *only* as a product of human activity.<sup>104</sup>

Social order, or social reality, is the product of routinized human activity. Each of us lives out our existence in what one paradigm refers to as the "world of everyday life."<sup>105</sup> This world is:

[T]he intersubjective world which existed long before our birth, experienced and interpreted by others, our predecessors, as an organized world. . . . All interpretation of this world is based upon a stock of previous experiences of it, our own experiences and those handed down to us by our parents and teachers, which in the form of 'knowledge at hand' function as a scheme of reference.<sup>106</sup>

The generalized world of everyday life is composed of discrete parts, or "institutions."<sup>107</sup> Individuals participate in social reality by participating in these institutions.<sup>108</sup> They experience institutions "as an objective reality" because each has "a history that antedates the individual's birth and is not accessible to his . . . recollection."<sup>109</sup> Institutions are, however, merely the

102. See, e.g., P. BERGER & T. LUCKMANN, *supra* note 4, at 1-18. The conception of society as a more or less fluid "social reality" is a characteristic of that branch of sociology which is known as the sociology of knowledge. *Id.*

103. *Id.* at 51.

104. *Id.* at 52 (footnote omitted) (emphasis in original). In presenting this model of social reality, Berger and Luckmann are deriving a sociological model from the work of philosophers who developed a phenomenological perspective on social relationships and society in general. See, e.g., ALFRED SCHUTZ ON PHENOMENOLOGY AND SOCIAL RELATIONS (H. Wagner ed. 1970) [hereinafter PHENOMENOLOGY AND SOCIAL RELATIONS]; PHENOMENOLOGY: THE PHILOSOPHY OF EDMUND HUSSERL AND ITS INTERPRETATION (J. Kockelmans ed. 1967).

105. See, e.g., PHENOMENOLOGY AND SOCIAL RELATIONS, *supra* note 104, at 72; P. BERGER & T. LUCKMANN, *supra* note 4, at 19-27.

106. PHENOMENOLOGY AND SOCIAL RELATIONS, *supra* note 104, at 72.

The reality of everyday life is taken for granted *as* reality. It does not require additional verification over and beyond its simple presence. It is simply *there*, as self-evident and compelling facticity. I *know* that it is real.

P. BERGER & T. LUCKMANN, *supra* note 4, at 23.

107. *Id.* at 53-67.

108. *Id.*

109. *Id.* at 60.

The institutions are *there*, external to him, persistent in their reality, whether he

result of routinized human activity.<sup>110</sup> They develop as individuals fall into routine patterns of behavior and develop concepts that are associated with these patterns of behavior.<sup>111</sup> They flourish because they are a means for establishing order in a chaotic universe:

Institutions . . . control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible. . . . To say that a segment of human activity has been institutionalized is already to say that this segment of human activity has been subsumed under social control.<sup>112</sup>

Because institutions are experienced as objective reality, they resist change.<sup>113</sup> This resistance occurs because the individuals whose activities are the present manifestation of a particular institution have been trained, or socialized, to believe in the validity of the institution as originally constituted.<sup>114</sup> Therefore, the participants will be reluctant or even unable to alter its basic structure. The extent to which institutional change will occur is a function of processes

likes it or not. He cannot wish them away. They resist his attempts to change or evade them. They have coercive power over him, both in themselves, by the sheer force of their facticity, and through the control mechanisms that are usually attached to the most important of them.

*Id.* The phenomenon is referred to as reification: "Reification is the apprehension of human phenomena as if they were . . . something else than human products—such as facts of nature, results of cosmic laws, or manifestations of divine will." *Id.* at 89.

110. *Id.* "It is important to keep in mind that the objectivity of the institutional world, however massive it may appear to the individual, is a humanly produced, constructed objectivity." *Id.*

111. "Institutionalization occurs whenever there is a reciprocal typification of habitualized actions by types of actors." *Id.*

112. P. BERGER & T. LUCKMANN, *supra* note 4, at 54-55. Institutions must also be "legitimated":

Legitimation 'explains' the institutional order by ascribing cognitive validity to its objectivated meanings. Legitimation justifies the institutional order by giving a normative dignity to its practical imperatives. . . . Legitimation not only tells the individual why he *should* perform one action and not another; it also tells him why things *are* what they are.

*Id.* at 93-94. Legitimation implies knowledge as well as values. Sophisticated legitimation structures "contain[ ] explicit theories by which an institutional sector is legitimated in terms of a differentiated body of knowledge. Such legitimations provide fairly comprehensive frames of reference for the respective sectors of institutionalized conduct." *Id.* at 94. In other words, legitimation comes to include a particular type of expertise, the exercise of which itself serves to legitimate the existence and operation of that institution. In pre-Norman England, the local courts were legitimated, as authority structures, by the fact that they were able to predicate their actions upon the force of custom; the availability of custom eliminated any perception that these communal courts were acting out of caprice, bias or as the result of any other impermissible, "illegitimate" factor. Weber's contribution was to isolate the concepts that can serve as legitimating predicates. See *supra* notes 87-100 and accompanying text.

113. See P. BERGER & T. LUCKMANN, *supra* note 4, at 45-72.

114. See *id.* In this context, the reference to the institution as "originally constituted" denotes the perception of the institution that has been transmitted to the individuals who are its present constituent parts. *Id.* at 60-72.

operating outside of a particular institution.<sup>115</sup> The extent to which change will be accepted within a particular institution is a function of the socialization that its members have received.<sup>116</sup>

Law is a fundamental institution in every society and was, therefore, one of the basic institutions of pre-Norman England. Pre-Norman law, of course, was an institution composed of the communal courts and their customary law.<sup>117</sup> By creating the king's court and assigning it the task of developing a common law, Henry II initiated a sociological revolution, setting in motion forces that would radically change "the law" as a social institution in England.

## 2. *Pace of Sociological Revolutions*

Sociological revolutions are inherently idiosyncratic, which means, among other things, that they proceed at their own pace. The pace of a sociological revolution is determined by: the nature and extent of the social relationships that are being altered; the forces that have set these alterations in motion; the temporal and geographical environment in which the alterations are occurring and a host of other equally unmanageable factors. One thing is certain, however, and that is that sociological revolutions cannot be effected overnight.

Indeed, this should be intuitively obvious after the discussion that was presented above. This Article is using the phrase "sociological revolution" to refer to dramatic changes in the structure and/or operation of social institutions. Social institutions are made up of individuals who have been socialized to believe in the validity of those institutions and in the means which they use to accomplish their activities. Institutions exist only because their constituent members are firmly committed to the legitimacy of their means and ends.<sup>118</sup>

Imagine, then, the effect which Henry II's creation of the "king's court" and its embarkation upon the invention of the common law must have had

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115. The issue of social change has always been a matter of great debate in sociology, and is, therefore, quite outside the scope of this Article. It should be intuitively obvious, however, that social institutions will be forced to change to reflect changes that are occurring in other aspects of society. One example of this process is the impact which the emancipation of the American slaves had upon existing social institutions. See, e.g., L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 192-201, 440-45 (1973).

116. See, e.g., P. BERGER & T. LUCKMANN, *supra* note 4, at 47-163. Again, this proposition is easily illustrated by referring to the changes that resulted from the emancipation of the American slaves. See, e.g., L. FRIEDMAN, *supra* note 115, at 440-45; C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2d rev. ed. 1966).

117. See *supra* section I(A). Arguably, of course, these communal courts had not yet evolved into a formal social institution, as they met only sporadically and were not characterized by the articulation of social roles that belonged only to the operation of "the law" as a separate and distinct activity. See, e.g., T. PLUCKNETT, *supra* note 13, at 139-55, 215-30.

118. See, e.g., P. BERGER & T. LUCKMANN, *supra* note 4, at 47-92; see generally M. NATANSON, *THE JOURNEYING SELF: A STUDY IN PHILOSOPHY AND SOCIAL ROLE* (1970).

upon the social institution of the law in twelfth and thirteenth century England. In the space of little more than a century, the law was being transformed and local custom, which had been legitimate legal authority, was being disregarded. This particular sociological revolution may have succeeded simply because Henry II set it in motion by establishing an entirely new aspect of an existing social institution rather than by attempting to replace existing law in one fell swoop. If, for example, he had attempted to re-form English law by simple legislative fiat the effect of which was to eliminate customary law all at once, it is highly likely that the attempt would have failed simply because it would have allowed no period of adjustment. Such a period of adjustment is necessary in order to allow a shift in the orientation of the individuals who constitute a particular social institution.<sup>119</sup>

The first evidence of this shift was the development of a cadre of professionally trained jurists. As was noted above, professionally trained jurists were necessary because the law had ceased to consist of customs which were available to every member of society and was well on its way to becoming a true modern social institution, complete with its own stock of idiosyncratic expertise.<sup>120</sup>

If this was true, then why did it take so long for the "new law" to implement its own legitimating structure, that is, the rule of precedent? Why did the common law persist for so long in using cases only as evidence of custom?

The answer lies in the constraints that attend upon any sociological revolution. Remember that English law had been customary law for many centuries by 1178, when the new court was created. Although customs were occasionally recorded, "it was typical of customary law that there was no need for it to be written down"<sup>121</sup> because the force of custom lay not in

119. It is true that prior to 1178, when Henry II created his new court, English law does not seem to have existed as a formal social institution complete with a clearly defined institutional structure and differentiated social roles within that structure. See, e.g., P. BERGER & T. LUCKMANN, *supra* note 4, at 72-79. "All institutionalized conduct involves roles" and, indeed, "roles represent the institutional order." *Id.* at 74.

This representation takes place on two levels. First, performance of the role represents itself. For instance, to engage in judging is to represent the role of judge. The judging individual is not acting 'on his own,' but *qua* judge. Second, the role represents an entire institutionalized nexus of conduct. The role of judge stands in relationship to other roles, the totality of which comprises the institution of law.

*Id.* at 74-75. Instead, the institutional courts appear to have operated in a sporadic fashion, with members of the community assuming their "judicial" roles as the need arose. See *supra* section I(B)(1). This does not mean, however, that the law did not exist as a social institution, nor does it mean that there would not have been an allegiance to the legitimacy of the existing social structure and its reliance upon customary law. See, e.g., P. BERGER & T. LUCKMANN, *supra* note 4, at 56-67. Indeed, such an allegiance is likely to have been particularly tenacious given that it was diffused among the entire male populace rather than being confined to a particular subset of that populace, as would be the case in later centuries.

120. *Id.* at 117-25.

121. T. PLUCKNETT, *supra* note 13, at 313. Plucknett goes on to note that "there can be no

its recordation but in the reiteration of empirical patterns that had been established long before.<sup>122</sup> The exercise of authority was legitimate if and only if it accorded with the force of custom; although the recordation of past practice could serve as evidence of custom, it had no legitimating value in and of itself.

After one understands this, it is possible to understand the laboriousness with which England went about adopting the rule of precedent and the events that were described in section I(A) fall into place as essential parts of that process. Prior to Bracton, although the courts were keeping records of their actions, no one consulted those records. Judges did not consult these records because they were able to remember what they had done in prior, similar cases<sup>123</sup> and because the records were not available to them.<sup>124</sup> Moreover, although "attorneys" had appeared by Bracton's time, they did not consult the case records either because it did not occur to them to do so, or because they did not have access to the records or both.<sup>125</sup> It is far more likely, however, that the legal artisans of this era did not consult case records because it did not occur to them to do so, rather than because the records were not available. Once it became apparent that there was some utility in consulting such records, means were then developed by which they were made available.<sup>126</sup>

Judges and attorneys did not think to consult case records because their conception of law was rooted in a strong tradition of oral advocacy. Written pleadings had not yet evolved; from Bracton's time until at least the fifteenth century, court proceedings were conducted orally.<sup>127</sup> "Cases" consisted of oral argument and "memoranda" of arguments noted on the plea rolls.<sup>128</sup>

doubt that many communities had notable bodies of custom without ever possessing a" written record of their customs. *Id.*

122. Plucknett notes that "[t]he communal courts . . . were customary in their origin, and declared customary law whose sanction was derived from custom." *Id.* at 307.

123. Judges may have been the only ones who would have been interested in the outcome of prior decisions, as it took some time for a legal profession to develop. *Id.* at 215-30. In discussing the Year Books, which encompass a much later period, Plucknett notes that "[t]here are quite frequent cases . . . where we find judges or counsel mentioning previous decisions. They seem generally to quote from memory; sometimes they give us the names of the parties, but not always." *Id.* at 344-45.

124. See *supra* section I(A)(2).

125. Indeed, access to the plea rolls might not have mattered. At least during this early period, the "record" was the "official memory" of the judges, while the plea roll was simply the notations that had been made by the court's clerk. T. PLUCKNETT, *supra* note 13, at 403 n.5; Thorne, *Courts of Record*, 40 W. VA. L.Q. 347, 352 (1934).

126. See *supra* section I(A).

127. A successful advocate "depended upon quick thinking in order to understand his own case and his opponent's, for it would seem that hardly any work was done on a case before it came into court." T. PLUCKNETT, *supra* note 13, at 222.

128. *Id.* at 401-02:

If we look at the earlier plea rolls, we shall find that they are brief and informal. Their object is merely to serve as memoranda of the proceedings for official use.

In addition, during this period, legal education emphasized the observation of proceedings in court.<sup>129</sup> Would-be attorneys observed oral arguments in order to develop the capacity for making such arguments. Consequently, they had little, if any, inclination toward written sources.<sup>130</sup>

As long as cases consisted of oral arguments, the common law courts measured their actions against the actions which had been taken in earlier, similar controversies, so that the legitimacy of their decisions derived from the extent to which they conformed to past practices. Although this system may have been known as the "common law" and although it included substantive areas that were unknown to customary law, its *modus operandi* was that of customary law.<sup>131</sup>

This changed once written pleadings appeared: instead of "memoranda," clerks began to write descriptions of oral arguments, or "pleas," onto the plea rolls. This development forced lawyers to conclude "that what really matters . . . is not so much what they say (as under the old system) as what the clerks write on the roll."<sup>132</sup> Although this development had certain advantages,<sup>133</sup> it inculcated a significant amount of paranoia because lawyers

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They were not for the use of the parties, and the parties had no control whatever over the form in which their case was enrolled.

*Id.* at 402.

129. According to Plucknett, legal apprentices had "a special enclosure, humorously called the 'crib,' from which they could follow the proceedings in court." *Id.* at 218. Plucknett is describing legal education in the thirteenth century at a time after the law schools that had existed in London "were closed by royal edict." *Id.* at 219. During this era, judges often explained their decisions "'for the sake of the young men who are present,' and down to the eighteenth century judges in court would bear in mind the fact that a judgment might be expanded into a lecture for the law students who were present." *Id.* at 346.

130. Plucknett suggests that the practice of educating attorneys in court rather than in universities gave "a very different complexion to English law." *Id.* at 219. Indeed, perhaps if legal education had been in the hands of the universities at this time, the rule of precedent might have been established much earlier than it was, as a university education would have accustomed future members of the bar to using written sources as the source of legal authority. Plucknett notes that English law differed from the legal systems that were developed on the continent in that English lawyers were not educated in canon law and so did not learn their law from "texts and text-books." *Id.*

131. This proposition is easily established by means of an illustration: In 1401, *Beaulieu v. Finglam* was tried to judgment at the Easter Term of the Court of Common Pleas. J. WALLACE, *supra* note 47, at 84-86. The case was included in Y.B. 2 Henry 4, fo. 18, pl. 6 (1401). *Id.* at 82. It was an action for damage to a neighbor's house; the damage was alleged to have resulted from a fire that the defendant negligently caused to occur. *Id.* at 84. Finglam's counsel argued that his client was entitled to judgment because he had "counted on a common custom of the realm." The court's response was "Pass over that, for the common law of the realm is the common custom of the realm." *Id.* at 85.

132. T. PLUCKNETT, *supra* note 13, at 403.

133. "[L]awyers could free themselves from the old bonds of the spoken [pleas] and indulge in tentative pleadings and arguments, trusting that nothing will be recorded until the informal altercation has finished, and the parties have reached definite positions." *Id.* at 403. Plucknett also notes that "the early Year Books are in consequence full of instances of counsel 'licking their plea into shape' . . . in open court," an opportunity that was considered "an advance from the old system where oral [pleas] were binding." *Id.*



were denied access to the plea rolls and "could only guess what was on" them.<sup>134</sup> This eventually led lawyers to draft their own written pleadings, thereby "secur[ing] absolute control of what was written on the rolls."<sup>135</sup>

As written pleas emerged, "cases" were transformed from oral arguments and memoranda of those arguments into something else. This "something else" became the foundation for the modern conception of precedent. "Custom" and "precedent" are superficially similar in that both emphasize consistency of outcome; that is, both systems attempt to maintain consistency of result in situations which present identical or nearly identical factual parameters. The distinction between them lies in the manner in which they go about achieving their results.

In a system of customary law, results are dictated by the extent to which a particular factual situation resembles factual situations for which custom has devised a resolution.<sup>136</sup> Thus, in England, customary law was legitimated by empirical consistency. During the period when the common law was functioning as a species of customary law, the courts recited maxims in order to link a particular exercise of judicial authority with custom, "reminding" the populace of the empirical referent.<sup>137</sup> Judicial maxims not only served this mnemonic, "reminding" function, but also operated as ritualistic formulae the intonation of which provided symbolic assurance of legitimation. Such formulae were necessary due to the absence of any tangible manifestation of custom.

By contrast, in a system that is predicated upon precedent, the legitimating device is not simply empirical consistency but "rational consistency," which requires that a particular result be brought within a particular "rule of law." These "rules of law" are the result of prior exercises of judicial authority. This is the fundamental difference between a system of customary law and a system of precedential law: in the former, the legitimation of judicial action is a function of empirical consistency; in the latter, although empirical consistency is a necessary element, the legitimation function is provided by an abstraction, by a "rule of law."<sup>138</sup>

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134. *Id.* at 403.

135. *Id.* at 406.

136. By its very nature, custom is reluctant to develop new remedies for situations that have not arisen before. Indeed, the argument that the early "common law" continued to function as a system of customary law is only strengthened by that law's notable reluctance to grant relief in any instance that could not be conformed to one of its existing writs or "forms of action." For a discussion of the conceptual underpinnings of such a system of law, see C. RADDING, *THE ORIGINS OF MEDIEVAL JURISPRUDENCE: PAVIA AND BOLOGNA 850-1150* (1988) [hereinafter C. RADDING, *MEDIEVAL JURISPRUDENCE*]; C. RADDING, *A WORLD MADE BY MEN: COGNITION AND SOCIETY 400-1200* (1985) [hereinafter C. RADDING, *A WORLD MADE BY MEN*].

137. What appears to be such a maxim is included in *Beaulieu v. Finglam*, which is described *supra* note 131. In *Beaulieu*, one of the justices of the Court of Common Pleas is recorded as having made the following observation: "If a man kill or slay another by misfortune, he shall forfeit his goods; and it is necessary that he get his character of pardon as of grace." J. WALLACE, *supra* note 47, at 85. This statement sounds very much like the type of maxim that would have been used to legitimate the exercise of judicial authority in a system of customary law.

138. For a theoretical perspective on the relationship between particular categories of intel-

In a fully developed system of precedential law, this "rule of law" will be recognized as the product of judicial activism.<sup>139</sup> The transition to a fully developed system of precedential law can, however, be accomplished only by passing through an intermediate stage which permits the accommodation and gradual elimination of the tension between the empirical legitimacy of customary law and the rational legitimacy of precedential law.

That is, the transition must include an intermediate stage in which judicial decisions are accorded some quantum of legitimate authority but in which the legitimacy of this authority is buttressed by a legitimating referent that has an objective existence that is external to the decisionmaker. This referent is essential in order to overcome the natural human reluctance to make fundamental shifts in the nature of one's social reality<sup>140</sup> and to provide some assurance of stability in decisionmaking.<sup>141</sup> The latter consideration is of particular importance in pre-industrial societies which are characterized by a distaste for social innovation.<sup>142</sup>

English law moved through this intermediate stage between the thirteenth and nineteenth centuries. During this transitional period, judicial decisions possessed a measure of authority but that authority was grounded in the external referent and not in the decisions *qua* decisions.<sup>143</sup> In the early part of this stage, when the common law's legitimacy depended upon its identity to custom, judicial decisions were valued as "evidence of custom."<sup>144</sup> In the latter part of this stage, when the common law's legitimacy depended upon an external referent, judicial decisions were valued as the means by which this referent manifests itself. This latter period was characterized by the insistence that judges do not make law but, instead, simply "discover" preexisting natural law.<sup>145</sup>

Bracton's contribution comes at this stage, for it was Bracton who "invented" the notion that one could examine particular judicial decisions in order to ascertain the extent to which the empirical manifestation of "law" had departed from its underlying source of legitimation.<sup>146</sup> Bracton "in-

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lectual operations and the social context from which they emerge, see J. WILLER, *THE SOCIAL DETERMINATION OF KNOWLEDGE* (1971).

139. See, e.g., J. FRANK, *LAW AND THE MODERN MIND* 127-58 (1949). "The law . . . consists of decisions, not of rules. . . . [W]henever a judge decides a case he is making law." *Id.* at 138 (footnote omitted) (emphasis in original); W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964).

140. See, e.g., P. BERGER & T. LUCKMANN, *supra* note 4, at 104-28.

141. See *infra* section III(A).

142. See, e.g., P. BERGER & T. LUCKMANN, *supra* note 4, at 116-28.

143. See, e.g., 1 W. BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* \*69.

144. "It is the custom which governs the decision, not the case or cases cited as proof of the custom." J. WALLACE, *supra* note 47, at 347.

145. See *supra* section III.

146. Bracton's application of this notion is apparent in his use of the cases which he relies upon in his treatise, and is evidenced by the instances in which his "note book" identifies a particular case as falling into "error." See, e.g., BRACTON'S NOTE BOOK, *supra* note 25, at 81; see also *supra* section I(A)(2).

vented" the "artifactual" use of cases, the practice by which particular judicial decisions are used as evidence of an underlying source of legitimation. For Bracton, that source was a type of customary law.<sup>147</sup> Later, the source of legitimation changed but the methodology remained the same. For example, judicial decisions were valued only as artifacts of an underlying, external source of legitimation. Once judicial decisions came to have value, even artifactual value, a market arose for accounts of those decisions.

However, as long as judicial decisions were valued only as artifacts of an underlying legitimation source, the legal system could tolerate a fair degree of ambiguity in its accounts of those decisions. This ambiguity was permissible because the artifactual value of the decisions lay in their results rather than in the rationale that was offered to sustain the results.<sup>148</sup> Consequently, the reports of this era display a high degree of idiosyncrasy in their accounts of judicial proceedings.<sup>149</sup>

This idiosyncrasy also resulted from another factor: because the legal system was still evolving from a system that was predicated upon oral invocations of an external source of legitimation, there was little, if any, reverence for the idea of a written "record."<sup>150</sup> This irreverence is expressed in the persistent observations that written case reports are "not authority"<sup>151</sup>

147. Bracton's whole purpose is to reconstruct, and, if possible, to revive the law of nearly a generation ago; he would put the clock back and restore the court's custom as it used to be in its best period, and it is as evidence of that custom that he uses his cases.

T. PLUCKNETT, *supra* note 13, at 344.

148. *See infra* section III(A).

149. Speaking generally, we may say that the older contemporary reports sometimes contradict one another, and sometimes confirm one another even on points which, but for their concurrence, we should think had hardly been decided. It is constantly observable, moreover, than an inferior—and sometimes in itself, only, a positively unintelligible—report will contain certain things which enlighten and render more complete another which, as a whole is much more accurate and valuable. Besides this, one reporter will give you the judgment of the court, in the form of an abstract principle; another will state you the facts on which it went; a third perhaps record the arguments of counsel; a fourth, last of all, supply something omitted by each of the others.

