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Peter M. Tiersma

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> The municipal law of England . . . may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written, or statute law.
>
> —Sir William Blackstone[1]

INTRODUCTION

In the English-speaking world, there are traditionally two major sources of law: statutes and judicial opinions. The former consist of written texts that have been carefully drafted in advance and which have been scrutinized and formally enacted by a legislature. Determining the meaning of statutes generally involves close textual analysis. Legislation thus came to be called *lex scripta* ("written law"). In contrast, judicial opinions were traditionally pronounced orally from the bench, and were thus known as *lex non scripta* ("unwritten law"). Figuring out what an opinion meant—determining the ratio decidendi or holding of a case—required engaging in the process of legal reasoning. This unwritten law made by judges has long been touted by the legal profession, especially in England, as being in many ways superior to the written enactments of the legislature.

Given the massive numbers of judicial opinions or judgments that have been preserved in writing since the thirteenth century, the notion that the common law is unwritten seems like a quaint myth, or at least an anachronism. Yet there is a surprising amount of truth to

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1 WILLIAM BLACKSTONE, 1 COMMENTARIES *63.

the notion that the common law resided in the memories of judges and the select group of barristers who practiced before them. In fact, a remarkable amount of orality has survived in the English common law. Even today, English judicial opinions need not necessarily be written down by the judge or by a reporter to have precedential force. And traditional legal reasoning remains a critical skill for English lawyers.

In the United States, however, the common law is embarking on a path towards becoming increasingly textual, just as statutes have been for hundreds of years. It is no exaggeration to say that in this country, the common law consists of what judges *write* in their opinions. What they *think* or what they *say* during the proceedings before them is almost entirely irrelevant. As a result, it is less and less necessary to search for the holding or ratio decidendi of a case; the judge writing for the majority will often specify exactly what the holding is in carefully crafted text that is meant to fetter the discretion of lower courts in the same way that a statute does. As a consequence, legal reasoning is gradually being supplanted by close reading.

More than two decades ago, Guido Calabresi wrote of the growing "statutorification" of American law.[2] Much of what was traditionally the domain of common law is now governed by statute. Oftentimes these statutes become obsolete. Calabresi's proposed remedy was to allow courts to update antiquated statutes. In essence, courts would treat legislation as though it were part of the common law.[3] But what Calabresi anticipated has not come to pass. Rather than treating statutes as common law, courts are beginning to treat the common law as legislation.

Minds will differ on whether this transformation is good or bad. There are many consequences that flow from writing down the law in an authoritative way, something that I call *textualization*. One of the most significant consequences is that the law becomes more transparent and less susceptible to subtle manipulation. The other side of the coin, of course, is that it becomes more rigid. Rules that reside in memory tend to be more conceptual. They can evolve—consciously or not—as circumstances change. Textualized law, on the other hand, places greater interpretive constraints on those who apply it, and it can usually be changed only by formal amendment or overruling, which can be a slow and cumbersome process.

Complicating the picture is that as the common law becomes ever more textual, the very notion of written text is undergoing dramatic

2 GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

3 *Id.* at 2.

and largely unpredictable changes. Paper is being replaced by pixels. Even though a computer display can mimic a text on paper, there are significant differences between them. Accessing a large corpus of written or printed information traditionally requires an index or digest of some sort, which means that a human being must categorize the content in some way. Accessing electronic text, on the other hand, typically involves requesting a machine to locate sequences of text that exactly match a search term. Moreover, publication, once an important emblem of the authority of a judicial opinion, is undergoing profound transformations in a culture where anyone can publish whatever he wants on the Internet. It seems likely that these developments, especially the massive increase in available cases and the ease with which they can be accessed online, will only intensify the shift from legal reasoning to close reading.

I should emphasize that this Article is more prophecy than empirical observation. To be more exact, it is prophecy based upon observation. There is no doubt that the common law and the nature of precedent have