J. WALLACE, *supra* note 47, at 42.

150. *See* H. MAINE, *ANCIENT LAW* 8 (1917).

151. We find it stated . . . not that a reporter is inaccurate, not that reliance cannot be placed upon his report, or that he is of bad authority, but that he is 'not authority.' Take, for example, the book known as Popham's Reports. Chief Justice Hyde, in quoting a case which is found there, while he vouches for the accuracy of the case (*having heard it*), yet speaks of 'the authority of the book as none.' So in regard to the Reports of Sir John Davies, a book of undoubted accuracy: when these were cited, the court, not denying the accuracy of the Reports, yet informed counsel that the book was not 'canonical;' that is, . . . not authoritative, not having the force and binding efficacy of a rule. . . . In another instance, Lord Hardwick . . . refers to Fitzgibbon's Reports, but adds: 'Which I do not care to rely on, as it is of no authority; though this and some other cases are well reported in it; this particularly finely.'

J. WALLACE, *supra* note 47, at 31-32 (footnotes omitted) (emphasis added).

and in the lack of concern with the literal accuracy of such reports.<sup>152</sup> It also appears in the distinction between a "case report" and the "opinion of the court," with the former being valued more than the latter.<sup>153</sup>

This disrespect for written accounts of prior cases had a distinct, pragmatic advantage for those who occupied the bench at this time: if written reports of prior cases were inaccurate, then they were of no consequence, so that judges were free to ignore or disagree with prior, adverse decisions.<sup>154</sup> It also appears, however, that jurists were not above using written reports to their advantage by citing a case as authoritative even though it had been "mis-reported."<sup>155</sup>

Although both practices may strike modern lawyers as peculiar, to say the least, they were perfectly rational in a legal system which accorded significance to particular judicial decisions only to the extent that they were perceived as evidence of an underlying, external source of legitimation.<sup>156</sup>

152. On this issue, the reader should refer back to the discussion in section I(A)(4), *supra*, of the reports issued by Sir James Burrow. Burrow, of course, "nowhere profes[s]e[d] to follow verbatim the opinions as delivered" but, instead, assured his readers only that "the case and judgment and the outlines of the *grounds* or reasons of the decisions are right." J. WALLACE, *supra* note 47, at 448 n.2 (emphasis in original).

153. In his discussion of the reports that were issued by Sir James Burrow, Wallace's practice of creating a report that included three parts, i.e., the statement of the facts, arguments of counsel and the "opinion or judgment of the court," and then goes on to criticize the style of reporting that succeeded Burrow's:

Burrow's influence on the style of reporting remained in England for many years. . . .

Of later times, by a departure from Sir James's plan, and referring the reader to the 'opinion of the court' for the case, a slovenly style has frequently been exhibited.

The result has been . . . [t]hat the opinion becomes the whole report, . . . its value as a report diminishing in the exact ratio of its excellence as an opinion or judgment.

J. WALLACE, *supra* note 47, at 450. Wallace also observes that "when the Judge turns himself into reporter, and undertakes to perform the duties of that person, it is then that person should, in presenting his report, relegate the Judge to his proper place, and confine the Judge's work to the judicial duty alone." *Id.* at 450-51; see Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48 (1981).

154. Lord Campbell, Chief Justice of the Queen's Bench, is reported . . . to have said, in referring to a dictum reported by Burrow in *Rex v. Wilkes*, as uttered by Lord Mansfield, with which dictum the Queen's Bench did not agree:—

'As Lord Mansfield himself has said, Sir James Burrows's [Burrow's] Reports were not always accurate.'

J. WALLACE, *supra* note 47, at 451 (footnotes omitted); see also T. PLUCKNETT, *supra* note 13, at 349 ("Another possibility was to blame the reporter for cases one did not like . . . a device often used by Mansfield").

155. J. WALLACE, *supra* note 47, at 33. Wallace says that:

In one case, Lord Rosslyn even speaks of a book as of 'considerable authority,' yet, referring to a case reported there, calls it '*totally* misreported.' And Sir William Grant, in another case, uses similar language about the same book, the technical 'authority' of which he does not call in question.

*Id.* at 33 (footnotes omitted) (emphasis in the original).

156. As Sir William Holdsworth has pointed out, there were: [C]ircumstances under which the courts considered themselves free from any obligation to follow prece-

Because decisions were accorded only artifactual significance, courts ranked reports in terms of the extent to which they were "recommended":

[T]ake the Year Books. The . . . judges not only 'allow the publishing' of the work, but also 'recommend the same to all students of the law,' . . . Moore is not only 'allowed,' but [is] 'approved,' . . . Yelverton is 'allowed and approved for the common good.' . . . All these are books of authority. Descend, however, along the scale of merit, and you find that Keble, Siderfin, Carthew, and Bulstrone . . . are merely 'allowed;' and that the Reports in Chancery are only 'licensed.'<sup>157</sup>

The ranking of case reporters is a reasonable precaution in a system in which the judicial decisions simply "evidence" what the law actually is. Such a ranking provides the consumers of such reports with certainty as to the extent to which it can rely upon a particular account of a particular decision.<sup>158</sup>

This changed with the completion of the transition to a system of precedential law in which legitimation derives from "logically deduced propositions."<sup>159</sup> When legitimation is derived from "logically deduced propositions" appearing in properly rendered judicial opinions, these opinions become a valuable legal commodity because they constitute "the law." Future cases are decided in accordance with these "precedents," which have become the source of law.<sup>160</sup> This is very unlike the older system in which "precedents"

dents. If following them would lead to 'inconvenient' results, then it was arguable that the precedents did not represent the true state of the law.

T. PLUCKNETT, *supra* note 13, at 349 (footnote omitted).

157. J. WALLACE, *supra* note 47, at 34-35 & n.3. Wallace is describing the state of affairs that prevailed under an act which was passed in 1662 and which expired in 1692. It provided that "all books concerning the common laws of the realm should be printed by the special allowance of" certain officials. *Id.* The purpose was to eliminate "abuses" in the printing of case reports. *Id.*

158. Of Barnardiston, Lord Mansfield 'absolutely forbade the citing;' yet he said nothing against the correctness of the particular case quoted; nay, admitted that the reporter *did surprisingly often stumble upon what was right*; and . . . *made no objection against receiving other evidence to show exactly the same thing which was found in the interdicted volume.*

*Id.* at 32 (emphasis added). Wallace also describes an instance in which Lord Mansfield: [T]old Mr. Impey that the book was one which 'he should not have quoted;' . . . Mr. Impey receives Lord Mansfield's remark *exactly as if it were the overruling of a point of evidence: 'the book is excluded; there's an end of that;'* and what the counsel meant to show by it *he shows independently of it, by producing a certificate to the same effect from the register's book.*

*Id.* at 32-33 (emphasis added).

159. MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 8-9; *see infra* section III(A).

160. "Judicial decisions serve two basic purposes: (1) to settle the particular dispute before the court, and (2) to establish the law that is used to decide other cases." Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 481 (1986). A complete discussion of the rule of precedent is beyond the scope and ambition of this Article; for such a discussion, see, e.g., B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); R. POSNER, *THE FEDERAL COURTS* 247-58 (1985); LeFlar, *Sources of Judge Made Law*, 24 OKLA. L. REV. 319 (1971).

simply evidenced "custom" and an "inconvenient" precedent could be ignored.<sup>161</sup>

Nevertheless, in a system of precedential law it is still possible to depart from prior practice. Such departures can be justified by "distinguishing" the present case from precedential cases or by "reconsider[ing] and discard[ing] a previous decision, either because on reflection it appears to have been decided incorrectly or because changes in law or society have made it obsolete."<sup>162</sup> The system is able to tolerate such departures because it is predicated upon the recognition that judicial decisions "make law,"<sup>163</sup> as opposed to the earlier insistence that judicial decisions simply "reveal" or "discover" the law.

### C. Case Law as Precedent—United States

The American experience is for a time the British experience, which is to say that what became American law began as English law. Consequently, from the earliest years of the colonial period until some time in the nineteenth century, American law existed in the intermediate stage between customary law and a fully articulated system of precedential law.

During this period, reports of judicial decisions were valued only to the extent that they served as "evidence" of an external legitimating referent. Originally, this referent was custom and later it became "natural law."<sup>164</sup> Because cases were valued only as artifacts, case reporting was an idiosyncratic affair which replicated the English experience in many respects. After American law completed the transition to a fully articulated system of precedential law,<sup>165</sup> the issuance of case reports became a more rigorous exercise.

#### 1. Intermediate Stage<sup>166</sup>

Since colonization commenced more than three centuries after Bracton issued his treatise, American law began with some appreciation of the role

161. See, e.g., T. PLUCKNETT, *supra* note 13, at 348-349. Plucknett notes that, according to Lord Coke, "'two or three precedents' cannot prevail against a long *catena* of older authority." *Id.* at 349 (quoting *Slade's Case*, 4 Co. Rep. 91, 92, 76 Eng. Rep. 1072, 1074 (K.B. 1602)).

162. R. POSNER, *supra* note 160, at 247-48.

163. See, e.g., J. FRANK, *supra* note 139, at 159-71.

164. See *infra* section III(A).;

165. Throughout the discussion, reference will be made to the "completion" of this transition. Such references are made to simplify the structure and progress of the discussion and are not intended to connote that the transition to a reliance upon written precedent was a straightforward, objective process that was completed at a date and time certain. Instead, as those students of sociological phenomenon and others should suspect, transitions of this type are a far more nebulous phenomenon, a phenomenon the accomplishment of which is uncertain in length and often idiosyncratic in its effects.

166. The descriptions which follow are not intended as comprehensive treatments of the publication of case reports in the United States but are, instead, simply intended to provide an empirical framework for the analysis which appears in section III, *infra*. For a comprehensive treatment of this phenomenon, see, e.g., Aumann, *American Law Reports: Yesterday and Today*, 31 OHIO ST. L.J. 331 (1938); Surrency, *supra* note 153, at 48.

that judicial decisions could play in the articulation and application of the common law. This appreciation did not, however, produce a system of printed case reports. Although there was a demand for printed statutes, “[a] corresponding demand for copies of judicial decisions did not exist.”<sup>167</sup>

Since “[t]here were no American reports,”<sup>168</sup> lawyers relied upon English case reports and upon their “notes” of American cases.<sup>169</sup> The revolution yielded a determination to create “a distinctively American body of law,” which resulted in a distaste for English cases and an emphasis upon the decisions of American courts.<sup>170</sup> These decisions were used in an artificial, rather than a precedential, sense; as “evidence” of underlying “principles” of law rather than as law in and of themselves.<sup>171</sup> Consequently, the means by which decisions were made available to the legal profession differed from those that are in use today.<sup>172</sup> For one thing, there was an incredible proliferation of reporters which varied widely in the style, accuracy and frequency of their reports.<sup>173</sup>

As an example, in 1798 Jesse Root published a volume of Connecticut case reports.<sup>174</sup> This volume did not, however, consist of verbatim reports of opinions drafted by judges but, instead, included “brief notes, recounting some point of interest in a trial or appellate case.”<sup>175</sup> One note “reports” the case of *Bacon v. Minor* as follows:

167. Surrency, *supra* note 153, at 49.

168. L. FRIEDMAN, *supra* note 115, at 282.

169. *Id.* English law books were apparently imported from the very beginning, and “[t]he reports of English decisions continued to enjoy popularity with the American legal profession well into the Nineteenth Century.” Surrency, *supra* note 153, at 49.

[L]egal education . . . encouraged students to prepare notebooks . . . containing the principles of law extracted from statutes and decisions, and arranged by topics. These notebooks were later used in practice. These written sources of law were useful to colonial and later lawyers, so that they were much less dependent upon published volumes than are present members of the profession.

*Id.* at 50.

170. Surrency, *supra* note 153, at 54-55; *see also* Aumann, *supra* note 166, at 331-35.

171. “Colonial and early Nineteenth Century lawyers relied more on general principles of law than on detailed fact comparisons with reported cases.” Surrency, *supra* note 153, at 66.

172. “Lawyers in different eras have reported cases to suit their needs, and methods of reporting have not so much progressed as merely changed in accordance with the changing needs of the profession.” *Id.* at 48-49.

173. “Previous to the year 1804, but eight volumes of indigenous reported cases had been printed in America; and the lapse of only one-fifth of a century has added to the number one hundred and ninety volumes, exclusive of many valuable reports of single cases.” 9 N. AM. REV. 377 (1824), *quoted in* Aumann, *supra* note 166, at 331, 335 n.20; *see also* L. FRIEDMAN, *supra* note 115, at 282-285; Aumann, *supra* note 166, at 332-43; Surrency, *supra* note 153, at 48-60.

174. The full title was “Reports of Cases Adjudged in the Superior Court and Supreme Court of Errors, From July A.D. 1789 to June A.D. 1793; With A Variety of Cases Anterior to That Period, Prefaced With Observations Upon the Government and Laws of Connecticut. To Which is Subjoined, Sundry Law Points Adjudged, and Rules of Practice Adopted in the Superior Court,” *quoted in* L. FRIEDMAN, *supra* note 115, at 284.

175. L. FRIEDMAN, *supra* note 115, at 284.

Action of defamation; for saying that the plaintiff had forged a certain note. Issue to the jury.

Daniel Minor was offered as a witness and objected to, on the ground that he was a joint promissor in said note, and is sued for speaking the same words. By the Court—Not admitted being interested in the question.<sup>176</sup>

Presumably, Root's audience found this "report" useful;<sup>177</sup> contemporary lawyers are likely to regard it as having the precedential value of one of the headnotes that are appended to modern case reports as research aids. It is true that both were prepared by the reporter rather than by the court. Modern lawyers accord no legal significance to such appendages<sup>178</sup> but at the time Root's volume appeared, that was not the case. This "report" was offered and presumably used as a "precedent" by Root's contemporaries, which illustrates the extent to which conceptions of precedent have changed in the past two centuries.<sup>179</sup>

Root's reports illustrate one type of early reporter. Others included "judicial opinions" that were drafted from notes taken by the reporter<sup>180</sup> while still others included opinions, "headnotes" and arguments of counsel.<sup>181</sup> Additionally, "pamphlet" reporters provided accounts of noteworthy trials.<sup>182</sup> All of these reporters supplied early nineteenth century lawyers with their "precedents," but "precedents" were not limited to printed case reports:

Legal literature . . . contains frequent references to unreported decisions. Wharton's Digest, published in Philadelphia in 1822, refers to unreported

176. *Bacon v. Minor*, 1 Root 258 (Conn. 1791), quoted in L. FRIEDMAN, *supra* note 115, at 284.

177. This is perhaps because of its "holding," i.e., that Minor's testimony "was not allowed on the grounds that [he] had a financial stake in the matter litigated." L. FRIEDMAN, *supra* note 115, at 284 n.53.

178. "[H]eadnote paragraphs are not authority but only indexes to it." M. PRICE & H. BITNER, *supra* note 2, at 96.

179. It also illustrates the proposition that was adduced earlier, i.e., that during this era case reports were used as *artifacts* of law rather than "as law." See *supra* section I(B)(2). Root's reports are still a recognized case reporter, which apparently means that *Bacon* can still be cited as a reported case notwithstanding its dramatic stylistic departure from modern case reports. According to the *Bluebook*, Root's reports can be cited as published reports of the cases that appear therein. See A UNIFORM SYSTEM OF CITATION 181 (14th ed. 1986) ("Cite to Conn., Day, or Root, and to A. or A.2d if therein"). The citation form that is given is the form for "reported" cases, as opposed to the citation form that is provided for "unreported" cases. See M. PRICE & H. BITNER, *supra* note 2, at 50-51.

180. The first volume of DALLAS REPORTS includes manuscript records of decisions of the Supreme Court of Pennsylvania, which were obviously written by persons in attendance when the opinions were pronounced. Their original authors are not known.

Surrency, *supra* note 153, at 51 (footnote omitted) (capitals in original).

181. *Id.* at 56.

182. *Id.* at 52-53. "Pamphlet reporting continued into the nineteenth Century, and some pamphlets were originally considered . . . as part of the decisional literature of the states." *Id.* at 52 (citing D. HOFFMAN, A COURSE OF LEGAL STUDY 659, 660 (1836)). "The PENNSYLVANIA STATE TRIALS, reported by E. Hogan, is often considered as part of a complete library of Pennsylvania reports." *Id.* at 53 (capitals in original).



decisions as did Dane's Abridgement, published in Boston during the 1820's. . . . This evidence suggests that in many jurisdictions a small cohesive bar used non-printed sources as a matter of course.<sup>183</sup>

Thus, American law reports, like their English counterparts, were idiosyncratic, with a high level of ambiguity. The demise of idiosyncratic law reporting began with the appearance of statutes requiring that judges issue written opinions "rather than merely stat[ing] them orally."<sup>184</sup> Such statutes revealed the extent to which American law was oral law while setting in motion its destruction and replacing it with a system which depends upon written precedent.<sup>185</sup>

Idiosyncratic law reporting's demise was hastened by another innovation, "the appointment of official court reporters, whose duty it was to attend the courts and publish judicial opinions."<sup>186</sup> The Supreme Court made the first such appointment in 1790 and several states followed suit.<sup>187</sup> The appointments resulted from the belief that law was "a science, a body of knowledge that had its own structure and was reducible to rational propositions."<sup>188</sup> This "reduction" was to be achieved scientifically, by using empirical data such as case reports to "identify the larger structure" of the underlying "natural law" and map out its contours.<sup>189</sup>

183. Surrency, *supra* note 153, at 51 (footnotes omitted). Surrency notes that this practice occurred in Alabama, and quotes an instance in which a Pennsylvania court relied upon a "manuscript note" of an unpublished English decision. *See id.* at 51 n.10 (quoting Clayton v. Clayton, 3 Binn. 476, 485 (Pa. 1811)).

184. Surrency, *supra* note 153, at 55; *see also* M. PRICE & H. BITNER, *supra* note 2, at 94 ("In the United States, contrary to English practice, opinions of courts are read instead of being delivered orally"). In 1785, Connecticut adopted a statute requiring that its judges give their opinions serially, including their rationales, and put their opinions in writing. Surrency, *supra* note 153, at 55. Other states followed suit.

185. *See* Radin, *The Requirement of Written Opinions*, 18 CALIF. L. REV. 486 (1930).

186. Surrency, *supra* note 153, at 55.

187. "'Official' reporting began with the appointment in 1790 by the Supreme Court of the United States of an official reporter, resulting in the initial volume of the *United States Reports* (1 Dallas), which, however, contained nothing but Pennsylvania Supreme Court reports." M. PRICE & H. BITNER, *supra* note 2, at 95. In 1804, both Massachusetts and New York enacted statutes authorizing the appointment of "official" reporters and other states followed their lead. Surrency, *supra* note 153, at 56-60. The Massachusetts statute imposed upon the reporter the duty to obtain and publish accurate reports. *Id.* at 56.

188. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15 (1987). They also resulted from a desire to, in the modern vernacular, "keep judges honest." One observer noted that when judges "know that their opinions may be severely scrutinized" and when they "write their opinions at length, and themselves prepare them for the press, they have every inducement . . . to be laborious, accurate, and impartial." 27 N. AM. REV. 179-80 (1828). Others made similar observations. *See, e.g.*, Aumann, *supra* note 166, at 331, 337 (citing 1 C. KENT, COMMENTARIES ON AMERICAN LAW \*455, 462, 463). While this reflects a nascent realization of the role judges play in the creation of the law, it has no profound significance for this discussion.

189. Berring, *supra* note 188, at 16-17. "A solemn decision upon a point of law arising in any given case, becomes an authority in a like case, because it is the highest evidence we can have of the law applicable to the subject . . ." J. KENT, COMMENTARIES ON AMERICAN LAW 476 (14th ed. 1896).

“Because these early reports were cited by the name of the reporter, a definite feeling persisted that the reporter was far more important than the judges who rendered the decisions.”<sup>190</sup> Consequently, certain reports were valued more highly than others.<sup>191</sup> Such preferences disappeared once states required that their reports be identified by the name of the jurisdiction rather than by the name of the reporter.<sup>192</sup> With this, the whole tenor of law reporting changed: reports no longer reflected the efforts of a particular reporter but, instead, appeared in volumes which displayed a standardized numbering system and a standard nomenclature.<sup>193</sup>

## 2. Contemporary Reports

The perception that cases constituted the *substance* of the law prompted the appearance of “official” reporters, and by the end of the nineteenth century, most jurisdictions had established a system of “official” reports.<sup>194</sup>

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190. Surrency, *supra* note 153, at 58 (footnote omitted) (citing Rudd, *Reports and Some Reporters*, 47 AM. L. REV. 481 (1913); *Reports and Reporters*, 24 AM. JURIST 335 (1841)). And, indeed, this was true in certain respects; it is difficult for modern lawyers to comprehend the extent to which these early reporters “participated” in the creation of their reports.

191. The reports issued by Judge Isaac Blackford of the Indiana Supreme Court between 1817 and 1841 are an example. *See, e.g.*, Surrency, *supra* note 153, at 57. A similar state of affairs prevailed with regard to the reporters of the decisions of the United States Supreme Court: “Names like Wheaton, Dallas, and Howard, are all better known than some of the Nineteenth Century justices” of that Court. *Id.* at 58. This paralleled the English practice of “ranking” reporters according to the degree to which they were “authorized.” *See supra* section I(B)(2).

192. Surrency, *supra* note 153, at 58. Connecticut passed such a measure in 1814; other states followed suit, so that the “nominative reporters” had disappeared by the close of the nineteenth century.

Formerly, the reporter commonly gave his name to his series of reports, as Dallas, Pickering, or Wendell, regardless of the jurisdiction reported. About the middle of the nineteenth century this cumbersome practice was dropped in favor of naming the series after the jurisdiction, as United States or Massachusetts. In those official series still current at the time, the existing volumes were renumbered consecutively from the earliest one. Thus, there were then ninety such renumbered *United States Reports* (Dallas through Wallace), ninety-six *Massachusetts Reports*, etc. However, in spite of the renumbering, these early ‘nominatives’ are still cited in their original form. Thus, 90 U.S. is cited as 23 Wallace, but 91 U.S. is not 1 Otto but 91 U.S. Similarly for state reports.

M. PRICE & H. BITNER, *supra* note 2, at 95-96.

193. *See, e.g.*, Berring, *supra* note 188, at 15, 20.

194. *See, e.g.*, M. PRICE & H. BITNER, *supra* note 2, at 93-116; Surrency, *supra* note 153, at 48. “Because it was common for the courts in a jurisdiction to require citation to the official report, the official sets quickly became definitive.” Berring, *supra* note 188, at 15, 20. The articulation of the rationale for this distinction seems never to have advanced beyond its pragmatic origins. That is, certain reports are “official” because they are prepared under the aegis of the court. This is illustrated by Price and Bitner’s explanation of “[w]hat makes a report official”:

This is not always clear. Those prepared by the statutorily appointed reporter and published under authorization of statute are certainly official, and this category

These reports were an attempt to control the case reports that were now regarded as a valuable legal commodity. Because they were a valuable legal commodity, case reports became an attractive business commodity: by the end of the nineteenth century, commercial publishers were making profits by reprinting reports from the "official" reporters.<sup>195</sup> Reprints were profitable because many "official" reports issued editions that were too limited to satisfy the demands of an expanding legal profession and because the reprints were often better reports.<sup>196</sup>

The initial advantage of commercial law reporting, however, was its speed: when West Publishing began its operations in 1879, "the official state reports were published only in bound form, usually more than a year and often several years after the decision date."<sup>197</sup> This sluggishness was due to a number of factors, not the least of which was a minimal financial incentive to the contrary.<sup>198</sup> Although all of the commercial reporters bested the official reporters in this regard, West Publishing Company outstripped its competitors by resuscitating a practice from the era of the Year Books.<sup>199</sup> West issued reports:

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includes all but a handful of the current state reports. Until about the middle of the 19th century, . . . it was customary for the official reporter to publish and distribute reports at his own expense or profit, and the reports were known by his name. Whether or not these were official in the present day sense is academic; they exist and are acceptably cited in any legal writing . . . .

M. PRICE & H. BITNER, *supra* note 2, at 116.

195. Surrency, *supra* note 153, at 60-61.

196. *Id.* at 61 (footnote omitted) (citing C. SOULE, *THE LAWYER'S REFERENCE MANUAL OF LAW BOOKS AND CITATIONS* 22 n.2 (1883)).

Although official sets met the need for systematic production, they failed to meet lawyers' varied and growing needs as legal activity expanded rapidly during . . . industrialization. The explosion of legal activity created a need for better tools, or at the very least, established a growing market for them. The old, inefficient process was founded on assumptions from another age and could not respond to the wild growth in legal materials.

Berring, *supra* note 188, at 15, 20.

197. M. PRICE & H. BITNER, *supra* note 2, at 118-19.

198. In the early years of "official" reporting, the most common form of reimbursement for these reporters was a "combination of salary and sales profit." Surrency, *supra* note 153, at 59. Unfortunately, this arrangement had a variety of undesirable effects both for the reporters and for the legal profession. In Pennsylvania, for example, a statute "limited the reporter to two volumes annually to be sold at not more than four dollars per volume"; if the reporter sold his volumes for more than the allowed price, he was subject to a two hundred dollar fine. *Id.* This, of course, created a financial disincentive toward the timely issuance of volumes to the extent that timely issuance would have required exceeding the two volume per year figure. Other statutes placed page limitations on the volumes that could be issued which, again, created disincentives toward timely, comprehensive publication. *Id.* And other problems arose: in North Carolina, the official reporter could price his reports at one cent per page, which made them very expensive and "may explain why . . . the position of reporter was abolished" at one point in time. *Id.* By the end of the century, these arrangements had disappeared, so that "all reporters were on salary and all reports were printed at the expense of the states." *Id.* at 60.

199. See *supra* section I(A)(3).

[I]n parts which, later, the subscribers could bind into volumes. The advantage . . . was that decisions . . . were available at an earlier date than the past practice of issuing opinions as a bound volume. Prior to this . . . no means existed for the systematic early publication of decisions in regular form. The 'advance sheet' . . . thus made its appearance and has become a standard form of legal publishing.<sup>200</sup>

Other factors in West's success were its unique approach to law reporting and the standardization of its reports.<sup>201</sup>

Unlike its rivals in the nineteenth century, West seems to have decided very early that success lay in publishing a comprehensive system of reports.<sup>202</sup> Its empire began in 1876, when John B. West and Company issued "a modest pamphlet known as 'The Syllabi.'"<sup>203</sup> Three years later, the *North Western Reporter* appeared and by 1887 "the entire nation was embraced in a series of Seven Reporters, which are now units of the National Reporter System."<sup>204</sup> West later added federal reports to this system.<sup>205</sup> Aside from the volume of cases that it made available, the National Reporter System had other advantages: the reports were accurate and included features that facilitated legal research. With regard to the former, West "prided itself on gathering decisions and verifying the text with the judge who wrote them."<sup>206</sup> With regard to the latter, West transformed case reports into a standardized product<sup>207</sup> and became the dominant supplier of that product by keeping "to

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200. Surrency, *supra* note 153, at 62-63.

201. See, e.g., W. MARVIN, WEST PUBLISHING COMPANY: ORIGIN, GROWTH, LEADERSHIP (1969); M. PRICE & H. BITNER, *supra* note 2, at 118-19. "[W]hat made the West Company dominant as a publisher of legal decisions was its standardization of court reports and its comprehensive reporting." Berring, *supra* note 188, at 15, 21.

202. In 1887, West Publishing Company obtained the Eastern Reporter, published by William Gould, Jr. and Company of Albany, New York. The last number of this title contained a 'Valedictory' in which the editors admitted that the comprehensive system such as that proposed by the West Publishing Company would 'alternatively prevail over any local and fragmentary enterprises of the same character.'

Surrency, *supra* note 153, at 62 (footnote omitted) (quoting 21 AMER. L. REV. 963 (1887)).

203. WEST PUBLISHING COMPANY, WEST'S LAW FINDER: A LEGAL RESEARCH MANUAL 5 (1987) [hereinafter WEST'S LAW FINDER]; see also Surrency, *supra* note 153, at 62. *The Syllabi* was a weekly pamphlet that reported the decisions of the Supreme Court of Minnesota. *Id.*

204. WEST'S LAW FINDER, *supra* note 203, at 5; see also Surrency, *supra* note 153, at 62. The seven reporters "listed in order of their addition to the system, are: North Western, Pacific, North Eastern, Atlantic, South Western, Southern, and South Eastern." WEST'S LAW FINDER, *supra* note 203, at 5.

205. *Id.* at 6-7. Federal cases are currently reported in the Supreme Court Reporter, the Federal Reporter, Federal Supplement, Federal Rules Decisions, Bankruptcy Reporter, Military Justice Reporter and Claims Court Reporter. *Id.*

206. Berring, *supra* note 188, at 15, 21; see also WEST'S LAW FINDER, *supra* note 203, at 9-10.

207. This was because West:

[E]stablished a uniform format for reporting. All West reporters were designed according to the same formula. West produced a sterile court reporting system that guaranteed reliability through similarity. Caption, syllabus, and headnotes appeared in the same form in all jurisdictions. They were produced by a centralized staff

a regular schedule and [keeping] its prices low.”<sup>208</sup>

West’s triumph was the triumph of a particular philosophy of case law reporting. “Two competing philosophies of law reporting continue to this day: one is devoted to publishing all decisions, and the other is based upon reporting selected decisions.”<sup>209</sup> England relies upon the latter, America upon the former.<sup>210</sup>

English law has a firmly rooted tradition of oral opinions. Thus, “any written report signed or initialed by a barrister present when the opinion was delivered . . . or any oral report vouched for by a barrister could . . . be cited in court.”<sup>211</sup> Written reports were intended to make decisions accessible to an audience which was wider and more varied than that which was present for a particular pronouncement. Nevertheless, oral opinions could be cited, and written reports did not constitute the only form in which opinions existed as “precedent.” Because written reports did not constitute the entire body of precedent, it was perfectly reasonable to limit these reports to the “highlights” of a particular judicial term.<sup>212</sup>

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and were drafted to fit into the pre-existing structure. Although previous digests and abridgments presented and described cases, the West digests created a subject structure and fit all new cases into it.

Berring, *supra* note 188, at 15, 21 (footnotes omitted); *see also* WEST’S LAW FINDER, *supra* note 203, at 7-33.

208. Berring, *supra* note 188, at 15, 21.

209. Surrency, *supra* note 153, at 63. *See also* *A Symposium of Law Publishers*, 23 AM. L. REV. 396, 406 (1889) (John B. West arguing that “it is one of the great merits of the National System that it gives all the cases”); *id.* at 661 (critically reporting on West Company’s disparagement of rival publisher); *id.* at 805 (Albany Law Journal’s comment on the symposium).

210. M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 333. “This method allow[s] for publication of only a fraction of the available decisions with selection made under a set of predetermined criteria.” Berring, *supra* note 188, at 15, 21. The English publish reports of cases “concerning new points of law and those of permanent interest to the legal profession.” M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 333. The publication criteria are also described as emphasizing decisions “involving new principles of law and cases interpreting established principles in light of modern circumstances.” *Id.* at 335.

211. *Id.* at 283, 331; *see also* M. PRICE & H. BITNER, *supra* note 2, at 283 (“any written report signed or initialled by a barrister, or any oral report vouched by a barrister, is citable in court”).

212. In the nineteenth century, there were selective American reporters. They reported cases “on the basis of probable usefulness and as illustrative of established principles, and were not confined to ‘leading cases.’” They included the *American Reports* (1869-1887), *American Decisions* (through 1868), *American State Reports* (1887-1911), *Lawyers Reports Annotated* (1888-1918), *American and English Annotated Cases* (1906-1911) and *American Annotated Cases* (1912-1918). *See, e.g.*, M. PRICE & H. BITNER, *supra* note 2, at 127-28. The purpose was “to make available . . . a limited selection of cases of interest in all jurisdictions,” an important undertaking “[i]n the days before law libraries were as complete and accessible as they are now.” M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 172. For a time, they were rivals with the West reporters but the latter prevailed, so that only one selective reporter survives. *Id.* at 171-72 (these reporters “merged in 1918 into the current American Law Reports Annotated”).

### 3. *The West Publishing Company and American Case Reporting*

The value of decisions . . . as precedents is . . . practically nonexistent if the[y] . . . are not printed but are of record only in the clerk's office of the court where decided. . . . [S]uch unprinted reports are in effect secret . . . . Selective printing of reports excluded too many cases which should have been reported and was one of the reasons for the establishment of the National Reporter System which publishes many thousands of otherwise unreported appellate decisions.<sup>213</sup>

Although "the expansion of jurisdictions and the growing litigiousness brought on by the Industrial Revolution played a major role in the growth of case *law*,"<sup>214</sup> it was not inevitable that this would produce a concomitant growth in case *reports*. The growth in case reports resulted from the perception that they were an essential legal commodity; while West may not have created this perception, it exploited it to good advantage.<sup>215</sup>

The perception had several consequences for the publication of case reports. The first was the decline of the "official" reporters. If case reports were a commodity that was essential for the practice of law, then lawyers would obtain them from the source that could provide the most comprehensive scheme of case reports with the most speed.<sup>216</sup> The West Publishing

213. M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 140 (emphasis added).

214. Berring, *supra* note 188, at 15, 21 (emphasis added).

215. The Preface to the initial volume of the *Federal Reporter*, for example, included the following observations as to the utility of the new reporter:

'The plan,' says the distinguished circuit judge of the first circuit, 'is an admirable one, and the FEDERAL REPORTER will be absolutely indispensable to all practitioners in the courts of the United States, and highly useful to all other lawyers.'

. . .

The publishers, therefore, confidently submit this new enterprise to the favorable consideration of the members of a busy and arduous profession, who cannot well afford to neglect any means that may serve to decrease their labors, and bring precedents to the aid of principles in the solution of legal problems.

1 F. iv (1880); see also WEST'S LAW FINDER, *supra* note 203, at 5-7.

Lawyers chose the comprehensive style of reporting, preferring that all precedent be available. There can be little doubt that publication of so many decisions was an incentive for the publication of even more decisions. Once the pattern of comprehensiveness was established, the volume of cases published grew apace. Whether the gigantic growth in published cases was a response to an existing demand or the product of a stimulated demand is, in the end, not relevant. By the middle of the twentieth century, an enormous structure of standardized case reporting had evolved. Far too many cases for any individual to master were now available. . . . No longer could memory serve as the lawyer's main tool.

Berring, *supra* note 188, at 15, 21-22.

216. Proper application of the rule of . . . precedent requires the speedy availability of the latest reports of decided cases in point. At the time the National Reporter System was inaugurated in 1879, the official state reports made a farce of this rule, because they were published from one to several years after the decision date. The situation has improved little since then. This is because law report publication is expensive. In most states, there are not enough cases decided during a year to

Company offered such a scheme: its philosophy has always been to publish every decision to which it can gain access regardless of whether or not that decision appeared in an "official" reporter.<sup>217</sup> As lawyers relied more and more upon the West reports, their use of the "official" reports declined.

As the use of "official" reports declined, publication in an "official" reporter ceased to have any significance with regard to a decision's precedential status: "The fact that [decisions published in a West reporter] were unreported in the official reports in no way lessen[ed] their authority as precedents."<sup>218</sup> If publication in an official report had no effect upon a decision's precedential value, then there seemed to be little if any reason to maintain two systems for reporting the same cases. Consequently, states began to abolish the reporters that they had so painfully established in the nineteenth century. In those jurisdictions, publication in a West reporter became the only means by which decisions could appear in print and thereby attain precedential status.<sup>219</sup>

justify the publication of more than a single volume. The contribution of the National Reporter System . . . was to collate the reports of several contiguous states in order to provide sufficient text to justify the expense of publishing them weekly. The result was the 'advance sheet' . . .

M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 166.

217. *See, e.g.*, Surrency, *supra* note 153, at 63; *see also* Berring, *supra* note 188, at 15, 21-22. The reporters in the National Reporter System "currently report in full *all* state appellate court decisions that are received from the courts for publication . . . [and] thousands of decisions that were not reported in the State Reports or that were reported there only as memorandum decisions." WEST'S LAW FINDER, *supra* note 203, at 5 (emphasis added).

Not all of the reports of cases decided in any court are published. Whether or not they are is, for most courts, a matter of editorial discretion on the part of the official reporter. In most jurisdictions, if the official reporter decides that a given case is merely routine and adds nothing to the state of the law, such a case is not reported. . . . [T]he National Reporter editors . . . believed that too few cases were being published. Accordingly, they have printed thousands of cases not officially published.

M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 167. "The editors feel that many decisions, unreported in the official reports, merit publication. As a result, many thousands of decisions elsewhere unavailable in print, are found in the *Reporters*." M. PRICE & H. BITNER, *supra* note 2, at 119:

According to literature issued by the West Publishing Company, it was founded "[t]o furnish the legal profession . . . with prompt and reliable intelligence as to the various questions adjudicated by our . . . courts at a date long prior to the publication of the regular reports." WEST'S LAW FINDER, *supra* note 203, at 5 (quoting from "The Syllabi").

218. M. PRICE & H. BITNER, *supra* note 2, at 119. "It must be emphasized that just because certain Regional cases have not been officially published, their authority as precedents is in no way diminished." M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 167.

219. *Id.* at 161.

Once every state had an official court report to which its courts preferred to be cited. Their number is now diminishing, and there is a trend toward discontinuing the official reports and relying, instead, upon reports published by private publishers. The following states have discontinued the publication of official reports: Alabama, Alaska, Delaware, Florida, Iowa, Kentucky, Louisiana, Maine, Mississippi, Mis-

This had always been true for federal courts other than the United States Supreme Court. Although there is an official Supreme Court reporter, the lower federal courts have never enjoyed the status of an "official" case reporter.<sup>220</sup> "[S]ome 233 different reporters at various times printed lower federal court decisions" until West initiated the *Federal Reporter* in 1880, which was initially dedicated to "the prompt and complete publication of the judicial opinions delivered in each of the United States circuit and district courts."<sup>221</sup> In 1923, West added the *Federal Supplement* and gave it the task of publishing the decisions of the district courts; since then, the *Federal Reporter* has been devoted exclusively to publishing the decisions of intermediate federal appellate courts.<sup>222</sup> Since 1880, therefore, West reports have been the only means of accessing the decisions of the lower federal courts.<sup>223</sup>

The value<sup>224</sup> of West's reports continued to increase because they were the only means for accessing the decisions of certain courts, and because they appeared in a format which provided the most coherent means for accessing the decisions of any court.<sup>225</sup> As its reports increased in value, West issued

souri, North Dakota, Oklahoma, Tennessee, Texas, Utah, and Wyoming.

*Id.* It is also, of course, possible that decisions from these states will be reported in *American Law Reports*, as well. *See id.* at 171-81. The proposition that publication is an essential concomitant of precedential status is considered in section III, *infra*.

220. *See, e.g.*, M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 152 (decisions of the lower federal courts have "appeared only in a multitude of unofficial series before 1880 and in units of the unofficial National Reporter System since then").

221. 1 F. iii (1880). The Preface also indicates that the reporter published "both oral and written opinions," and that it obtained these opinions from court clerks, from court stenographers and from "qualified attorneys, employed specially for that purpose." *Id.* "It is believed that . . . many able and learned opinions will be rescued from a most undeserved oblivion, while greater uniformity in the interpretation of the federal statutes and the practice of the various federal courts will at the same time be secured." *Id.* In 1894 a new reporter appeared, the purpose of which was to organize this body of decisional law into a coherent whole. This reporter, *Federal Cases*, simply reprinted the decisions that were issued between 1789 and 1880 and arranged them by "title and an arbitrary case number." M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 157-58.

222. "[T]hat is, the Courts of Appeals, the Court of Appeals for the District of Columbia, United States Court of Custom and Patent Appeals and the patent, trade-mark, and customs cases from the United States Emergency Court of Appeals." M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 159.

223. *See, e.g.*, *Garfield v. Palmieri*, 193 F. Supp. 137, 143 (S.D.N.Y. 1961) ("There are no official published reports of the opinions of the federal district courts"), *aff'd*, 207 F.2d 526 (2d Cir. 1962).

224. "Value," here, refers both to simple economic value, as expressed in the price charged for the reports, and to the more nebulous concept of "social" value. This concept of "social value" is implicit in the discussion of the "factual" approach to case reports which appears in the text. *See infra* notes 357-62 and accompanying text.

225. *See, e.g.*, *Berring*, *supra* note 188, at 15, 22-25.

So long as the reporting of decisions was limited to those cases selected by members of the bar for their particular rectitude and value as examples, and to cases noted for their utility by a practitioner or a judge, the literature was subject to a certain quality control. . . . But . . . [w]hen publication standards shifted from a selection



more and more of them, which required that more and more judicial opinions be located and processed into case reports. This process expanded with almost exponential rapidity during the recent years of this century.<sup>226</sup>

#### 4. *Recent Adventures in Selective Publication*

Lawyers have come to rely more and more upon "case reports" as the means by which they gain access to precedents. As the most visible manifestation of precedents, case reports have become objects of concern; after comprehensive reporting prevailed, reports proliferated, producing fears that the decisional law was becoming unmanageable.<sup>227</sup> At the end of the nineteenth century, an American Bar Association committee studied the problem and considered "withholding opinions from publication" but concluded that "public papers cannot be suppressed and therefore [this] course of action was not feasible."<sup>228</sup> By the end of the 1940's, however, certain lower federal courts were "withholding opinions from publication"<sup>229</sup> and the others would

criteria of quality and utility to total comprehensiveness in coverage, the nature of legal literature changed dramatically. Now the legal researcher was confronted with enormous amounts of available and largely undigested data. The precedent that was available did not emerge from a coherent and cohesive pattern . . . but instead emerged as a large body of unorganized and contradictory principles.

*Id.* at 22; see also *id.* at 24-25 (impact of West's Key Number System upon the structure of American law).

226. See, e.g., R. POSNER, *supra* note 160, at 59-93.

227. "[T]he period from 1790 to 1840 produced 50,000 reported decisions; the next 50 years, 450,000; the next 50 years, ending in 1940, 1,250,000; and from 1940 to 1960, approximately 600-700,000 opinions were published." Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 L. LIBR. J. 362 (1974). For statistics on the current status of decisions of federal courts, see, e.g., R. POSNER, *supra* note 160, at 59-93; Reynolds & Richman, *The Non-precedential Precedent—Limited Publication and No-citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978). In 1821, Mr. Justice Story predicted that the nation was in danger of being "buried alive, not in the catacombs but in the labyrinths of the law" and called for measures to confine the ever-increasing corpus of the law to manageable proportions. Aumann, *supra* note 166, at 331, 342 n.40 (quoting Story, "Address delivered before the members of the Suffolk Bar in 1821," reprinted in 1 AM. JURIST 31 (1829)). Such observations continued throughout the nineteenth and on into the twentieth century: "Unless courts set some restraints on the length and number of published opinions, . . . our present system of making the law reports the chief repository of new unwritten law will break down of its own weight." H.F. STONE, *LAW AND ITS ADMINISTRATION* 214 (1915), quoted in Aumann, *supra* note 166, at 343; see also O'Connell, *A Dissertation on Judicial Opinions*, 23 TEMP. L.Q. 13 (1949) (discussing the perceived problem); Warren, *The Welter of Decisions*, 10 ILL. L. REV. 472 (1916) (same). They echoed Sir Francis Bacon's call for a reduction "of the course or the core of the common law by omitting from the reports all 'cases wherein there is solemnly and long debated matter whereof there is now no question at all and cases merely of iteration and repetition.'" Chanin, *supra*, at 362.

228. Surrency, *supra* note 153, at 64 (citing 8 REP. A.B.A. 39 (1885); 16 REP. A.B.A. 345 (1895); 21 REP. A.B.A. 440 (1898)).

229. See, e.g., O'Connell, *supra* note 227, at 15 (discussing a report reprinted in *Opinions of Courts: Should Number Published Be Reduced?*, 34 A.B.A. J. 668 (1948)); Prince, *Law Books, Unlimited*, 48 A.B.A. J. 134 (1962); Whitehair, *Opinions of Courts: Fifth Circuit Acts Against Unneeded Publication*, 33 A.B.A. J. 751 (1947).

eventually follow suit.<sup>230</sup>

Restricted publication was implemented in the federal courts as the result of recommendations issued by the Federal Judicial Center.<sup>231</sup> The Judicial Conference of the United States adopted these recommendations and directed that each of the circuit courts of appeal "develop an opinion publication plan."<sup>232</sup> In 1973, the Federal Judicial Center issued a model publication plan that became "the template for many of the rules subsequently promulgated by the United States courts of appeals."<sup>233</sup> Those rules continue in

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230. Judge Posner notes that prior to the 1970's, "all opinions in federal court of appeals cases were published by the West Publishing Company in the *Federal Reporter*, or its successor, *Federal Reporter, Second*." R. POSNER, *supra* note 160, at 129. The discussion emphasizes practices among the courts of appeal and the district courts, as the Supreme Court has not adopted restricted publication: "All decisions for which there are written opinions are published both in the official United States Reports and in the unofficial Lawyers' Edition and Supreme Court Reporter." M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 152. The implementation of restricted publication has been considered at great length and with great erudition elsewhere and is not a primary concern of this Article. See, e.g., P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL (1976); Nichols, *Selective Publication of Opinions: One Judge's View*, 35 AMER. U.L. REV. 909 (1986); Reynolds & Richman, *supra* note 227, at 1167; Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989); Weaver, *supra* note 160, at 477.

231. See FEDERAL JUDICIAL CENTER ANN. REP. 7-8 (1971); BOARD OF THE FEDERAL JUDICIAL CENTER, RECOMMENDATION AND REPORT TO THE APRIL 1972 SESSION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE PUBLICATION OF COURTS OF APPEALS OPINIONS (1972). The report issued by the Board of the Federal Judicial Center recommended that the Judicial Conference direct each of the circuits to implement the following modifications in their publication policies:

- a. Opinions will not be published unless ordered by a majority of the panel rendering the decision;
- b. Non-published opinions should not be cited, either in briefs or in court opinions;
- c. When an opinion is not published the public record shall be completed by publishing the judgment of the Court.

*Id.* at 1, *quoted in* Reynolds & Richman, *supra* note 227, at 1167, 1170.

232. Reynolds & Richman, *supra* note 227, at 1167, 1170. In 1964, the Judicial Conference adopted a resolution requiring that the "Judges of the Courts of Appeals and the district courts authorize publication of only those opinions which are of general precedential value." REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 1, 11 (1964). For the concerns that prompted restrictive publication, see, e.g., COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (June 1975); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE. A PRELIMINARY REPORT (Apr. 1975).

233. Reynolds & Richman, *supra* note 227, at 1171 (footnote omitted). The Model Rule provided that opinions should not be published unless they: (a) established a new rule of law or altered or modified an existing rule of law; (b) involved "a legal issue of continuing public interest;" (c) "criticize[d] existing law;" or (d) resolved "an apparent conflict of authority." *Id.* at 1171 n.28; see also ADVISORY COUNCIL FOR APPELLATE JUSTICE, FJC RESEARCH SERIES NO. 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973).

effect with modifications that have appeared in the years since 1973.<sup>234</sup>

The rules distinguish between "published" opinions, which *are* "precedent," and "unpublished" opinions, which are generally *not* considered "precedent."<sup>235</sup> However, these rules make no concerted effort to define what is meant by "publication,"<sup>236</sup> a noteworthy omission given that there is no official reporter for the lower federal courts.<sup>237</sup> Because there is no official reporter, the rules seem to equate "publication" with being printed in an unofficial West reporter,<sup>238</sup> such as the *Federal*

234. See *e.g.*, 1ST CIR. R. 36.2; 3D CIR. INT. OP. PROC. F(1),(3); 4TH CIR. INT. OP. PROC. 36.3-36.4; 6TH CIR. R. 24; 6TH CIR. INT. OP. PROC. 14.4; 7TH CIR. R. 53; 8TH CIR. PLAN FOR PUB. OF OPINIONS; 9TH CIR. R. 36.1; 10TH CIR. R. 36; 11TH CIR. INT. OP. PROC. 3; D.C. CIR. R. 14; FED. CIR. R. 47.8.

235. See, *e.g.*, 10TH CIR. R. 36, as amended, effective January 1, 1989 ("Unpublished opinions and orders and judgments of this court have no precedential value and shall be not be cited").

Unpublished opinions . . . are those unanimously determined by the panel as not adding significantly or usefully to the body of law and not having precedential value. Opinions . . . designated as unpublished shall not be employed as precedent by this court, and may not be cited by counsel as precedent.

FED. CIR. R. 47.8(c). Unpublished opinions can be cited "in support of a claim of res judicata, collateral estoppel, or law of the case." *Id.* This is a standard feature of many of the rules, and is an interpretation that has been applied to all of them. See, *e.g.*, 10TH CIR. R. 36.3 (as amended effective Jan. 1, 1989); Nichols, *supra* note 230, at 909; Weaver, *supra* note 160, at 477; *cf.* 11TH CIR. INT. OP. PROC. 36-1(E) ("Although unpublished opinions may be cited as precedent, this is looked upon with disfavor by the Court"); accord 6TH CIR. R. 24; 4TH CIR. INT. OP. PROC. 36.5.

236. The Seventh Circuit rule does attempt to clarify the issue, providing that publication means:

- (i) Printing the opinion as a slip opinion;
- (ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media; and
- (iii) Unlimited citation as precedent.

7TH CIR. R. 53 (as amended, effective Jan. 1, 1989). Unpublished opinions are "typewritten and reproduced by copying machine," subject to limited distribution and are reported only in a table of dispositions in the *Federal Reporter*. *Id.* This rule is predicated upon what was once a common practice, *i.e.*, the practice by which the various courts of appeals printed and distributed their own slip opinions. See *infra* notes 240-41 and accompanying text.

237. See, *e.g.*, M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 152:

Each of the . . . Courts of Appeals . . . prints and distributes its slip decisions. . . . Reversing the usual practice—that the unofficial reports print decisions not officially reported—the above slip decisions *may print per curiam decisions not printed in the unofficial Federal Reporter*. . . . All courts . . . accept citations to the unofficial only.

*Id.* at 157 (emphasis in original). Due to budgetary constraints, all the courts of appeals except the Seventh Circuit have ceased this practice, so that there is no longer *any* "official" publication of their opinions.

238. One rule, for example, begins by providing that:

[The] disposition of appeals may be announced in a published or unpublished opinion . . . 'Published' means the opinion . . . has been . . . forwarded for publication in one or more commercial reports of decisions. 'Unpublished' means

*Reporter*.<sup>239</sup> Under these rules, therefore, an opinion is “published” when its full text appears in that reporter and “unpublished” when only a notation of the disposition of the case appears.<sup>240</sup>

Although the rules of the respective courts of appeals are phrased differently, each is based upon the concept of precedent that is noted above, that precedent is a commodity the existence or nonexistence of which can be determined by whether or not the full text of an opinion is printed in a volume of the *Federal Reporter*.<sup>241</sup> This concept is illustrated by a provision from the Eighth Circuit: “It is unnecessary for the court . . . to publish every opinion written. The . . . nonpublication of an opinion does not mean that the case is considered unimportant. It does mean that an opinion in the case will not add to the body of law and will not have value as precedent.”<sup>242</sup>

The premise underlying this concept of precedent is that courts can distinguish between “precedential” and “nonprecedential” opinions.<sup>243</sup> Accord-

an opinion . . . that has not been prepared for publication in a commercial report of decisions.

FED. CIR. R. 47.8(a); *see also* 9TH CIR. R. 36-1; D.C. CIR. R. 14.

239. *See, e.g.*, 6TH CIR. R. 24; 6TH CIR. INT. OP. PROC. 14.

Although not official reporters of this court the West Publishing Company in its *Federal Reporter* and, in Virgin Islands cases, also the Equity Publishing Corporation in its Virgin Islands Reports report for the information and use of the bench and bar those opinions of this court which the court desires to have published.

3D CIR. INT. OP. PROC. F(1). The presumption of publication in the *Federal Reporter* is explicit in the Sixth Circuit’s rule and in the above quoted procedure from the Third Circuit, but is implicit in the rules of certain of the other circuits. *See, e.g.*, 9TH CIR. R. 36-1 (“As used in this rule, the term publication means to make a disposition available to legal publishing companies to be reported and cited”); FED. CIR. R. 47.8(A) (“‘Published’ means the opinion . . . has been prepared and forwarded for publication in one or more commercial reports of decisions. ‘Unpublished’ means an opinion . . . that has not been prepared for publication in a commercial report of decisions.”).

240. *See, e.g.*, 5TH CIR. INT. OP. PROC. (“The style of all nonpublished opinions is published in table form in the *Federal Reporter*.”); *accord* 4TH CIR. INT. OP. PROC. 36.4 (“The *Federal Reporter* periodically lists the result in all cases involving unpublished opinions”); 11TH CIR. INT. OP. PROC. 36-1(3) (“All non-published opinions and affirmances without opinion . . . are printed in table form in the *Federal Reporter*”). By the same token, “publication” for district court cases seems to mean that they have appeared in printed form in the *Federal Supplement*. *See, e.g.*, *Garfield v. Palmieri*, 193 F. Supp. 137, 143 (S.D.N.Y. 1961) (no official reports for the opinions of the federal district courts, so that the West reports furnish “the only comprehensive compilation of such opinions”), *aff’d*, 207 F.2d 526 (2d Cir. 1962).

241. *See* R. POSNER, *supra* note 160, at 120.

242. FED. R. APP. PROC., (28 U.S.C.) 8th Circuit Rules, Appendix II, 8th Cir. Plan for Pub. of Opinions, sec. 1; *see also* 1ST CIR. R. 36.2 (general policy of publication may be overcome where opinion does not change the law, apply the law to new situation, or otherwise guide future litigants); 4TH CIR. INT. OP. PROC. 36.3-36.4 (opinions will only be published if they change the law, involve a legal issue of public interest, criticize existing law, review the history of a rule for the first time, resolve an intra-circuit conflict or create an inter-circuit conflict); 11TH CIR. INT. OP. PROC. 36-1 (“unlimited publication of opinions is undesirable because it tends to impair the development of the cohesive body of law”); D.C. CIR. R. 14 (“All published opinions of this court shall be printed”).

243. *See, e.g.*, 1ST CIR. R. 36.2; 3D CIR. INT. OP. PROC. F(1); D.C. CIR. R. 14; *see also*

ing to this premise, "precedential" opinions have a legal significance which extends beyond an immediate controversy while "nonprecedential" opinions simply resolve a controversy.<sup>244</sup> Because "precedential" opinions have a generalized legal significance, they are made "available to legal publishing companies to be reported and cited."<sup>245</sup> In sum, "published" opinions can be cited as "precedent" and "unpublished" opinions cannot.<sup>246</sup>

This scheme postulates that the quantity of legal precedent that is generated by a particular court can be determined and controlled by simply limiting the number of opinions that are released for "publication."<sup>247</sup> Full-text publication in the West reporters is being used as an operational definition of "precedent," with the lack of such publication constituting the residual category of "nonprecedent."<sup>248</sup> The application of this operational definition

Reynolds & Richman, *supra* note 227, at 1167, 1191-92 ("The . . . generally unarticulated premise of the non-publication [rules] asserts that judges can, and in good faith will, predict early in the game whether the opinion in a case will merit publication.").

244. *See, e.g.*, D.C. CIR. R. 14 ("It is the policy of this court to publish opinions and explanatory memoranda found to have general public interest.").

In general, the court thinks it desirable that opinions be published. . . . The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts of serve otherwise as a significant guide to future litigants.

1ST CIR. R.

Unpublished opinions give counsel, the parties and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court.

4TH CIR. INT. OP. PROC. 36.4; *see also* FED. CIR. R. 47.8(c) ("Unpublished opinions and orders are those . . . not adding significantly or usefully to the body of law and not having precedential value"); *accord* 3D CIR. INT. OP. PROC. F(1); 7TH CIR. R. 53(2).

245. 9TH CIR. R. 36-1.

246. [T]his court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citations of this court's unpublished dispositions in briefs and oral arguments in this court and in the district courts within this Circuit is disfavored, except for the purpose of establishing *res judicata*, *estoppel*, or the law of the case.

4TH CIR. INT. OP. PROC. 36.5; *accord* FED. CIR. R. 47.8(c) ("Opinions and orders designated as unpublished shall not be employed as precedent by this court, and may not be cited by counsel as precedent"); 10TH CIR. R. 36.3 ("Unpublished orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing law of the case, *res judicata* or collateral *estoppel*."); 7TH CIR. R. 53(b)(2)(iv) ("Unpublished orders . . . except to support a claim of *res judicata*, collateral *estoppel* or law of the case, shall not be cited or used as precedent by any [federal court within the circuit] for any such purpose."); 1ST CIR. R. 36.2(6); *cf.* 11TH CIR. INT. OP. PROC. 36-1(3) ("Although unpublished opinions may be cited as precedent, this is looked upon with disfavor by the Court").

247. *See, e.g.*, Nichols, *supra* note 230, at 909; Reynolds & Richman, *supra* note 227, at 1167, 1181-94; Robel, *supra* note 230, at 940.

248. *See* Nichols, *supra* note 230, at 909:

I am sure no judge . . . ever dreamed of suggesting [the courts of appeals] should . . . publish official reports. The idea of federal circuit courts below the Supreme Court actually themselves publishing their own opinions we may safely regard as

is a consistent theme in the reported decisional law.<sup>249</sup> In *Leimer v. Aetna Life Insurance Co.*,<sup>250</sup> for example, the Eighth Circuit observed that its unpublished opinions “are not intended to create binding precedent” because the “decision of a panel not to publish an opinion usually represents the judges’ view that the case is without substantial value as a precedent.”<sup>251</sup> A District of Columbia judge<sup>252</sup> emphasized the responsibilities that attend such decisions:

With a burgeoning caseload, there is little doubt . . . courts will resort to . . . unpublished opinions with even greater frequency. Thus it is imperative that we scrutinize our selection of those cases to be disposed of without . . . precedential effect ever more carefully so as to avoid confusion, repetition, nonuniformity, and even skepticism about the way we do our job.<sup>253</sup>

The concerns that are perceived as requiring the continued application of this operational definition of precedent were expressed in a dissent which, ironically enough, issued in a case in which the majority relied upon the unpublished decisions of a Guam court as binding precedent.<sup>254</sup> Judge Fer-

dead. . . . This leaves us in the hands of the West Publishing Company.

*Id.*

249. *See, e.g.*, *Standard Mutual Insurance Co. v. Bailey*, 868 F.2d 893, 895 nn.2 & 3 (7th Cir. 1989) (unpublished decisions “improperly cited as legal precedent”); *Federal Savings and Loan Insurance Corp. v. Capozzi*, 855 F.2d 1319, 1326 (8th Cir. 1988) (same); *Tsosie v. United States*, 825 F.2d 393, 397 (Fed. Cir. 1987) (court not “bound” by its “own unpublished precedents”); *Wrenn v. Gould*, 808 F.2d 493, 499 n.4 (6th Cir. 1987) (unpublished per curiam opinion improperly cited as precedent); *Aetna Life & Casualty Corp. v. Maravich*, 824 F.2d 266, 269 (3d Cir. 1987) (unreported memorandum opinion not binding precedent); *Griffin v. Martin*, 785 F.2d 1172, 1175 (4th Cir. 1986) (“An unpublished opinion is . . . not a binding precedent”); *Western Union v. FCC*, 773 F.2d 375, 377 n.1 (D.C. Cir. 1985) (unpublished orders are not to be cited as precedents); *National Classification Committee v. United States*, 765 F.2d 164, 170 (D.C. Cir. 1985) (same); *Walker v. Jones*, 733 F.2d 923, 930 n.9 (D.C. Cir. 1984) (same); *Prestin v. Mobil Oil*, 741 F.2d 268, 270 (9th Cir. 1984) (same); *Demarest v. United States*, 718 F.2d 964, 967 (9th Cir. 1983) (same); *Watts v. United States*, 703 F.2d 346, 351 (9th Cir. 1983) (same); *Caspary v. Louisiana Land & Exploration Co.*, 707 F.2d 785, 798 (4th Cir. 1983) (“we do not even treat unpublished opinions of our own court as binding precedent”); *King v. Blankenship*, 636 F.2d 70, 72 (4th Cir. 1980) (same); *Environmental Defense Fund v. Higginson*, 631 F.2d 738, 739 n.1 (D.C. Cir. 1979) (“as an unpublished opinion, the decision . . . does not establish precedent”); *Laborers’ Pension Fund v. Jobarr Concrete, Inc.*, 1988 WL 17595 (N.D. Ill.) (same); *Fisher v. Walters*, 1988 WL 6946 (N.D. Ill.) (same); *Belcher v. Sears, Roebuck & Co.*, 686 F. Supp. 671, 673 (M.D. Tenn. 1988) (unreported decision does not establish precedent); *Pane v. RCA Corp.*, 667 F. Supp. 168, 173 (D.N.J. 1987) (same); *Philman’s v. City of West Carrollton*, 577 F. Supp. 1380, 1384 (S.D. Ohio 1983).

250. 724 F.2d 744 (8th Cir. 1984).

251. *Id.* at 745-46; *see also* *Krolick Contracting v. Benefits Review Bd.*, 558 F.2d 685, 689 (3d Cir. 1977) (the “published opinions of this Court are binding precedents . . . while the . . . unpublished opinions” are not).

252. *National Classification Committee v. United States*, 765 F.2d 164 (D.C. Cir. 1985).

253. *Id.* at 175.

254. *People v. Yang*, 800 F.2d 945, 948 (9th Cir. 1986) (Ferguson, J., dissenting). The Ninth Circuit relied upon the unpublished decisions because the applicable provisions of Guam’s court rules, “insofar as they address the issue, suggest that simple filing is sufficient to make an opinion citable.” *Id.* at 947 n.2 (citing GUAM DIST. CT. R. APPL. P. 22).

guson dissented because he was concerned about the consequences of such a result.<sup>255</sup>

[P]ermitting unpublished decisions to control would create the worst sort of judicial confusion. Instead of access for all individuals to the law, the result would be chaos. Only the most elaborate system would permit any law firm, let alone a sole practitioner, to keep abreast of every decision. One of the greatest features about the law is that anyone may walk into a public law library and almost instantly learn of every controlling decision on a given issue. If unpublished decisions became controlling, legal research as we know it would end, and only the most wealthy—those who could afford a permanent law clerk stationed in every clerk's office—would be able to litigate the great issues of our day.<sup>256</sup>

## II. "LEGAL RESEARCH AS WE KNOW IT":<sup>257</sup> LEXIS And WESTLAW

This section provides an overview of a recent innovation in legal research, the use of computer systems such as LEXIS and WESTLAW. Subsection A examines some general characteristics of these systems. Subsection B considers their aptitude as law reporters.

### A. Computerized Legal Research

LEXIS and WESTLAW are "online database systems which contain judicial cases . . . from the federal and state courts of the United States."<sup>258</sup>

255. He also felt that the majority misinterpreted Guam's attitude toward the unpublished decisions of its courts. *Id.* at 947-50 (Ferguson, J., dissenting).

256. *Id.* at 949. Restrictive publication was the product of concerns other than the simple inequities inherent in allowing the citation of decisions that are not generally accessible. *See, e.g.,* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE. A PRELIMINARY REPORT 72 (Apr. 1975). This rationale is, however, commonly used to justify a distinction between the precedential effects of "published" and "unpublished" opinions. *See, e.g.,* *King v. United Commercial Travelers*, 333 U.S. 153 (1948). *King* presented the issue as to whether a federal court of appeals was required to accord precedential status to a decision issued by a South Carolina trial court. The Supreme Court held that the decision was not binding precedent, first of all, because the issuing court did not occupy a position within the South Carolina court system such that "its decisions should be taken as authoritative expositions of that State's 'law.'" *Id.* at 161. The Court also relied upon the difficulty of gaining access to such decisions:

Litigants could find all the decisions on any given subject only by laboriously searching the judgment rolls in all of South Carolina's forty-six counties. To hold that federal courts must abide by Common Pleas decisions might well put a premium on the financial ability required for exhaustive screening of the judgment rolls or for the maintenance of private records. In cases where the parties could not afford such practices, the result would often be to make their rights dependent on chance; for every decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered.

*Id.* at 161-62.

257. *People v. Yang*, 800 F.2d 945, 949 (9th Cir. 1986) (Ferguson, J., dissenting).

258. J. KINSOCK, *LEGAL DATABASES ON LINE: LEXIS & WESTLAW I* (1985). Although both

Both are "full-text" data bases, which means that each incorporates the full text of judicial opinions into its database<sup>259</sup> and that this text can be accessed in a particular fashion. The text that they provide is identical to the text that was issued by the deciding court and is available as a display on a computer screen and/or in "hard copy" as a computer print-out.<sup>260</sup> It is even possible to obtain print-outs that permit citations to specific pages of the printed report of an opinion, although this feature can vary between the two databases.<sup>261</sup>

The information that is contained in a data base can be accessed through any of several means, including "full-text" and "index" searching.<sup>262</sup> "Index" searching depends upon the creation of index terms which can be assigned to particular documents, stored and then searched. A "full-text" system allows searching based upon "all the non-common words in the original text."<sup>263</sup> In LEXIS and WESTLAW, this permits "searches for anything contained in the text of an opinion including names of judges,

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also include other materials, this Article is concerned with them only to the extent that they incorporate the decisions of the state and federal courts. A data base is "a compilation of facts stored in a computer memory and . . . capable of being retrieved in various forms through a set of prescribed search instructions." Donham, *Copyright, Compilations, and Public Policy: Lingering Issues after the West Publishing-Mead Data Central Settlement*, 64 CHI.-KENT L. REV. 375, 380-81 (1988) (footnote omitted).

259. See, e.g., M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 459-67. "The LEXIS base . . . includes every word of each respective case and statute." McGonigal, *Implementation and Cost Effectiveness of Computerized Legal Research—LEXIS and WESTLAW Compared*, 1 COMPUTER L.J. 359, 364 (1978). West describes WESTLAW's contents as "Full-Text Plus, which means that they include the full text of court opinions plus editorially prepared synopses and headnotes." WEST'S LAW FINDER, *supra* note 203, at 34.

260. See, e.g., M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 460-467. For an interesting study of the error rate in the opinions that appear on the two data bases, see, e.g., Warnken, *A Study in LEXIS and WESTLAW Errors*, 13 A.B.A. J. (July-Aug. 1987), ABANET ID ABA137.

261. This, of course, has been the subject of a recent controversy between Mead Data Central, Inc. and West Publishing Company. See, e.g., *West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219 (8th Cir. 1986); Donham, *supra* note 258, at 375; Comment, *Copyright Protection for Citations to a Law Reporter: West Publishing Co. v. Mead Data Central, Inc.*, 71 MINN. L. REV. 991 (1987). As the result of a settlement between the two entities, each data base now has its own system for identifying the documents that it contains and for allowing citations to specific pages within that material. See, e.g., *Standard Mutual Ins. Co. v. Cook*, 1989 U.S. App. LEXIS 2277 (7th Cir.) (printed at 868 F.2d 893); *Taher v. K Mart Corp.*, 1988 WL 142240 (D. Kan.). For a discussion of the differences between the arrangement and organization of the two databases, see Donham, *supra* note 258, at 375, 397-406.

262. See, e.g., P. MAGGS & J. SPROWL, *COMPUTER APPLICATIONS IN THE LAW* 40 (1987); Bing, *Legal Information Retrieval Systems: The Need for and the Design of Extremely Simple Retrieval Strategies*, 1 COMPUTER L.J. 379 (1978).

263. C. TAPPER, *COMPUTERS AND THE LAW* 125 (1973); see also Bing, *supra* note 262, at 379. Full-text searches cannot be predicated upon "common words" such as basic articles ("a," "an," "the"), prepositions ("to," "by," "with") and the similar terms. See, e.g., M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 462.



witnesses, products, companies or organizations, unusual terms and so on."<sup>264</sup>

### B. LEXIS and WESTLAW as Law Reporters

Neither LEXIS nor WESTLAW were created as a "law reporter."<sup>265</sup> When computerized legal research was being developed, many felt that computers could be used only as a case indexing system rather than as a full-text retrieval system.<sup>266</sup> One early service used its computers to generate lists of case citations in response to search requests submitted by subscribers.<sup>267</sup> Even WESTLAW began as merely an indexing system, originally including only "the West summary headnote digests of cases and their key numbers."<sup>268</sup>

Although WESTLAW, and even LEXIS, may have been originally created as a device for locating decisions that were available in printed form in the case reporters, both systems have undergone a dramatic change in recent years. One indicator of this change is the amount of information that each presently makes available, as opposed to what was available ten years ago.

In 1978, WESTLAW was transforming itself from an indexing system into a full-text system, and LEXIS had been operating as a full-text system for at least eight years.<sup>269</sup> At that time, LEXIS included the full-text of "federal court decisions from 1960 for district courts, from 1945 for courts of appeals, and from 1938 for the United States Supreme Court," as well as the decisions of some state courts.<sup>270</sup> Moreover, it was reported that the operators of the LEXIS system were "reasonably receptive to embarking on a program to build a state file covering the past ten to twenty years."<sup>271</sup> By this time,

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264. WEST'S LAW FINDER, *supra* note 203, at 34; *see also* M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 461.

265. *See supra* section I(C)(3).

266. *See, e.g.*, C. TAPPER, *supra* note 263, at 106-206; Bing, *supra* note 262, at 379.

267. The service was Law Research Incorporated ["LRI"] and it was founded in 1964. *See* C. TAPPER, *supra* note 263, at 184-85. At first, search requests were submitted in writing on a standardized form and the searches were conducted by an LRI employee. After running a search, the employee selected the four "most relevant" citations and sent the full-text of these decisions, along with the list from which they had been selected, to the subscriber. *Id.* Later, subscribers were able to conduct their own searches on terminals which they rented from LRI, but LRI remained an indexing system until it went out of business. *Id.* at 185-86.

268. M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 70, at 464. In 1977, it consisted of "the headnotes from all federal court opinions from 1961, and all state appellate court decisions from 1967." *Id.* In 1978, it was expanded into a full-text system. *Id.*

269. McGonigal, *supra* note 259, at 359, 360; Comment, *supra* note 260, at 991.

270. McGonigal, *supra* note 259, at 364, 375-78. In 1978, LEXIS included cases from seventeen identified states: Arizona, California, Delaware, Florida, Georgia, Illinois, Kansas, Kentucky, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, Texas and Virginia. *Id.* at 375-77. The extent to which cases from particular states were included varied widely: the Florida cases, for example, were selected from decisions that had issued after 1968, while Michigan cases were selected from decisions that had issued after 1977. *Id.* at 376. But because LEXIS was the descendant of an Ohio State Bar Association data base, it included Ohio decisions extending back to 1940. *Id.* at 377.

271. *Id.* at 364.

WESTLAW had added full-text versions of the decisions of certain federal courts, and was in the process of adding full-text versions of state decisions, as well.<sup>272</sup> Its primary advantages were that it allowed searches by means of its key number system and that it provided access to the decisions of all the states, albeit on a limited basis.<sup>273</sup>

In 1989, the contents of both systems have expanded to such an extent that it is difficult to describe them concisely. The sections immediately below summarize the contents of both data bases as they existed in May of 1989, emphasizing the extent to which each included full-text reports of the decisions of the various federal courts. Although both also include the decisions of state courts, the discussion emphasizes federal decisions simply because they provide an adequate empirical predicate for the analysis that appears in section III of this Article.<sup>274</sup>

### 1. LEXIS in 1989

In a computer search conducted on May 22, 1989, LEXIS described the contents of its federal decisional files as follows:<sup>275</sup> decisions of the United States Supreme Court, "1790 to 5/89"; decisions of the courts of appeals, "1789 to 5/89"; decisions of the district courts, "1789 to 5/89."<sup>276</sup> According to this same search, the LEXIS data base includes decisions from each of the federal courts of appeals<sup>277</sup> and from the district courts for which they serve as appellate tribunals.<sup>278</sup>

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272. See *id.* at 372. WESTLAW described itself as including the full text of the following: "U.S. Supreme Court cases, 1932 to date"; "reported cases from the U.S. Courts of Appeals, Court of Claims, Court of Customs and Patent Appeals and Temporary Emergency Court of Appeals—all from 1961 to date"; and "reported cases from the U.S. District Courts . . . from 1961 to date." *Id.*

273. McGonigal, *supra* note 259, at 364. WESTLAW described its coverage of state cases according to the divisions of its National Reporter System, and indicated that this coverage consisted of the "[h]eadnotes of all reported cases" within those divisions for certain periods of time and the full-text of decisions for more limited periods of time. *Id.* at 372-73. The headnotes were generally available for the period from 1967 through 1977, while full-text reports were available from "1978 to date." *Id.* at 372-73.

274. The discussion is also limited: (a) because any attempt to include a consideration of the extent to which state court decisions are reported in LEXIS and WESTLAW would expand this Article to unnecessary, unmanageable proportions; and (b) because the discussion of the reporting of federal decisions is representative of the reporting of state court decisions, as well.

275. The descriptions that appear in the text above are limited to the description of the decisions of the "general" federal courts, i.e., the Supreme Court, the courts of appeals and the district courts, and do not attempt to describe the extent to which the decisions of the specialized courts are available on either LEXIS or WESTLAW.

276. Search run on LEXIS, GENFED file descriptions, May 22, 1989. The specific descriptions of files for the individual courts of appeals and district courts reveals qualifiers which indicate that these files include actually decisions from "the date of creation of the court" to the present. *Id.*

277. That is, from the First through Eleventh Circuits, as well as the District of Columbia and Federal Circuits. *Id.*

278. *Id.*

It is extraordinarily important to realize that for some time LEXIS has been including full-text opinions from state and federal courts even though these decisions have not been printed in "hard copy" in either the West reporters or in other unofficial or official reporters. Although it is not possible to quantify the extent to which these otherwise "unreported" decisions are being incorporated into LEXIS, Mead Data Central ("MDC") has explained the reasons for their inclusion:

MDC's customers constantly demand access to more and more information. MDC's basic philosophy is to meet these needs. Counter balancing out customer's needs, however, is our knowledge that many courts prefer to limit the distribution of some of their documents. MDC works with individual courts to develop procedures which are responsible to the court's policies, while maximizing the amount of information available to our customers.<sup>279</sup>

These procedures differ according to the extent to which a particular court is willing to have its "unreported" opinions incorporated into the LEXIS data base. Some federal courts of appeals allow all of their opinions to be included in LEXIS while others place restrictions upon the incorporation of opinions that are designated "not for publication."<sup>280</sup> Mead Data Corporation actively solicits otherwise "unreported" opinions for inclusion in LEXIS.<sup>281</sup> This means that LEXIS includes decisions that are *not* available in the conventional reporters as well as the decisions that *are*.

In addition to including West citations,<sup>282</sup> LEXIS has begun to assign document identifiers to decisions as it includes them in its data base. For

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279. Letter from Lorraine Gongla-Coppinger, MDC Analyst, to Susan W. Brenner (June 9, 1989) (discussing MDC's posture in regard to including otherwise unreported decisions on LEXIS).

280. The United States Courts of Appeals, taken as a group, provide an excellent example of the variety of accommodations MDC has made with courts regarding the publication of opinions. *Some Courts of Appeals have agreed that all of their opinions can be available on LEXIS, in their entirety.* For other Courts MDC includes only the style and disposition information of those opinions designated as 'Not for Publication.' These specially designated opinions which are included in LEXIS also carry wording which explains the status of the opinions, and often details how it may be used by attorneys appearing in that court. This wording, frequently adapted from and citing to a local court rule, has been developed in conjunction with the issuing Court. Some courts have requested that 'Not for Publication' opinions not be available in any format. MDC honors this request.

*Id.* (emphasis added).

281. MDC has a group of people in the Legal Data Collection Department, who are dedicated exclusively to maintaining good court relations. *They inform the court, by visits and by mass mailings, of our desire to include unpublished opinions in LEXIS and then they negotiate to obtain them.*

*Id.* (emphasis added).

282. As the result of a settlement effectuated with the West Publishing Company, LEXIS is entitled to include West citations in its reports of cases and other materials. *See, e.g., Blodgett, West, Mead Data Central Settle*, A.B.A. J., Sept. 1, 1988, at 36; Donham, *supra* note 258, at 375.

example, the decision that the District Court for the District of Kansas issued in *Taher v. K Mart Corp.* is given the following identifier, or "citation": 1988 U.S. Dist. LEXIS 15036.<sup>283</sup> Because *Taher* was not reported in West's *Federal Supplement*, the LEXIS citation is the only citation that appears when this decision is retrieved by a LEXIS search.<sup>284</sup> If a decision has been printed in full-text form in a West or other case reporter, LEXIS provides citations to those reporters and then appends its own. For example, LEXIS provides the following citations for the decision that the District Court for the Middle District of Tennessee issued in *Belcher v. Sears, Roebuck & Co.*: 686 F. Supp. 671, 1988 U.S. Dist. LEXIS 6003, 47 Fair Empl. Prac. Cas. (BNA) 1222, 48 Empl. Prac. Dec. (CCH) para. 38, 603.<sup>285</sup>

If LEXIS includes the full text of a case the disposition of which has simply been noted in West's *Federal Reporter*, then LEXIS so indicates, usually by quoting the circuit's limited "publication" rule at the beginning of the LEXIS report of the opinion. For example, LEXIS reports the decision issued by the Federal Circuit in *Collins Marine Corp. v. United States* in full text, while the *Federal Reporter* simply notes the disposition on appeal.<sup>286</sup> In addition to providing its own citation for the full text of the opinion,<sup>287</sup> LEXIS prefaces it with the following:

Rule 18 opinions designated as unpublished opinions shall not be employed as precedent by this court, nor may they be cited by counsel as precedent, except in support of a claim of res judicata, collateral estoppel, or law of the case. A party may, on motion, request that an unpublished opinion be reissued as a published opinion, citing reasons therefore. Such motion will be granted or denied by the panel that rendered the decision.<sup>288</sup>

When such cases are reported in full-text form in West's *Federal Reporter*, LEXIS so indicates by providing a parallel citation to that volume.<sup>289</sup>

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283. *Taher v. K Mart Corp.*, 1988 U.S. Dist. LEXIS 15036 (D. Kan.).

284. LEXIS uses an identical system with regard to state court decisions that have not been reported in "hard-copy" in a West or other conventional reporter. *See, e.g.*, *State v. Pete*, 1988 Wisc. App. LEXIS 515.

285. *Belcher v. Sears, Roebuck & Co.*, 686 F. Supp. 671 (M.D. Tenn. 1988). Once again, LEXIS follows the same practice with regard to state court decisions. *See, e.g.*, *McSloy v. Jeanes Hospital*, 376 Pa. Super. 595, 546 A.2d 684, 1988 Pa. Super. LEXIS 2236 (1988).

286. *See, e.g.*, 838 F.2d 1222-23.

287. *Collins Marine Corp. v. United States*, 1988 U.S. App. LEXIS 918 (Fed. Cir. Jan. 28, 1988).

288. *Id.* (upper-case deleted). LEXIS follows the same practice with regard to state court decisions. For example, the decision which the Wisconsin Court of Appeals, District Two, issued in *State v. Varnell* is reported in full-text form but is prefaced by the following admonition:

Pursuant to Rule 809.23(3) of Appellate Procedure, an unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority except to support a claim of res judicata, collateral estoppel or law of the case. UNPUBLISHED LIMITED PRECEDENT OPINION - REFER TO LOCAL RULE 809.23(3).

*State v. Varnell*, 123 Wis. 2d 480, 392 N.W.2d 848 (1986).

289. *See, e.g.*, *Law v. United States Postal Service*, 852 F.2d 1278, 1988 U.S. App. LEXIS 6217 (Fed. Cir.).

## 2. WESTLAW in 1989

In a computer search conducted on May 20, 1989, WESTLAW described the contents of its federal decisional files as follows: the decisions of the Supreme Court since 1790 until the present,<sup>290</sup> and the decisions for the federal courts of appeals and federal district courts from 1789 until the present.<sup>291</sup> Like LEXIS, WESTLAW includes decisions from each of the federal courts of appeals<sup>292</sup> and from the district courts for which they serve as appellate tribunals.<sup>293</sup>

Also like LEXIS, WESTLAW is including full-text reports of decisions even though these decisions have not been printed in "hard copy" in either the West reporters or in other unofficial or official reporters.<sup>294</sup> According to a communication from the West Publishing Company, it "seeks to provide

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### 290. *Id.*

Coverage begins with the inception of the court, 2 U.S. (1790) through [the present] and includes documents released for publication in the Supreme Court Reporter and/or the United States Supreme Court Reports. Additional courts reported in U.S. are included from 1 U.S. (1754).

### *Id.*

291. The decisions for the federal courts since 1945 appear in the CTA file, while the decisions from 1891 until 1944 are available in the CTA-OLD file. *Id.* Decisions of the former federal circuit courts that were issued between 1789 and 1911 are included in the DCT-OLD file. *Id.* District court decisions that have issued since 1945 are included in the DCT file, while decisions issued prior to 1945 are included in the DCT-OLD file. *Id.* The peculiar division of the decisions among these files is apparently the result of incorporating the decisions according to the reporters in which they initially appeared. *Id.*

### 292. *Id.*

### 293. *Id.*

294. In the descriptions of its case files, WESTLAW explicitly notes that many of these files include "opinions that are not scheduled to be reported by West Publishing Company" which, of course, must mean that they are not scheduled to be printed in one of the volumes of the National Reporter System. *See id.* at DESCRIPTION files for DCT. WESTLAW indicates that certain "topical services are being monitored for [such] cases," including several CCH and BNA services. *See id.* WESTLAW also includes one decisional file, DCTU, the contents of which it describes as follows:

Decisions obtained directly from the courts for WESTLAW, but which are not scheduled to be reported by West and have not been published by any of the topical services being monitored. Currently, cases are being obtained from the following U.S. District Courts, beginning on the dates shown:

- (a) N.D. Ill. (beginning 1984);
- (b) E.D. La. (beginning 1986);
- (c) D. Mass. (beginning 1986);
- (d) E.D.N.Y. (beginning 1986);
- (e) S.D.N.Y. (beginning 1984);
- (f) E.D. Pa. (beginning 1985);
- (g) S.D. Tex. (beginning 1986).

*Id.* The discussion in the text illustrates that WESTLAW is reporting decisions of the federal courts of appeals that are not published in full text form in its Federal Reporter, and WESTLAW is implementing the same practice with regard to at least some of the state courts. *See id.* at DESCRIPTION files for ARKANSAS CASES, OHIO CASES, DELAWARE CASES, MINNESOTA CASES and TENNESSEE CASES.

the most complete source of opinions of American courts, state and federal in print and electronically that it is possible to do and observe the guidelines and rules adopted by the courts."<sup>295</sup>

West's practices seem to parallel those of Mead Data Central: in response to an inquiry from the author, West merely noted that it "observe[s] the selection and publication rules in place in every [federal] judicial circuit" governing the publication of the opinions of the federal courts of appeals.<sup>296</sup> But its general practices are suggested by comments concerning the inclusion of otherwise unreported state appellate court opinions in WESTLAW:<sup>297</sup> "*If the state court permits electronic publication only*, but also restricts citation or reference by court rule that limitation by rule appears in the electronic presentation of those opinions released for electronic publication."<sup>298</sup> Furthermore, West intimated that it actively seeks out otherwise unreported federal district court opinions for incorporation into WESTLAW,<sup>299</sup> thereby continuing a practice that was established when decisions were available only in printed form.<sup>300</sup> All of which means, of course, that WESTLAW, like

295. Letter from Arnold O. Ginnow, Vice President & Editor-in-Chief, West Publishing Company, to Susan W. Brenner (May 23, 1989) (concerning the incorporation of otherwise unreported opinions into WESTLAW).

296. *Id.* No further information was provided on the efforts, if any, that West expends in order to secure otherwise unreported decisions for inclusion on WESTLAW. Indeed, it may be that West is not required to expend any additional effort given that the federal courts of appeals are already in the habit of sending opinions to the West Publishing Company for inclusion in the Federal Reporter, either in full-text form or as a disposition noted in tabular form.

297. "The state appellate courts have a variety of approaches to selection of opinions for print and we cooperate with each of those courts." *Id.*

298. *Id.* (emphasis added).

299. The United States District Courts send us opinions based upon their individual determination whether the case is of interest to other than the principal litigants. . . . In addition our attention is directed to U.S. District Court opinions by lawyers, by U.S. Government lawyers, by references to such opinions in other cases or in newspapers or other print media. Whenever a case of interest from another source is noted, a request is made of the U.S. District Court for a copy of the opinion. There are no formal arrangements with any of the United States District Courts. It is our practice to advise the individual judges of our wish to receive copies of their opinions.

*Id.*

300. *See, e.g.,* Garfield v. Palmieri, 193 F. Supp. 137 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 526 (2d Cir. 1962). The *Palmieri* case was a libel action brought by an attorney, Gustave B. Garfield, against a federal judge, Edmund Palmieri. The alleged libel was contained in an opinion issued by Judge Palmieri. *Id.* at 139. Judge Palmieri issued the opinion in question, but did not submit it for publication in the Federal Supplement until after he received the following letter from the West Publishing Company:

In a recent opinion by Justice Spector which we are preparing for publication there is reference to your unreported opinion in the above case.

We shall therefore appreciate it if you will send us copy [sic] of your opinion, together with the names and addresses of the attorneys for the respective parties and the filing date with a view to publication in the Federal Supplement so that a definite volume and page reference may be given in Judge Spector's opinion.

*Id.* at 140. Judge Palmieri sent the opinion to West "and shortly thereafter it appeared under the title of the case, Fleischer v. A.A.P., Inc., in 180 F. Supp. 717." *Id.*

LEXIS, includes decisions that are *not* available in the conventional reporters as well as the decisions that *are*.

WESTLAW has the advantage of being able to include citations to its own National Reporter System volumes of printed reports, and does so. But because WESTLAW also includes decisions that have not been printed in volumes of the National Reporter System, it, too, has had to develop new forms for identifying these "unreported" cases. When the disposition of a case is published in the *Federal Reporter* but the full text is available in WESTLAW, this is indicated by the following device: the full-text opinion appears with a Federal Reporter citation, for example, 865 F.2d 1329 (Table), plus the notation "(text in WESTLAW)."<sup>301</sup> Such an opinion will also be accompanied by a caveat similar to that which accompanies an "unreported" LEXIS decision, for example:

NOTICE: D.C. Circuit Local Rule 11(c) states that unpublished orders, judgments, and explanatory memoranda may not be cited as precedents, but counsel may refer to unpublished dispositions when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant.<sup>302</sup>

Caveats such as this may also include the following, prefatory observation: "Note: This opinion will not be published in a printed volume. The decision will appear in tables published periodically."<sup>303</sup>

WESTLAW has also developed its own unique citation form, a form which is almost identical to the citation form that LEXIS uses for its cases. As an example, the District Court for the Northern District of Illinois' decision in *Laborers' Pension Fund v. Jobarr Concrete* is given the following identifier, or "citation": 1988 WL 17595.<sup>304</sup> This citation is accompanied by the notation that such a decision is not reported in one of the volumes of the National Reporter System, or simply, "Not Reported in F. Supp."<sup>305</sup>

While it is not uncommon for WESTLAW and LEXIS both to report a decision that is not included in one of the volumes of West's National Reporter System, when this occurs neither system indicates that the document is available in the other database as well.<sup>306</sup> For example, in 1988 the District Court for the District of Kansas issued a decision in *Taher v. K Mart Corp.*<sup>307</sup>

301. See, e.g., *KN Energy, Inc. v. Federal Energy Regulatory Comm.*, 865 F.2d 1329 (D.C. Cir. 1988) (text in WESTLAW).

302. *Id.*

303. *Id.* (upper-case deleted). Like LEXIS, WESTLAW also includes otherwise "unreported" decisions from various state courts. See, e.g., *Unocal Corp. v. Superior Court*, 198 Cal. App. 3d 1245, 244 Cal. Rptr. 540 (1988). The full text of this decision is included in WESTLAW, accompanied by the notation that "[i]n denying review, the Supreme Court ordered that the opinion be not officially published." *Id.*

304. *Laborers' Pension Fund v. Jobarr Concrete, Inc.*, 1988 WL 17595 (N.D. Ill.).

305. *Id.*

306. *Id.* In other words, there are as yet no "parallel citations" between the two data bases.

307. See *supra* section II(B)(1).

LEXIS gave this decision a LEXIS citation: 1988 U.S. Dist. LEXIS 15036.<sup>308</sup> Because *Taher* is not reported in West's *Federal Supplement*, this is the only citation that appears when *Taher* is retrieved by a LEXIS search.<sup>309</sup> Although *Taher* is not reported in the *Federal Supplement*, it is included on WESTLAW and is given the following WESTLAW citation: 1988 WL 142420 (D. Kan.).<sup>310</sup>

In sum, LEXIS and WESTLAW are now law reporters in the same way that the volumes in West's National Reporter System are law reporters. Section III develops the implications of this observation.<sup>311</sup>

### III. LEGITIMATION REFERENTS AND DIFFERENTIAL ACCESS TO PRECEDENTS: AN ANALYSIS OF THE PAST AND AN ANTICIPATION OF THE FUTURE

Section I introduced the concept of "sociological revolution" as denoting a fundamental alteration in the fabric of a social institution.<sup>312</sup> It explained that social institutions must "legitimate" their existence and activities if they are to survive.<sup>313</sup> Since "the law" is such an institution, it too must legitimate

308. *Taher v. K Mart Corp.*, 1988 U.S. Dist. LEXIS 15036 (D. Kan.).

309. LEXIS uses an identical system with regard to state court decisions that have not been reported in "hard-copy" in a West or other conventional reporter. See, e.g., *State v. Pete*, 1988 Wisc. App. LEXIS 515.

310. *Taher v. K Mart Corp.*, 1988 WL 142420 (D. Kan.). This WESTLAW citation is also accompanied by the notation "Not Reported in F. Supp." *Id.*

311. In this regard, it is also relevant to note that the Director of the Administrative Office of the United States Courts recently announced a "pilot project for distributing federal Circuit Court opinions in electronic format." *Pilot Project for Distribution of Federal Circuit Court Opinions Announced*, 20 AM. A.L. LIBR. NEWSL. 353 (June 1989). The pilot project:

[E]nvisions hardware (a personal computer) being placed in each participating court to be used for transmitting electronic copies of each publicly available opinion, immediately after release from the Court. The opinions will be transmitted to an electronic mail service, where they will simultaneously be made available to all interested recipients.

*Id.* (emphasis added). The project is being implemented in four circuits, and is similar to an experiment that the Supreme Court is considering. See Marcotte, *High-tech High Court*, A.B.A. J. Mar. 1990, at 26 (Supreme Court will soon distribute opinions electronically to approximately a dozen subscribers who will then make opinions widely distributed). It is interesting to note that this experiment at the appellate court level continues the distinction between "published" and "unpublished" opinions, although it apparently categorizes them as "publicly available" and "not publicly available" opinions.

312. See *supra* section I(B)(1). A society is composed of "social institutions." A "social institution" is simply an accumulation of routinized conceptualizations about certain types of activity and a repertoire of behaviors that have become the established means for accomplishing that activity. As an example, every society will include a social institution that is devoted to the process of "education," although the performance of this function will be organized differently within different societies. See, e.g., P. BERGER & T. LUCKMANN, *supra* note 4, at 47-128.

313. Legitimation 'explains' the institutional order by ascribing cognitive validity to its objectivated meanings. Legitimation justifies the institutional order by giving a normative dignity to its practical imperatives. . . . Legitimation not only tells the individual why he *should* perform one action and not another; it also tells him why things *are* what they are.

P. BERGER & T. LUCKMANN, *supra* note 4, at 93-94.



its activities. Courts may legitimate their authority through any of three predicates—tradition, faith or rationality.<sup>314</sup>

Subsection A traces the evolution of Anglo-American law from a reliance upon the first predicate, tradition, to a reliance upon the third predicate, rationality, with particular reference to the consequences which this had for “precedent.” The discussion denominates the predicates as “legitimation referents” to more clearly denote their function as conceptual “yardsticks” against which the correctness of particular conduct is measured; “precedent” is the discrete manifestation of a particular legitimation referent. Subsection B then examines the effects that computerized legal research is likely to have upon the concept of “precedent” and upon the law itself.

### A. *The Past*

Between the fifth and twelfth centuries, English law was legitimated by tradition.<sup>315</sup> Exercises of legal authority were “legitimate” to the extent that they were consistent with prior exercises of legal authority in similar situations.<sup>316</sup> The system had developed an inventory of routine responses, or “customs,” that corresponded to recurring factual situations.<sup>317</sup> Adjudication proceeded by comparing a particular factual situation with the inventory of available responses and applying the response that most closely corresponded with the facts presented.<sup>318</sup>

“Precedent,” to the extent that it existed at all, was a purely empirical phenomenon, for example, reference to prior applications of custom in factually isomorphic situations.<sup>319</sup> Although the system relied upon the rec-

314. See *supra* section I(B)(1).

315. See *supra* sections I(A)-(B). “[T]he old law . . . was preserved merely because it was old. Those who practiced and obeyed it . . . offered no account of it except that it had come down to them from their ancestors.” H. MAINE, *supra* note 150, at 130; see also C. LEVI-STRAUSS, *THE SAVAGE MIND* (1973) (“antiquity and continuance are the foundations of legitimacy”).

316. “For the people of the early Middle Ages, the fact that a rule had been applied in the past . . . meant . . . that the rule existed, and therefore ought to be obeyed.” C. RADDING, *MEDIAEVAL JURISPRUDENCE*, *supra* note 136, at 20.

317. See *supra* section I(B). The development of such an inventory was possible simply because society was much simpler and far less problematic than it was to become; the development of such an inventory was also possible because society had changed very little throughout the preceding centuries. As others have noted, “things have changed more in the past two hundred years than in the previous two thousand years.” Collier, *Precedent and Legal Authority: A Critical History*, 1988 *Wis. L. Rev.* 771, 783 n.47 (referring to comments made by Herman Oliphant in his 1927 Presidential Address to the Association of American Law Schools, *reprinted as* Oliphant, *A Return to Stare Decisis*, 14 *A.B.A. J.* 71, 74 (1928)).

318. [L]egal expertise consisted . . . of knowing what the laws were. There was little room for interpretation, because there either existed a law to fit the facts of a case, in which case its applicability was . . . obvious, or there did not . . . .  
C. RADDING, *MEDIAEVAL JURISPRUDENCE*, *supra* note 136, at 33 (describing the practice of law in medieval Italy).

319. See generally C. RADDING, *MEDIAEVAL JURISPRUDENCE*, *supra* note 136, at 17-33 (medieval laws were a set of relatively independent rules governing a variety of concrete situations).

itation of maxims as the mnemonic embodiment of custom,<sup>320</sup> such recitations were not the invocation of abstract principles of legitimacy, but merely a symbolic linking of what was "being done" with what "had always been done." There was no need for abstract principles of legitimacy because a particular exercise of legal authority was legitimate to the extent that it replicated an unbroken sequence of similar exercises.<sup>321</sup>

### 1. "Immemorial Custom"

The destruction of the traditional referent began in 1178, when Henry II created the Court of Common Pleas. English law entered a transitional stage in 1178 and remained there until at least the fifteenth century.<sup>322</sup> During this stage, the legitimating referent was still the force of tradition, but tradition in a new guise.

English law was legitimated by reference to "immemorial custom," which may seem peculiar given that the king's court was actively engaged in "inventing" much of this law. The referent was, however, inevitable: although the court could invent new manifestations of the law, it could not invent a new rationale for "the law." Such a measure was inconceivable to a legal system that was only beginning to move away from simple tradition.<sup>323</sup> Consequently, it was necessary for courts to articulate a legitimating referent that retained a linkage to the past while permitting the legitimation of legal practices that had obviously not existed in ages past.

This transition was accomplished by grounding the law upon generalized custom, as opposed to the bucolic customs that had constituted English law

320. See *supra* section I(B).

321. Charles Radding's insightful study of the evolution of a meaningful jurisprudence in medieval Italy offers comments which apply with equal force to the English jurisprudence of this era:

[I]t [was] a habit of thinking about the laws as a set of more or less independent rules applying to a variety of concrete situations. There was no thought that one law might have implications for the interpretation of another nor that they could be seen as logically interrelated parts of an internally consistent whole. This conception, in turn, defined the nature of early medieval legal expertise. Legal science meant knowing what the laws were. It did not involve analysis of the entire body of laws to determine underlying juristic principles that could be applied to circumstances not explicitly covered by [existing law], nor did it involve mastery of a set of concepts whose use would maintain the logical consistency of the law.

C. RADDING, *MEDIEVAL JURISPRUDENCE*, *supra* note 136, at 21-22.

322. The end of this transitional stage is located at the beginning of the fifteenth century because it was during this period that written pleadings appeared and law began to become a written, as opposed to a purely oral, enterprise. See *supra* section I(B).

323. One author has described the mind-set of this era as manifested in a slightly different context: "To be old was to be good; the best writers were the more ancient. The converse often seems to have been true: if a work was good, its medieval readers were disposed to think that it was old." A. MINNIS, *MEDIEVAL THEORY OF AUTHORSHIP* 9 (1984).

until the twelfth century.<sup>324</sup> Therefore, although the king's court might create a remedy where none had existed before, this act of creation was legitimate because it was simply an extension of a generalized custom that had existed from time immemorial. The move from empirical custom to generalized custom was the first step toward an abstract, externalized legitimating referent. Nevertheless, generalized custom remained an empirical referent because its legitimation source was the reiteration of at least theoretically venerable usages.<sup>325</sup>

Bracton's use of cases is perfectly reasonable in this context: when he was writing, the king's court had been creating and applying the new "common law" for some seventy-five years. Because Bracton intended to criticize his contemporaries for their erroneous application of this law, he required empirical data as to the nature and extent of their errors. The only source of such data was the plea rolls, which recorded specific applications of "immemorial custom." Although he obviously had some general recollection as to the course that the law had taken in decades past, Bracton certainly would not have been able to recall specific cases from those years. Therefore, he required some method of reacquainting himself with what the judges of that era had done in specific situations. Unlike his predecessors of a few centuries past, Bracton could not simply rely upon actual custom, as opposed to the increasingly fictionalized "immemorial custom," because the application of actual custom had become increasingly problematic, if not discredited. Consequently, he turned to the memoranda on the plea rolls as a device for reminding himself as to what had actually been done in the relatively recent past.

By using memoranda from the plea rolls, however, Bracton invented a new method of legal research and set in motion forces that would eventually lead attorneys to regard cases as significant in and of themselves. The development of a modern conception of "precedent" is simply a matter of coming to value the details of the recordation of a past practice over the empirical specificities of the practice itself. In order to accomplish this,

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324. See 1 W. BLACKSTONE, *supra* note 143, at \*74. "General customs are such as prevail throughout a country and become the law of that country. . . . Local customs . . . prevail only in some particular district." BLACK'S LAW DICTIONARY 461 (Rev. 4th ed. 1968).

325. In describing the law of this era, Weber notes that its concepts were:

[N]ot 'general concepts' which would be formed by abstraction from . . . logical interpretation of meaning or by generalization and subsumption; nor were these concepts apt to be used in syllogistically applicable norms. In the purely empirical conduct of legal practice and legal training one always moves from the particular to the particular but never tries to move from the particular to general propositions in order to be able subsequently to deduce from them the norms for new particular cases.

MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 201-02. Weber also observed that English law during this era was not interested in developing "a rational system but rather [aimed at] a practically useful scheme . . . oriented towards the interests of clients in typically recurrent situations." *Id.* at 201.

however, one must be able to accept that judges play an active role in the articulation and application of the law. This period was not capable of such a recognition, so cases were regarded as significant only to the extent that they evidenced what custom was and what it was not.<sup>326</sup>

Because cases were the available data of custom, a market arose for reports of them.<sup>327</sup> These reports, however, did not resemble modern case reports.<sup>328</sup> The system could tolerate eccentric reporting because the controlling force of the law was "immemorial custom," which meant that it was beyond the power of a judge to alter the law by a decision issued in a particular case.<sup>329</sup>

The development of an interest in case reports did, however, have a profound consequence for the evolution of the legitimating referent. Although the law overtly relied upon "immemorial custom," the habit of using cases to evidence custom permitted the development of a legitimating referent that was predicated upon principles of an abstraction transcending simple adherence to prior usage. Such a referent became possible once the partici-

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326. It was because cases were merely artifacts of custom that English law could maintain that it was custom which controlled a decision rather than the cases that were cited as evidence of custom. See *supra* section I(B).

327. The development of an interest in cases and of a market for reports of cases is, of course, attributable to empirical forces far more profound than Bracton's example. During this era, English society was experiencing social change in a variety of areas, albeit slowly. This also contributed to the development of an interest in case law because processes of social change produce empirical situations that cannot be resolved by reference to "what has been done before." If there had been no quantum of social change, English society could have settled comfortably into a system of traditional law in which the characteristics of the common law replaced the bucolic customs of an earlier age. And it is true that the common law almost achieved such a settled rigidity for a time. Fortunately, at least to the modern way of thinking, external forces interceded to make this finally impossible. Unfortunately, however, the identification and description of these forces is quite beyond the compass of the present exercise.

328. See, e.g., T. PLUCKNETT, *supra* note 13, at 268-73. In discussing the case reports in the Year Books, Wallace notes that:

[Y]ou cannot but be struck with the peculiar manner of them, quite unlike that of modern days. The Report seems to be almost an exact transcript of whatever was said or done in court during the trial of a cause, and often ends with the statement or argument or counsel . . . without the least mention of what became of it finally. The same thing happens in other volumes of the Year Books.

J. WALLACE, *supra* note 47, at 76.

Wallace also notes that some of the earliest reports included "the reasons and causes of the judgments" but that "the practice of so expressing them ceased" for a time, to be resumed with the rise of the modern case reporters. See *id.* at 75-76.

329. Indeed, to the extent that a decision in a particular case departed from past practices, it would have been regarded as erroneous and would not, therefore, have been a matter in which there was any especial interest. It is also probable that the system could tolerate a high degree of ambiguity in its case reports because it was based upon a consensus as to the substance and consequences of extant legal principles. Given this consensus, variations in case reports were unimportant because, given the fundamental assurance as to the nature of "the law," they could not give rise to any confusion or uncertainty in that regard. See, e.g., C. RADDING, *MEDIAeval JURISPRUDENCE*, *supra* note 136, at 850-1150.

pants in the legal system developed the idea that cases could be construed as the empirical manifestation of a metempirical phenomenon, i.e., an abstract legitimating referent.<sup>330</sup>

## 2. *Natural Law*

It is impossible to identify the precise moment when Anglo-American law shifted its allegiance from custom to rationality, although it is possible to say it occurred between the fifteenth and nineteenth centuries.<sup>331</sup> The instant of its occurrence is, however, less important than the form in which it initially manifested itself: legal systems can rely upon any of three referents—tradition, faith or rationality.<sup>332</sup> Rational referents are divisible into “value rationality” and “legal rationality.” Weber concluded that systems evolve from a traditional referent through a value rational referent and into a “legal” referent.<sup>333</sup>

When value rationality is the referent, “valid is that which has been deduced as absolutely demanded”; when legal rationality is the referent, legal authority is legitimate if it comports with rules that are “formally correct and [that] have been made in the accustomed manner.”<sup>334</sup> The classic example of a value rational referent is “natural law.”<sup>335</sup> “Natural law” is

330. In discussing a similar phenomenon in Italian jurisprudence, Charles Radding notes that it resulted from an increase in judicial heterogeneity:

To understand why this is important, one needs to recall that one of the basic experiences in developing critical standards is the need to explain one's view to others to whom those views are not obvious. Because the judges . . . all came from the same environment, shared similar training, and often sat together . . . on courts, they would not often have had this experience. . . . Indeed, the shared perspective resulting from common experiences probably accounts for the absence of discussion about law or facts apparent in all the pleas of the early Middle Ages: there was no need to discuss how to assess a case when all those involved viewed the issues from much the same angle.

C. RADDING, *MEDIEVAL JURISPRUDENCE*, *supra* note 136, at 75. The creation of the king's court would have had a similar effect on the English judiciary, because it resulted in the creation of a professional class of jurists and because these jurists were the product of differing backgrounds and training, at least until standardized legal training appeared in English law. *See, e.g.*, MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 198-223 (criticizing the effects which later English legal training had upon the law's ability to develop “rational” constructs).

331. For a treatment of “the development of legal science” as “a shift from taking laws as external realities to adopting the stance of a consciously critical interpreter,” see C. RADDING, *A WORLD MADE BY MEN*, *supra* note 136, at 400-1200 (1985).

332. *See supra* section I(B)(1).

333. These referents will be referred to as a “value rational referent” and a “legal” referent, in order to avoid the cumbersome, “legal rational referent.” The third general referent, i.e., “faith,” cannot be incorporated into a general evolutionary sequence because it operates as a sociological “wild card.” *See* MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 224-55, 336-37 (legitimacy rests upon the authority of a *concrete individual* which is not based on rational rules or tradition).

334. *Id.* at 8-9; *see also id.* at 336 (the legitimacy of an exercise of authority can be established by “a system of consciously made *rational* rules”).

335. *Id.* at 8-9 (“The purest type of value-rational validity is represented by natural law”).

legitimation according to "an objective standard of values" rather than by a repertoire of formally established rules.<sup>336</sup> Because value rational legitimation is the necessary intermediary between traditional and legal referents, Anglo-American law exchanged its reliance upon "immemorial custom" for a reliance upon "natural law."

The first step in this exchange was apprehending "immemorial custom" as a body of "principles" transcending empirical routines. Once this step had been taken, custom ceased to be a purely empirical phenomenon and took on at least a veneer of abstraction, albeit an abstraction the legitimacy of which was ostensibly grounded upon adherence to tradition.<sup>337</sup> This gloss of abstraction became the foundation for a value rational referent—"natural law."

Value rationality continues the reliance upon an external body of legitimating principles that was the animating feature of English law while "immemorial custom" was its referent. This body of principles provides an assurance of order and stability, as the legitimacy of specific exertions of legal authority does not depend upon the caprice or jurisprudential aptitudes of the decisionmaker. The distinction between the two referents lies in the constitution of this body of legitimating principles. As long as "immemorial custom" is the referent, it consists of a congeries of propositions of idiosyncratic generality that have been inductively derived from the routines of daily activity.<sup>338</sup> After "natural law" becomes the referent, it is a more or less accessible scheme of ethical principles.<sup>339</sup> A value rational referent continues its predecessor's reliance upon an external body of legitimating principles, and regards cases with an attitude which resembles that of its predecessor, as artifacts of "natural law," and values them accordingly. However, because a value rational referent is predicated upon abstract concepts, as opposed to the fundamentally empirical concepts that animate a traditional referent, the two systems approach their artifacts differently.

In a value rational system, these artifacts are used by judges who have been given the task of "discovering" the "natural law."<sup>340</sup> This refers to a

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336. *Id.* "Natural law has . . . been the collective term for those norms which owe their legitimacy not to their origin from a legitimate lawgiver, but to their imminent and teleological qualities." *Id.* at 288, 313.

337. During this era, the courts developed convenient legal fictions whenever necessary in order to maintain the illusion that they were simply applying principles that derived from immemorial custom, as opposed to inventing novel solutions for novel situations. *See, e.g.,* H. MAINE, *supra* note 150, at 16 ("'Legal Fiction' [signifies] any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration. . . . The *fact* is . . . that the law has been wholly changed; the *fiction* is that it remains what it always was.") (emphasis in original).

338. *See* P. BERGER & T. LUCKMANN, *supra* note 4, at 47-92.

339. *See, e.g.,* MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 284-300.

340. *See supra* section I(B)(2). In a system that relies upon tradition as its legitimation referent, cases are regarded as evidence of custom. Consequently, cases become empirical data from which judges and legal practitioners can infer the parameters of particular custom.

process by which the constitutive parameters of a scheme of ethical principles are inferentially identified and described. Although this process is superficially similar to the process that occurs in a system which relies upon a traditional referent, there are fundamental differences. A system which is legitimated by reference to tradition uses cases as data illustrating the authoritative value of empirical routines, while a system which is legitimated by reference to natural law uses cases as inductive support for propositions that have been inferentially deduced from the scheme of ethical principles which are postulated as the system's value rational referent.<sup>341</sup>

Because the emphasis was upon "discovering" the "natural law," law came to be regarded as a "science" that was to be undertaken with methodologies comparable to those found in other fields of scientific endeavor.<sup>342</sup> This approach affected the use of cases and case reports.

While the natural system continued to tolerate ambiguity in case reporting, it did assume certain characteristics of modern law reporting. For example, the system developed a concern with accurate reporting and with the issuance of reports that included standardized features such as the facts, the arguments of counsel and the judgment of the court.<sup>343</sup> "Accurate reporting," however, did not mean what it means today. Reporters prepared their own "reports" of cases, as opposed to printing opinions drafted by the deciding judge. The consequence was that cases were "reported" differently by different reporters.

Although this would be intolerable to a modern lawyer, it was perfectly reasonable when judgments were legitimated according to an external referent. Reports could be idiosyncratic because cases did not constitute, but merely evidenced "the law." "The law" had a fixed, independent existence, so that particular cases could not affect its substance,<sup>344</sup> which had two consequences for law reporting. First, there was a preference for older cases, as it was reasonable to assume that, having stood the test of time, they were more likely to represent accurate reflections of the underlying principles of

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341. "[V]alid is that which has been deduced as absolutely demanded." MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 8.

342. See *supra* section I(B)(2) & (C). This also reflected a perception of law as a phenomenon that was analogous to other natural forces and subject to discovery by the same means. See, e.g., MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 289 (the "elaboration of natural law . . . derived from the concept of nature of the Renaissance, which everywhere strove to grasp the canon of the ends of 'Nature's' will."); W. FRIEDMAN, LEGAL THEORY 114-51 (5th ed. 1967).

343. See, e.g., J. WALLACE, *supra* note 47, at 446; see also *supra* section I(A).

344. The following quotation was offered in defense of the charge that Edmund Anderson, who was appointed Lord Chief Justice of the Court of Common Pleas in 1582, had "a slavish adherence to precedents":

'What!' says he in one case, 'shall we not give judgment because it is not adjudged in the books before? We will give judgment according to reason; and if there be no reason in the books, I will not regard them.'

J. WALLACE, *supra* note 47, at 141 (quoting GOULDSBOROUGH'S REPORTS 96 (1653)).

“the law.”<sup>345</sup> The corollary to this preference is that the modern concern with gaining immediate access to judicial pronouncements was not used. Second, participants in the legal system were not impelled by the desire to obtain every case pertaining to an issue. A search for all relevant cases was unnecessary because the resolution of legal problems was governed by “principles” rather than cases.<sup>346</sup>

This situation changed after the law exchanged its value rational referent for a reliance upon “enactments which are formally correct and which have been made in the accustomed manner,” that is, those enactments which are “legally” correct.

### 3. Rational—Legal Referent

This exchange had been completed by the beginning of the twentieth century, so that the legal system now relied upon “[r]ational adjudication on the basis of rigorously formal legal concepts.”<sup>347</sup> In such a system:

[L]aw is *self-justifying*. It requires no appeal to moral or political values for its legitimacy. Its own systematic logical structures provide its legitimacy. Law is accepted solely as a rational system of rules. The religious, traditional or ethical natural law principles which grounded it in earlier era are lost as law is ‘unmasked’ as merely technical rules of ever increasing intricacy.<sup>348</sup>

The participants in the legal system dedicate themselves to mastering the evolving intricacies of an ever-expanding body of technical rules which result from legislative and judicial action. Although legislative enactments are a conspicuous feature of contemporary American law, judicial action continues to be an essential source of rules because judicial pronouncements are the means by which these enactments are operationalized and because such

345. See *supra* section I. This also explains why it was common for a reporter to issue a volume that reported cases which had been described many years before, and as to which he may or may not have had personal knowledge. See, e.g., J. WALLACE, *supra* note 47, at 142-43, 153-54, 165-96. Lord Coke, for example, “brought out the 1st volume” of his reports “twenty years after the date when he . . . began” preparing it. *Id.* at 166. And remember that the American colonial lawyers were more interested in obtaining reprints of English cases than in receiving reports of the cases that were being decided by their own courts. See *supra* section I(C).

346. Indeed, there was a tendency to “re-report” cases that were held in high esteem and that had already been reported by other reporters. See, e.g., J. WALLACE, *supra* note 47, at 229 (“The cases are merely selected from other books”).

347. MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 296-321. Weber believed that the transition to a purely rational legal system had been accomplished in certain of the civil law countries, but that the Anglo-American persistence in relying upon common law and the force of “precedent” impeded the realization of this accomplishment in the English and American legal systems. *Id.*; see also R. COTTERRELL, *supra* note 5, at 162-66.

348. R. COTTERRELL, *supra* note 5, at 166 (1984). Rules are accepted “because they are rules; not for their moral worth or political idealism.” *Id.* at 165.



pronouncements are the only source of rules in areas that have not yet become the objects of legislative attention.<sup>349</sup>

With the demise of an external referent, "the law" becomes whatever judges say it is; their decisions no longer merely evidence "the law" but have *become* "the law." It is therefore absolutely imperative that the participants in the legal system have access to judicial pronouncements *as rendered*; hence the importance of reporting and distributing judicial decisions. The system no longer tolerates idiosyncratic case reporting. Because judicial decisions are now the "text" of the law,<sup>350</sup> the system insists that they be reported accurately and consistently. Thus, reporters "publish" decisions that have been drafted by the judges, after confirming the accuracy of such reports with the issuing judicial officer.

Section I described certain consequences which this emphasis had for American case reporting, including increases in the value and in the supply of case reports.<sup>351</sup> These increases resulted from an approach to case law that is a profound departure from the approach that prevailed when the legal system relied upon an external legitimating referent. This approach is the "factual" approach to case law.<sup>352</sup>

As opposed to its predecessor,<sup>353</sup> the factual approach treats cases as the "facts" of the law; that is, judicial decisions are the "facts" which, in the aggregate, come to constitute a "body" of law. Such an aggregate can concern a particular category of law so that, for example, there emerges a "body" of Ohio tort law consisting of the decisions that the Ohio courts have rendered on issues concerning tort liability.<sup>354</sup> To practice tort law in Ohio, one must have access to this "body" of law; to have access to this "body" of law, one must have access to its constitutive elements, the decisions on Ohio tort liability.<sup>355</sup> Thus, in a rational-legal system, judicial decisions come to be prized in and for themselves because they are the constitutive fabric of "the law." Judicial opinions *can* and *do* change "the

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349. See, e.g., G. CALABRESI, *A COMMON LAW FOR AN AGE OF STATUTES* (1982).

350. See Collier, *supra* note 317, at 771, 805-08. "In the classical tradition of the humanities, authority derives principally from an original text . . . Etymologically, the 'authority' is the author (*auctor*), the originator of something." *Id.* at 805-06 (footnote omitted).

351. See *supra* section I(C)(3).

352. The description of this approach and its consequences for the practice of law and the utilization of case reports therein is an attempt to articulate what Polyani describes as "*the structure of tacit knowing*" in the context of the American legal profession. M. POLYANI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* x (1962).

353. See *supra* section I(B)(2).

354. This "body" of Ohio tort law is, of course, only one of the constitutive elements of a larger "body" of American tort law; and this larger "body" of American tort law is only one of the constitutive elements of a larger "body" of American civil law which, in turn, is only one of the constitutive elements of a larger "body" of American law, and so on.

355. This discussion and the discussion that follows proceed on the basis of sociological concepts that were discussed in section I(B)(1), *supra*. For a more detailed discussion of the processes by which particular approaches to discrete realities emerge and maintain themselves, see, e.g., P. BERGER & T. LUCKMANN, *supra* note 4, at 104-16, 138-47.

law," which means that access to them assumes critical importance.

This reverses an assumption that governs when a system relies upon an external legitimating referent. Such a system prefers older cases, assuming that they are more likely to be accurate because they have stood the test of time or because they were issued at a time when the legitimating referent was more accessible and/or both. When a system relies upon a "legal" referent, the reverse is true. There is an exaggerated preference for "new" cases on the assumption that, as the most "current" pronouncements on an issue, they are also the most accurate pronouncements on that issue. As the system increases its complexity and the pace with which it issues its precedents, this preference becomes more exaggerated, so that practitioners demand access to "newer" and "newer" case reports.<sup>356</sup>

Consequently, this approach accounts for the fact that, unlike other commodities, case reports increase in value as they increase in number. This phenomenon occurs because reports are perceived as providing access to information that produces certain advantages in the practice of law, particularly in adversarial encounters in the practice of law.<sup>357</sup> Access takes on a significance that transcends the precedential value of a particular decision, because anyone who is familiar with the practice of law in modern American society appreciates that it is an undertaking fraught with ambiguity and uncertainty. When a system relies upon a "legal" referent for its legitimation, the constitutive principles of legal authority are liberated from the constraints of an external legitimating referent and left to evolve into esoteric and often perplexing intricacies.<sup>358</sup> Because they are not anchored in an external referent, these intricacies are subject to the possibility of sudden, dramatic change. This infects the practice of law with uncertainty. As opposed to the practitioner in a traditional legal system, who knows what the law is and will be because he knows what the law has been, the practitioner in a

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356. See, e.g., 3 *LEXIS Brief* 4 (May 1989).

[C]ommunications law is constantly changing. From FCC decisions to federal case law, new parameters are constantly being defined. To stay abreast of the most recent developments, the practitioner must regularly check a variety of legal resources. . . . *LEXIS* . . . puts these resources at your fingertips.

*Id.* See also *BNA Online* announcement: "Get news from Washington—while it's still new." Furthermore, a *WESTLAW* advertisement included the following assurance:

*WESTLAW* gives you new decisions online days, even weeks earlier than any other service. . . .

Days ahead in reporting federal court decisions.

Weeks ahead in reporting state court decisions.

*Nat'l L.J.*, June 19, 1989, at S10-S11; see also *Nat'l L.J.*, June 26, 1989, at 64 (*WESTLAW* advertisement for its *Shepard's PreView* service: "Now a list of the most recent decisions citing your case can put your research a step ahead").

357. For example, *LEXIS* describes itself as providing "[t]he power to win." See, e.g., *Nat'l L.J.*, June 26, 1989, at 32-33.

358. Although systems which rely upon traditional or value rational referents may include doctrines of profound complexity, these doctrines will not fluctuate dramatically because they are grounded in an external legitimating referent which is not receptive to alteration.

rationally-derived legal system has no assurance that because he knows what the law was yesterday, he knows what the law is today. This insecurity increases as the legal system continues to increase the specificity and complexity of its rules.<sup>359</sup>

The lawyer's insecurity is enhanced by the adversarial ethos of American law. Adversarial encounters are consummated before a judicial officer who is unlikely to have any particular tolerance for attorneys who are "unprepared." The awareness that this officer expects a certain level of "preparedness" and is capable of imposing a variety of official and unofficial sanctions if that expectation is not satisfied imposes pressure upon the advocates to "be prepared" when they appear before him. This pressure is aggravated by the adversarial character of the appearance; each side's advocates will be aware that there is a very real possibility that their opponent(s) will have done their homework in order to be "prepared" for their mutual encounter before the judicial officer.

As such an encounter approaches, each side will be driven by the desire to be "prepared" This desire emanates both from a desire to perform in a professional manner and from a desire to avoid the embarrassment that is associated with a "lack of preparation."<sup>360</sup> The desire to be prepared will also reflect, either explicitly or implicitly, a determination to avoid the situation in which the other side has discovered "a case" that is beneficial to it and disadvantageous to the preparer. This determination also often encompasses a determination to avoid the situation in which one discovers, after the judicial encounter has concluded in a fashion that is adverse to one's client, "a case" that was favorable to that client's position and that "might have made a difference if we had known about it." Both situations are, of course, to be avoided because of the embarrassment and consequent diminution in professional confidence which they produce.

Obviously, the practice of law in such a system will emphasize access to case reports, as they are the primary means for being "prepared" and

359. Moreover, this insecurity is the product of a system of legal education that is predicated upon what one observer characterized as the "atomistic" approach to law:

American law became associated with precedents rather than principles and with ad hoc rationalizations, as the judges moved from case to case. Instead of attempting to discover 'the underlying theory of law,' the American lawyer looked 'for cases "on all fours,"' cases whose facts duplicated as closely as possible the ones from the case at hand.

R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 133 (1983).

The greater the number of decisions that had been rendered, the greater the likelihood that one could be found precisely on point. The more needful it seemed to find this closest possible parallel case, the greater was the demand for access to the largest and most up-to-date collection of decisions.

A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAWS* 374-75 (1921).

360. This desire has been enhanced by the recent increase in legal malpractice actions and by the increasing activism of attorney disciplinary entities.

thereby avoiding embarrassment and a consequent loss in professional confidence. And this access to case reports becomes important for two reasons, one of which is explicit and overt, and one of which is implicit and unexpressed. On an explicit, overt level, access to case reports will be prized because it is the means by which one "prepares" for an adversarial encounter. "Cases" are the constitutive elements of the law; one can only prepare by gaining access to and scrutinizing as many pertinent cases as possible.

Because the level of one's preparation will be correlated to the extent to which he or she has gained access to such cases, the system will emphasize the generation of as many case reports as possible, along with making those reports available to practitioners with all possible speed. Indeed, in such a system, access to judicial decisions that have not been "published" may be prized, so that certain law firms and governmental agencies will attempt to accumulate their own stock of decisions that have been issued by courts before which they often appear. These "unreported" decisions can be attached to pleadings or otherwise made available to the presiding judicial officer and can be used both in an attempt to gain a strictly "legal" advantage as "precedent" and, in a more nefarious sense, in an attempt to "throw the other side off balance" or to curry favor with a judge whose earlier, "unreported" decision is being cited as controlling authority in another matter.<sup>361</sup>

In addition to their significance at this explicit, overt level, access to case reports also has significance at an implicit, subtle level. The above discussion explained that the ambiguity and uncertainty of much of contemporary law produces certain pressures in those who practice that law, including the pressure to be "prepared" when appearing at an adversarial encounter before a judicial officer. In addition to exploiting access to case reports in order to locate cases that can be cited as evidence of "preparation" at such an encounter, those who practice law will also exploit their access to case reports for another, perhaps even more important purpose.

This purpose is to assure themselves, again on an implicit, perhaps even unconscious level, that they are "prepared" by providing them with some tangible evidence that they have undertaken a search for "adverse precedent" or even for cases that would prove helpful to their position, but have been unsuccessful in locating any cases to either effect. The ability to undertake such a search and arrive at some tangible result is a very significant symbolic means for providing oneself with some assurance that one is "prepared" for a particular adversarial encounter.<sup>362</sup> Furthermore, the extent to which one is able to have confidence that such searches are correct in their outcomes

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361. See, e.g., Robel, *supra* note 230, at 940.

362. Indeed, the ability to undertake such a search may be the only empirical means by which one can gain any assurance that he or she is "prepared" for a particular adversarial encounter.

is directly correlated to the confidence and assurance with which one is able to approach a particular judicial proceeding.<sup>363</sup>

The net effect of the "factual" approach to case law is, therefore, to enhance the value of access to reports of judicial decisions; here, "access" encompasses both the fact of procuring such reports and the speed with which this is achieved. A subsidiary effect is to increase the market for such reports, so that there is an emphasis upon gathering and issuing more and more reports of judicial decisions without regard to the metempirical significance of those decisions. This emphasis is generated by a practitioner concern with locating cases that may be "on point" or "on all fours" with the matter that one is currently handling. This concern derives from the assumption that such cases exist "out there" if one can only gain access to them. Such an assumption, in turn, derives from a generalized attitude that is not confined to the legal profession although it is permeating that profession with increasing rapidity.

This generalized attitude is the modern conception of information. "Information" denotes "some tangible or intangible entity that reduces uncertainty about a state or event."<sup>364</sup> Case reports, therefore, are a specialized subset of "information." In the last few decades, American society has developed a particular concept of information as an essential commodity in decisionmaking in a competitive environment.<sup>365</sup> Because information is the means by which one gains competitive advantage, access to information takes on critical significance.<sup>366</sup>

In the legal system, the desire for access to information takes the form of an ever-increasing demand for case reports.<sup>367</sup> Because this demand is the proximate result of thinking of information such as case reports<sup>368</sup> as the means by which one stays competitive, it does not reach satiation. Instead,

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363. In this sense, of course, the ability to conduct such searches has a symbolic functions that is analogous to the signs of "election" to which Weber assigned such an important role in his study of the Protestant ethic. See M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1958).

364. H. LUCAS, JR., *THE ANALYSIS, DESIGN, AND IMPLEMENTATION OF INFORMATION SYSTEMS* 4 (1985).

365. *Id.* at 27-42.

366. The conceptualization of information as a commodity results in the drive to create systems which improve our access to that commodity. These systems are referred to as "information systems." An information system is "a set of organized procedures that, when executed, provide information for decision making and/or control of an organization." *Id.* at 3-4. Information systems are discussed in section III(B), *infra*. For a theoretical analysis of decisionmaking and the role which access to information plays in that process, see I. JANIS & L. MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE AND COMMITMENT* (1977).

367. It also includes, of course, a demand for "information" in the form of statutes, regulations and other "nonjudicial" materials. Since the discussion is concerned only with case reports, it does not include reference to these materials.

368. See, e.g., *BNA Online* announcement ("fourteen leading BNA information services"); Nat'l L.J., June 19, 1989, at S9 ("WESTLAW is first in legal information in America").

the demand continues to increase both quantitatively and qualitatively. Consequently, the system experiences a tremendous expansion in the number of case reports that are available.<sup>369</sup>

### B. *The Future*

The American legal system is experiencing such an expansion that it has responded by attempting to limit case reports.<sup>370</sup> This section argues that limited publication is not a viable means for dealing with this phenomenon and suggests an alternative; exploiting available technology in order to develop new research methodologies. Such methodologies are foreshadowed by techniques that are already in existence, and they will almost certainly lead to the development of new conceptions of "precedent."

#### 1. *Overview*

The consequences of a legal system's adopting a "factual" approach to case law manifest themselves at an individual level and at an institutional level. At an individual level, there is an increased demand for case reports and a concomitant emphasis upon obtaining the newest possible case reports.<sup>371</sup>

At an institutional level, there is a reaction to what is perceived as an undesirable proliferation of "law," followed by the implementation of measures to arrest this proliferation. Because "the law" has become "cases," these measures endeavor to limit the proliferation of "law" by rationing "cases." Because "cases" are accessed by means of case "reports," they attempt to limit case "reports." This limit is achieved by creating a distinction between "published" cases, which *are* "law" or "precedent," and cases that have not been "published," which are "not-law" or "not-precedent."<sup>372</sup> The

369. This expansion in case reports is, of course, also attributable to the sheer increase in the number of cases that have been, and are being, brought in the courts of this country. This is an empirical fact that is essentially outside the scope of the analysis that is being presented in this Article; it is, however, factored into the discussion that is presented in section III(B), *infra*.

370. *See supra* section I(C)(4).

371. *See supra* section III(A)(3).

372. This distinction arises because the obvious option, limiting the number of decisions that actually appear, is unavailable because most appellate courts cannot refuse to decide cases that have been filed with them. *See, e.g.,* R. POSNER, *supra* note 160, at 130-35. And although some courts have issued decisions without opinions, such as "affirmed" or "reversed," these have been criticized because they provide the parties to such cases with no information as to the reasons for the court's decision. *See, e.g.,* Reynolds & Richman, *supra* note 227, at 1167, 1173-76. And even this is no guarantee that the reasoning for a particular disposition will remain unpublished:

In 1898, it was reported that the judges in New Jersey had omitted 667 decisions by designating them as 'Conclusions,' but they were nonetheless published in the first thirty-three volumes of the Atlantic Reporter. The Tax Court, much later, attempted to designate some of its opinions as memorandum opinions that were not to be published. However, they were published and are widely quoted in tax literature.

Surrency, *supra* note 153, at 64 (citing 21 REP. A.B.A. 444 (1898)).

implicit rationale of these rules is that "cases" cannot become "precedent" without undergoing the intermediate step of "publication."

If this rationale is offered as a jurisprudential postulate, then it is unsound, for as one judge said, "[e]ach ruling, published or unpublished, involves the facts of a particular case and the application of law . . . to the case. Therefore all rulings . . . are precedents, like it or not."<sup>373</sup> To paraphrase an earlier observation, "there is no magic in publication."<sup>374</sup> If there were, then courts would categorically refuse to accord precedential significance to the unpublished decisions which are brought to their attention. Those who have practiced law know, however, that this is not the case.<sup>375</sup> Moreover, if there were "magic in publication," then a decision that had been "published" would be "precedent" regardless of the fact that its publication may have resulted from circumstances other than the proper course of decisional justice.<sup>376</sup>

Therefore, the only reasonable interpretation of limited publication provisions is that they are not intended as jurisprudential postulates but are,

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373. Statement of Chief Judge Holloway, joined in by Judges Barrett and Baldock, dissenting from the promulgation of Rule 36.3 of the Tenth Circuit Court of Appeals, 28 U.S.C. Appendix III (Nov. 18, 1986). Chief Judge Holloway dissented from that part of the revision of Rule 36.3 that prohibited the citation of unpublished opinions as precedent, noting that a court "cannot consign any of them to oblivion by merely banning their citation" unless they have been "published." *Id.*; see also *Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972) ("any decision is by definition a precedent"). Judge Posner reached a similar conclusion: "Almost by definition, all opinions have some actual or potential precedential value because if the appeal involved no element of novelty whatsoever it could be disposed of in one line, or perhaps with a citation to a previous case or a statute." R. POSNER, *supra* note 160, at 123. Decisions can, therefore, be "good" precedents or "bad" precedents or "overruled" precedents or even "redundant" precedents, but they cannot be *no* precedent. See, e.g., *Robel, supra* note 230, at 940, 946-47.

374. *Master v. Miller*, 2 Rev. Rep. 399, 403 (1791) ("There is no magic in parchment or in wax," quoted at text accompanying note 1, *supra*).

375. See, e.g., R. POSNER, *supra* note 160, at 120-27; *Robel, supra* note 230, at 940, 946-47.

376. See, e.g., *Kilkenny Catt & Gallico Catt v. State*, 285 Ark. 334, 691 S.W.2d 120 (1985), also available on LEXIS (States library, Ak file) (May 20, 1989). Although both LEXIS and the West reporter indicate that this opinion is available in the Arkansas reports, it does not appear at the page cited, nor does it appear in WESTLAW. It seems that the opinion may have been included in the West reporter, and reprinted therefrom by LEXIS, as the result of a prank: the opinion recounts the travails of the Catt brothers after they are apprehended by "Les Javert," an undercover police officer. 691 S.W.2d at 121. Aside from other circumstances, the fact that the opinion is dated April 1, 1985 lends inferential credence to its status as what might be denominated "suspect precedent." Assuming, *arguendo*, that the *Catt* case is the result of a prank, and is not a decision that was entered as the result of legitimate litigation, does the fact that it has appeared in print, in a West reporter, therefore render it "precedent?" If the answer to that question is in the affirmative, then the American legal system has certainly embarked upon a peculiar, Alice-in-Wonderlandish existence, in which legitimate cases are denied precedential status because they have not appeared within the pages of a West reporter, while prank cases are accorded such status because they have appeared within the pages of such a volume.

instead, expressions of simple pragmatism. That is, these provisions are prudential constraints that have been developed to respond to what is perceived as an empirical crisis—the proliferation of cases and case reports.<sup>377</sup> If they are approached from this perspective, then these rules depend upon the logic noted earlier, that it is inherently unfair to allow those who can access “unpublished” decisions to use them to the disadvantage of those who cannot do so.<sup>378</sup> Although this proposition is unimpeachable in its concern for achieving equity among litigants, it has not achieved this result<sup>379</sup> and, indeed, has encouraged an opposite result.

For example, one consequence of limited publication provisions is to enhance the perceived value of unpublished decisions. Other authors have documented the practice among government agencies and affluent litigants of accumulating files of “unpublished” decisions to be offered in support of future arguments.<sup>380</sup> Even if a particular judge makes a valiant attempt not to accord “precedential” status to such decisions, he will most certainly be influenced by the desire to conform to such decisions in order to display a rational consistency in his judging activities.<sup>381</sup> Furthermore, even if a particular judge is not actually swayed by the logic of an “unpublished” opinion, this is unlikely to be apparent to the litigants and to decrease their perceptions of the “value” of such an opinion. In a system which is

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377. See, e.g., R. POSNER, *supra* note 160, at 120-27.

378. See *supra* section I(C)(4).

379. One reason why such provisions do not achieve the results which they seek is the fact that many courts readily grant requests to publish otherwise “unpublished” opinions. Because these requests are likely to come from litigants who are able to pursue a consistent course of conduct, such as institutional litigants or litigants for wealthy clients, this injects a distinct element of unfairness into the application of the limited publication provisions. See, e.g., R. POSNER, *supra* note 160, at 120-27; Judge Posner refers to this as “bias in the creation of precedents.” *Id.* at 126.

380. See, e.g., Reynolds & Richman, *supra* note 227, at 1167, 1195-96 (“Compilations of those opinions will still be made by institutional litigants . . . and by wealthy private litigants”); see also P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 230, at 38-40 (1976) (“bootleg, private publication of unpublished opinions”); Robel, *supra* note 230, at 940, 946-47. At least one commentator notes that the availability of compilations of “unpublished” opinions “frustrates the objective of the non-publication policy, namely, reducing the quantity of printed material that lawyers must read and use.” See P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 230, at 36. See also *EEOC v. Watson Standard Co.*, 119 F.R.D. 632 (W.D. Pa. 1988) (denial of summary judgment properly based upon an unpublished decision submitted by defense counsel).

381. The reference to the habits of “a judge” subsumes the effects upon a panel of judges, as panels consist of individual judges who are susceptible to the influences noted above. See, e.g., Reynolds & Richman, *supra* note 227, at 1167, 1197-99. Reynolds and Richman note that a far more insidious use can be made of such opinions, as when one litigant does not cite a favorable albeit unpublished opinion but bases his arguments upon its logic. The opposing parties and the judge are likely to be unaware that the latter is being importuned to conform present practice to a prior decision. And, on another level, “[i]n a multi-panel appellate court, [nonpublication] may leave the law in a state of disarray that is hard to cure because counsel are prevented . . . from calling attention to contradictory or chaotic decisions.” P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 230, at 38-39.



predicated upon ambiguity, tangible symbols assume a symbolic significance that may or may not correspond to their empirical effects.<sup>382</sup>

This perception causes LEXIS and WESTLAW to seek out "unpublished" decisions and include them in their respective data bases. The question then becomes whether or not these decisions are properly characterized as "unpublished."

The author submits that they are not. Limited publication provisions were introduced in the federal courts in the early 1970's. Neither LEXIS nor WESTLAW nor any other system for the full text retrieval of judicial opinions existed at that time. Consequently, these provisions were articulated on the basis of two empirical categories that reflected the then-extant realities of legal research: (1) accessible in full-text in a printed volume of case reports; and (2) not accessible in full-text in a printed volume of case reports.<sup>383</sup> With the development of LEXIS and WESTLAW into their present form, these categories are now incomplete. Consequently, the contemporary realities of legal research require the addition of a third category: (1) accessible in full-text in a printed volume of case reports; (2) accessible in full-text from a computer data base such as LEXIS and/or WESTLAW; and (3) not accessible in full-text. The next section considers whether there is any reason to distinguish between the first category, "print publication," and the second category, "online publication," with regard to the precedential value that is accorded to a particular decision.

## 2. Online Publication

The status of online publication depends upon whether it is reasonable to distinguish between the "publication" of an opinion and its appearance in printed form in a volume of case reports. The answer to this question lies in the function that is assigned to the "publication" of an opinion.

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382. See, e.g., P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 230, at 37-38 (continued reliance upon unpublished decisions as precedent even after the Fourth Circuit had declared that they were "non-citable"). With the advent of online systems such as LEXIS and WESTLAW, the possibility of access has been dramatically expanded. Consider, for example, the plight of a single practitioner in a small Midwestern town, approximately one hundred miles from any significant law library. If he develops a conventional office library, then he will acquire the state's statutes and a subscription to the bound volumes of the appropriate regional case reports, along with the index that is necessary for the utilization of these reports. But if he elects to subscribe to one of the online systems, he will have access to the statutes of his own and other states, plus the federal statutes and implementing regulations; he will also be able to access federal cases plus cases issued by the courts of his own and every other state. And in addition to being able to access more materials, the materials that he can access online will be far more current than the materials that he can obtain through conventional means. Imagine, therefore, the psychological and professional impact that his "going online" will have upon his contemporaries in that small Midwestern town that is approximately one hundred miles from any significant law library.

383. As recently as 1976, the *Bluebook* did not include a citation form for citing to cases obtained from LEXIS or WESTLAW. See A UNIFORM SYSTEM OF CITATION R. 10.7 (1976).

Limited publication provisions are based upon the assumption that it is inequitable to allow decisions to be utilized as precedent when they are not equally available to all litigants.<sup>384</sup> This assumption derives from the ancient requirement that laws must be “promulgated” in order to be effective.<sup>385</sup> “Promulgation” meant that the provisions of a law were made accessible to those who might be affected by it, and this could be accomplished either orally or in writing.<sup>386</sup> The correlation of “precedent” with “publication” is a logical extension of this requirement,<sup>387</sup> but the correlation of “publication” with “printed in a volume of case reports” is not: “[p]ublication” means “to put into general circulation, as distinguished from printing.”<sup>388</sup> The requirement that judicial opinions must be “published,” therefore, means that they must be made generally available, *not* that they must have been printed in a West or other “hard copy” reporter.<sup>389</sup>

Because “publication” is not synonymous with being printed in such a reporter, the issue then becomes whether the inclusion of decisions in the LEXIS or WESTLAW data base(s) is sufficient to constitute “publication.” Given that these databases are becoming ever-more ubiquitous features of legal research in this country, and given that the cost of accessing them is not prohibitive,<sup>390</sup> there is no rational basis for distinguishing between “online

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384. See *supra* section III(B)(1).

385. See, e.g., Weaver, *supra* note 160, at 477; see also 6 THE ENGLISH WORKS OF THOMAS HOBBS 26-28 (W. Molesworth ed. 1966) (arguing there should be wide distribution of statutes similar to wide distribution of the Bible); G. HEGEL, PHILOSOPHY OF RIGHT 138 (T. Knox trans. 1942) (law must be “universally known” to have binding force).

386. “Promulgare” “[i]n Roman law” meant “[t]o make public; to make publicly known; to promulgate. To publish or make known a law after its enactment.” BLACK’S LAW DICTIONARY 1380 (4th rev. ed. 1968). See T. AQUINAS, SUMMA THEOLOGIAE 15-16 (Blackfriars ed. 1966); Weaver, *supra* note 160, at 477. The emphasis is upon providing public access to the provisions of such an enactment rather than upon the means by which such access is provided; as an example, although the modern legal system emphasizes “promulgation” in writing, this is not an effective means of promulgation to an illiterate audience.

387. According to *Black’s Law Dictionary*, “promulgate” means “[t]o publish; to announce officially; to make public as important or obligatory.” BLACK’S LAW DICTIONARY 1380 (4th rev. ed. 1968).

388. Lynett v. Hueter, 322 Pa. 524, 527, 185 A. 835, 837 (1936); accord United States v. Williams, 3 F. 484, 486 (C.C. N.Y. 1880) (same); United States v. Baltimore Post Co., 2 F.2d 761, 764 (D. Md. 1924) (same); *In re Willow Creek*, 74 Or. 592, 619-20, 144 P. 505, 515 (1914) (same); see also BLACK’S LAW DICTIONARY 1396, 1397 (4th rev. ed. 1968). The verb “print” means “to make an impression with inked type,” and is not synonymous with “publish” which means “to make public.” See *In re Publishing Docket in Local Newspaper*, 266 Mo. 48, 50, 187 S.W.2d 1174, 1175 (1915); accord *People ex rel. City of Chicago Heights v. Richton*, 43 Ill. 2d 267, 271, 253 N.E.2d 403, 405 (1969) (same).

389. See, e.g., Baer v. R & F Coal Co., 782 F.2d 600 (6th Cir. 1986) (unpublished decision can be cited as precedent if counsel serves a copy on opposing parties and on the court); accord Aviles v. Burgos, 783 F.2d 270, 283 n.4 (1st Cir. 1986) (court relied on unpublished decision because all parties had access to the opinion and opinion was well-reasoned).

390. See, e.g., Phelps & Moyer, *Library Budgets for Start-Up Firms*, Nat’l L.J., June 19, 1989, at 18-19 (costs of establishing a library consisting of bound volumes versus costs of accessing WESTLAW and LEXIS).

publication" and "print publication." Once decisions have been incorporated into such a database, they have been "published" in the sense of being "put into general circulation."<sup>391</sup> Consequently, no unfairness inheres in allowing litigants to cite them for whatever precedential value they may have in a particular context.<sup>392</sup>

### 3. *Consequences of Online Publication*

Supplying . . . information on paper is . . . practically useless . . . when the volume of information is large and computer search and retrieval capabilities are essential to efficient use.<sup>393</sup>

The acceptance of online publication will undoubtedly have dramatic consequences. It may be the first event since Bracton that will have a significance comparable to his use of cases from the plea rolls. This section suggests what some of these consequences may be.

#### a. Restrictive publication

Will restrictive publication survive? If so, then the online services will continue to function in much the same way as do the print reporters. If not,

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391. This is precisely analogous to the practice by which the West Publishing Company seeks out decisions that have not been "published" by a jurisdiction's "official" reporter and prints these "unpublished" decisions in its own reports. *See supra* section I(C)(3). Such decisions are accorded a precedential status that is in no wise inferior to decisions that have been "officially" published. It also appears that courts may be beginning to treat decisions that are available online as "reported" decisions. *See, e.g., Doe v. Cutter Laboratories*, 703 F. Supp. 573, 574 n.6 (N.D. Tex. 1988) ("This case is reported on WESTLAW at 1987 WL 24717").

392. This requires developing standardized citation forms which (a) clearly denote that the full text of a decision must be obtained online, and (b) provide the information that is needed in order to do so expeditiously. The most reasonable course of action is to rely upon the identifiers that LEXIS and WESTLAW attach to the "unpublished" decisions in their databases and to require parallel citations (a) to both services if a particular decision is available from both, and (b) to volumes of printed reports if a particular decision is also available through that means. Such a citation form allows decisions to be located either online or in a volume of printed reports if it appears in such a volume and if the firm and/or court relies upon such volumes.

Although both the *Bluebook* and *Maroon book* include citation forms for LEXIS and WESTLAW, neither is satisfactory; for one thing, both characterize these as forms for citing "unreported" decisions. *See A UNIFORM SYSTEM OF CITATION*, R. 10.8.1 (14th ed. 1986); *THE UNIVERSITY OF CHICAGO MANUAL OF LEGAL CITATION*, R. 4.2(b) (1989). Aside from being factually incorrect, this errs by preferring "book cites" over "online cites." Both the preference for book cites and the equation of "publication" with "printing" come perilously close to exalting form over substance, i.e., to a ritualistic insistence that case reports must appear in printed volumes because "this is the way that it has always been done." Unless the law divests itself of this attitude, it will become a system in which certain practices persist despite the fact that they have ceased to serve a necessary or even useful purpose.

393. OMB, Advance Notice of Further Policy Development on Dissemination of Information, 54 Fed. Reg. 214, 216 (1989).

it will be possible to develop new methodologies and new conceptions of "precedent."

Restrictive publication is based upon any of several rationales, none of which militates against comprehensive online publication.<sup>394</sup> However, a recent Supreme Court decision may pave the way for the demise of restrictive publication. The issue in *United States v. Tax Analysts* was whether the Department of Justice ("DOJ") was obliged to supply a private enterprise with copies of federal tax decisions.<sup>395</sup> Tax Analysts ("TA") electronically distributes such decisions to its subscribers.<sup>396</sup> Because of difficulties in obtaining them from the courts, TA served a Freedom of Information Act ("FOIA") request seeking copies of all decisions obtained by DOJ.<sup>397</sup> DOJ resisted, but the Court held that it must comply with the request.<sup>398</sup>

This holding opens the way for essentially unlimited access to federal judicial decisions. If the Department of Justice must comply with this request, then other agencies must comply with similar requests. Reporting services could, therefore, use FOIA requests to obtain at least the decisions issued in cases in which the federal government was a party. Given the extent to which the federal government is involved in the litigation of certain types of

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394. These include the problems of storing and accessing bound volumes of case reports, the destruction of a coherent mass of decisional law by an inundation of redundant precedent, and the inefficiency that would result if judges knew that all of their opinions were available for public scrutiny. See, e.g., Reynolds & Richman, *supra* note 227, at 1167. When cases are available online, the problems posed by bound volumes of printed reports are no longer relevant; and computerized research allows large masses of material to be searched in ways that were not available when limited publication appeared. The availability of these new search technologies means that neither the volume of this material nor its anticipated redundancies threatens the coherence of "the law." Finally, no correlation has been established between publication rates and the expenditure of judicial resources and even if it had, this would go more to deficiencies in judicial decisionmaking strategies than to the issue as to whether all decisions should be available for public perusal. See, e.g., *id.* at 1167, 1191. The resolution of the latter issue may require developing new strategies of decisionmaking: for example, if certain decisions are not "published" because they present routine issues that are not considered to contribute markedly to the state of the law, one solution would be to dispose of those cases with short, relatively standardized opinions. See, e.g., P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 230, at 38-40. It might be desirable to code them into a separate data base or so that they were accessible by different means. See, e.g., *id.* at 40-41 (proposal to publish "less important" decisions in "a separate set of books . . . in relatively impermanent form" and/or to revive the old English practice of allowing "an Official Reporter of stature" to reissue such decisions "in permanent form"). Such decisions could be included in a standard data base but be accessible only as a bloc if the system were to develop a concept of precedent that considered the extent to which a particular outcome had been consistently repeated.

395. 109 S. Ct. 2841 (1989).

396. *Id.* at 2844. TA summarizes them in a printed publication and makes the full text available on micro fiche and on a data base. *Id.*

397. *Id.* The case only involved decisions issued by the federal district courts, although TA's request also sought copies of decisions from the courts of appeals and the Court of Claims. *Id.* Since the DOJ represents the federal government in "nearly all civil tax cases," this allowed Tax Analysts to obtain access to almost all of the decisions that issued in this area. *Id.*

398. *Id.* at 2853.

issues, the cases subject to FOIA access would constitute a significant portion of all the decisions issued by the federal courts, at all levels.

However, it is far more reasonable to require that the courts make decisions readily available to services such as Tax Analysts. This would provide the opportunity for the online publication of *all* decisions which, in turn, would provide the opportunity for developing new research methodologies in accordance with the suggestions offered below. This approach would also eliminate the burdens that the *Tax Analysts* outcome imposes upon federal agencies.<sup>399</sup>

Although the Supreme Court may neither have foreseen nor intended this consequence, the *Tax Analysts* decision may herald the eventual demise of restrictive publication. At the very least, it illustrates the operation of the forces described in section III(A)(3). As long as restrictive publication exists, similar tactics will almost certainly be used to obtain access to the "facts" of American law—judicial decisions.

#### b. New research techniques

Suppose that all decisions are online.<sup>400</sup> An attorney is preparing to oppose the adoption of a judicially established rule of law which holds parents absolutely liable for the intentional torts of their children under the age of twenty-one. Such a rule has been in force in two other jurisdictions for varying periods of time, and has been rejected on several occasions by a third jurisdiction. Because *all* decisions are available online, the attorney uses a computerized research system to assemble the entire body of law on this issue. Assume that this universe of precedent consists of one hundred decisions, sixty-five of which are from the two jurisdictions in which the rule is in force and thirty-five of which are from the jurisdiction that has rejected it. Having compiled this universe, the attorney can either craft her argument upon traditional principles or nontraditional principles.

If she elects the former, the attorney will proceed according to the present conception of precedent of judicial decisions as the "facts" of the law. The attorney will begin by reviewing the universe of precedent, although she is likely to concentrate most of her energies on the thirty-five decisions from the jurisdiction that has rejected the rule. She is likely to do so both because

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399. Justice Blackmun dissented because he found it incredible that the majority would require the taxpayers to bear the cost of supplying copies of these decisions to an organization that "is in business and in that sense is a commercial enterprise." *Id.* at 2854 (Blackmun, J., dissenting). He noted that TA "sells summaries of these opinions and supplies full texts to major electronic databases." *Id.*

400. The discussion that follows is based upon the assumption that "all judicial decisions" refers to all judicial decisions having precedential effect. Because precedential effect is generally accorded only to appellate decisions, the discussion assumes that all appellate decisions are available online. *See, e.g.,* J. JACOBSTEIN & R. MERSKY, *LEGAL RESEARCH ILLUSTRATED* 12 (1987 ed.). Many of the observations are, however, equally applicable in a system in which the decisions of all courts, trial and appellate, are available online.

these decisions are intuitively more appealing, as this is the result that she wants to achieve, and because this approach provides a useful *ad hoc* device for carving the entire universe up into more manageable proportions. The attorney will then select a subset of decisions and will extract propositions from those which she perceives as being the most persuasive or favorable to her position.<sup>401</sup> Thus, she will be limited to propositions that are explicitly enunciated in the decisions.

The next step is to use these propositions, which represent a subset of the reasoning that is contained in the total universe of opinions, to develop her argument. Assume that the attorney has selected fifteen decisions upon which to place primary reliance. Her argument will consist of a recitation of propositions that she has extracted from this intuitively selected sample of judicial decisions and followed by extrapolations from those propositions. The latter will take two forms: (a) postulated identities and/or analogies between facts at issue in the decided cases and in the instant case; and (b) arguments of "policy." The operation of the former is evident.<sup>402</sup> For the latter, the attorney will extract empirical considerations from her subset of preferred opinions and will assert both (i) that they are matters about which her judicial audience should be concerned, and (ii) that a decision in her favor would favorably impact upon the status of these considerations in their jurisdiction.<sup>403</sup>

If the attorney elects the latter, she can build her argument on a new conception of precedent as a quantitative phenomenon.<sup>404</sup> Here, she can develop her argument not only from propositions that are included *within* a subset of the universe of precedent, but also from the contours of *all* the decisions in that universe. With regard to the latter, the attorney no longer relies upon her own "instincts" as to what is and is not "important" but proceeds in a more objective fashion.

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401. In making this selection, she will be guided by certain assumptions. For example, she may assume that a decision of the highest appellate court is superior in precedential value to a decision of an intermediate appellate court, or that more recent decisions have more precedential impact than older decisions, etc. These assumptions constitute the common-sense understandings that are an essential aspect of her "taken for granted" professional reality. See, e.g., P. BERGER & T. LUCKMANN, *supra* note 4, at 138-47.

402. As an example, assume that the attorney represents the parents of a nineteen-year-old boy who has a history of vandalism and assaults. In arguing that his parents should not be held liable for his conduct, she will rely upon decisions in which the preferred jurisdiction refused to hold parents liable in situations which she perceives as being factually analogous to hers. Such cases are likely to involve, in descending order of preference, the transgressions of a nineteen-year-old boy, then of a nineteen-year-old girl, then of an eighteen-year-old boy/girl, and so on.

403. The attorney might argue, for example, that the implementation of such a rule would discourage individuals under the age of 18 from assuming financial responsibility for their lives and/or that it would encourage irresponsible and socially detrimental courses of conduct.

404. The discussion that follows is intended to be illustrative only, as it is particularly difficult for one trained in "factual" precedent to foresee the directions that this concept is likely to take with the implementation and maturation of computerized research technologies.

This new approach might involve analyzing the facts that are involved in the universe of precedents. Although present technologies commit this to the idiosyncrasies of the individual researcher, computer methodologies will allow for the rapid searching, indexing and processing of the factual elements of judicial decisions.<sup>405</sup> This capability would permit the identification of patterns among the entire universe of decisions. Although it is not possible, here, to detail such an analysis, it could examine the ages of the individuals for whose activities liability was imposed in the two disfavored jurisdictions and compare that with the ages of those for whose activities liability was denied in the favored jurisdiction. It might also examine the relationship between the ages of these individuals and the activities that had generated the litigation.

The analysis would produce an objective schematic of the factual profile of the precedential universe with, perhaps, a projection as to postulated relationships among certain demonstrated regularities and irregularities. This schematic would provide the court with a consistent mapping of the factual contours of the precedential landscape, so that the parties would be confined to arguing about the legal significance or insignificance of these contours as opposed to arguing about discrete facts from particular decisions. This schematic would also provide an objective foundation for ascertaining whether asserted "policy" considerations warranted a particular outcome.<sup>406</sup>

A quantitative approach might also focus upon the results of these decisions. This aspect could consist of two parts. The first part would concentrate upon the extent to which the two disfavored jurisdictions were actually allowing recoveries for the activities of children of particular ages. A mapping of the results of these decisions might show, for example, that although the appellate courts were ostensibly applying such a rule, their decisionmaking practices were effectively holding recoveries to a minimum, allowing recovery only in the most egregious situations. The second part would concentrate upon the favored jurisdiction, and might extend to an analysis of related precedent. Such an analysis could show that recovery was being permitted in this jurisdiction although under another, less "radical" guise. This analysis could be used in making meaningful policy arguments, as opposed to the often intuitive projections that presently characterize such endeavors.

These are two examples of the application of a quantitative conception of precedent. Another application might concentrate upon the decisional patterns of particular judges or courts; a radical departure from a prior,

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405. See, e.g., J. JACOBSTEIN & R. MERSKY, *supra* note 400, at 69.

406. Such a schematic might, for example, be used to argue that liability in the two disfavored jurisdictions was being imposed almost exclusively upon the parents of offspring under the age of eighteen. This might support the proposition that liability-generating activities are more likely to be engaged in by children under eighteen, perhaps because of the maturity levels of such individuals. Moreover, this could be used to argue that a "liability for conduct of children aged 21 and under" rule would be over-inclusive, as the same result could be accomplished by confining the operation of the rule to children aged 18 and under.

consistent pattern could be used as the basis for asserting that this decision was erroneous. Here, the quantum of prior, consistent decisions is being asserted as having "precedential" effect. After all, if *stare decisis* is consistency, then perhaps empirical inconsistency is a factor that should be incorporated into precedential analysis.<sup>407</sup> Yet another application could be the "method of absence."<sup>408</sup> Here, arguments would be supported by "negative citations," for example, citations consisting of the parameters of specific computer searches that have produced no decisions "on point."<sup>409</sup> At the present time, attorneys can argue that no *reported* decisions appear on point. It seems, however, that the ability to assert that no court has addressed a particular issue should carry some heightened authoritative implications. Also, arguments could be predicated upon the extent to which a particular issue had spawned litigation, and the outcome of that litigation.<sup>410</sup>

This raises a related issue. With the appearance of a quantitative conception of precedent, it may be that arguments will rely upon "bloc cites," that is, citations to an entire body of decisional law. As opposed to the "string cites" which are disfavored in current practice, "bloc cites" would be utilized in order to invoke the authoritative significance of a volume of consistent decisional law. The phenomenon of consistency among this body of decisional law would itself have precedential import. If this were to become the

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407. It is also possible that such an analysis could be used in an attempt to predict arguments that might appeal to a particular judge and/or court: although present-day practitioners attempt to achieve similar results by relying upon anecdotal information from their peers, a quantitative analysis of the decisionmaking habits of particular jurists, based upon every decision that each had issued, could take "judge watching" to new levels of precision and abstraction.

408. See, e.g., 2 R. ARON, *supra* note 87, at 268.

409. Citations to this effect are already appearing. See, e.g., *In re Graven*, 1989 WL 55600 (Bankr. W.D. Mo.) ("As per LEXIS and WESTLAW, there are no reported cases"); *accord* *Brooks v. Johnson and Johnson*, 685 F. Supp. 107, 108 n.2 (E.D. Pa. 1988) (LEXIS search revealed no reported cases on point); *Sarratone v. Longview Van Corp.*, 666 F. Supp. 1257, 1263 (N.D. Ind. 1987) (LEXIS search revealed that case had been cited but not for point at issue); *Carter v. Orr*, 587 F. Supp. 436, 439 (D.D.C. 1984) (plaintiff filed suit in violation of injunction against litigiousness; LEXIS search revealed 46 reported cases filed by plaintiff in addition to 178 cases cited by defendant); *Church of Scientology v. Siegelman*, 475 F. Supp. 950, 951 n.1 (S.D.N.Y. 1979) (characterization of church as litigious supported by LEXIS search revealing 30 cases filed by the church); see also *Robin v. Doctors Officenters Corp.*, 1986 WL 7065 (N.D. Ill.) (LEXIS search rejected as a device to ascertain whether a particular class had been certified and, if so, the outcome of that certification as LEXIS only includes reported decisions).

410. With the appearance of a quantitative concept of precedent, attorneys will be required to provide citations indicating that a specific, defined search request was used to explore a data base with a carefully described result. The court can then replicate the search that was undertaken and either verify or disconfirm the extent to which the attorney's argument is supportable based thereupon. Such citations would also have to indicate the date on which the search was performed. And it may be that courts will have to establish rules defining the point at which they will cease to search for relevant precedent. Perhaps these rules should put the onus on the parties to the litigation to ensure that the court is apprised of any recent developments in the area, or perhaps they should simply establish a categorical point beyond which precedent will not be explored.



case, courts might find it advisable to distinguish between the precedential impact of particular decisions by issuing decisions as "first-order" precedents or "second-order" precedents. Although this is an alien practice to those who have been inculcated with the contemporary notion of precedent, it addresses the "proliferating precedent" issue and is a perfectly reasonable tactic in a system in which the quantitative empirical aspects of judicial decisions are factored into their status as "precedent."

c. Consequences of a quantitative conception of precedent

The conception of precedent that is described immediately above will result from a shift in the prevailing legal paradigm. "Precedent" is the means by which the constructs of a particular legal paradigm are operationalized and applied to empirical phenomena.

Section III(A) explained that traditional law, or "custom," is operationalized through an empirical conception of precedent, while an artifactual conception is used to achieve the same end for value rational systems grounded upon an external body of legitimating principles. It also explained that value rationality is an intermediate stage in the transition to "legal" rationality, in which law is predicated solely upon the authority of a body of formally established rules. Section III(A) did not explain, however, that according to the architect of this schema, American law never completed this transition.

Weber contended that American law is incapable of reaching complete "legal" rationality so long as it relies upon the erratic progress of "precedent" instead of upon a formally enacted legal code.<sup>411</sup> Such a code is essential because it provides the foundation of "pure" rationality from which systematic rules can be derived. A system of precedent lacks this central core of rationality and cannot, therefore, achieve the final transition to a purely "legal" referent.<sup>412</sup>

Weber's comments were no doubt correct at the time they were made, but they were made in ignorance of the effects which technology can have upon the articulation of a "legal" referent. In order to understand these effects, it is necessary to consider the structures which conceptual systems, including legal systems, can assume.

Conceptual systems are structured by the thought processes through which they are articulated. There are three available categories of thought processes: "empirical, rational or abstractive."<sup>413</sup> Empirical thought processes are concerned with observable phenomena and permit the articulation of empirically-grounded conceptual systems, such as magic or customary law.<sup>414</sup> Rational thought processes, which are concerned with concepts and their connection

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411. See, e.g., MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 315-17.

412. *Id.*

413. J. WILLER, *supra* note 138, at 19.

414. *Id.* at 25-28. Magic, for example, assumes the existence of routine, causal connections

to each other,<sup>415</sup> permit the articulation of conceptual systems which, although they may affect empirical reality, elicit their *raison d'être* from nonempirical concepts. Such systems include religious systems and legal systems that are grounded in external "principles" such as the principles of "natural law."<sup>416</sup> Abstractive thought processes unite empirical and rational thought processes into a new phenomenon which permits the development of conceptual systems that measure rationally-derived concepts according to their utility in predicting or controlling empirical reality.<sup>417</sup> Abstractive thought processes are the basis of scientific systems.<sup>418</sup>

Weber, of course, blamed the American legal system's reliance upon precedent for its failure to complete the transition to a purely "legal" referent. He believed that "precedent" inflicts an unavoidable irrationality upon a legal system because it consigns the corpus of the law to the idiosyncratic predilections of particular decisionmakers. Moreover, Weber argued that "legal" referents appear only after a cadre of disinterested experts have developed and implemented "rigorously formal legal concepts."<sup>419</sup> Because such concepts cannot appear in a system of precedential law, Weber concluded that American law cannot complete the transition to a "legal" referent.

In this Weber erred: the implementation of computerized research techniques based upon the implementation of comprehensive online publication will permit the articulation of a quantitative conception of precedent. This conception of precedent will permit the American legal system to move away from a system which relies upon intuitive, essentially *ad hoc* "rational" constructs and into a system which implements abstractive thought processes to develop a conceptual scheme which is "scientific" in its concern for both logical and empirical integrity.

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between empirical phenomenon, whereas expertise consists of knowing that certain connections exist, with no concern as to the reasons why they may exist. In such a system, therefore, an artisan of magic would be expected to know that the burning of a red feather will cause rain, but would not be expected to be able to explain why this should be so. *See id.* at 22-28.

415. *Id.* at 22-23. "[T]he primary meaning of concepts is in their connection to one another." *Id.* at 23.

416. *Id.* at 23, 28-30. Religious systems consist of an internally consistent network of rational constructs. "Rational" refers to the fact that these constructs are created by the individuals who develop the system and "are purposefully empty of intrinsic meaning," i.e., their significance comes from their relationship to each other. *Id.* at 24. In a magical system, the emphasis is upon the empirical consequence of empirical acts, i.e., burning a red feather. *See supra* note 414. In a religious system, the emphasis is upon the metempirical consequence of empirical acts so that, for example, burning a red feather might be a symbolic act of penance in a religious system. Although the manifestation of this behavior is an empirical phenomenon, its meaning derives from a system of purely rational constructs, i.e., the concept of "penance" and the associated concepts which give it meaning. J. WILLER, *supra* note 138, at 29-30.

417. *Id.* at 24.

418. *Id.* at 30-34.

419. *See, e.g.,* MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 80, at 351.

Weber believed that the achievement of such a system was possible only by creating a rigorous, formalistic conceptual system and then conforming empirical practice to the tenets of this system. Indeed, Weber's concept of legal systems may have been inevitable given the constraints that were imposed by the technology of his time or, for that reason, of ten or fifteen years ago. The American legal system is, however, approaching technological innovations that can allow it to move beyond these constraints and into a system of surpassing rationality, efficiency and justice. But unless the American legal system understands this and embraces the opportunities that this technology offers, it risks an unreasoned adherence to outmoded constructs and practices that could evolve into the "customary" law of the twenty-first century.

#### IV. CONCLUSION

A system of law is . . . largely influenced by the technical methods used by the lawyers in going about their daily business. . . . The method which they pursue, the character of the books and sources which they use, and the attitude of mind with which they approach them, all have their influence upon the shaping of the law, and upon their conception of law itself.<sup>420</sup>

Case reporting is a unique phenomenon in Anglo-American law, for it is the point at which pragmatism and principle intersect to create the essential characteristics of the "common law." Historically, case reporting has evolved from an idiosyncratic exercise to one that is predicated upon great technical rigor. This Article has traced that evolution for three purposes.

First, the Article illustrates that present reporting techniques are but the lineal descendants of older, less sophisticated techniques. Second, the Article establishes the proposition that the application of computer research technologies can only enhance the accuracy and sophistication of American case reporting and of the legal profession's utilization of such reports. Third, the Article offers a cautionary tale: if American law rejects the realities of modern computer technology and continues to insist that there is some "magic" in case reports which are printed and appear in bound volumes, it will be engaging in an ultimately futile attempt to re-establish "custom" in an era when "custom" controls no other aspect of social life.

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420. T. PLUCKNETT, *supra* note 13, at 253.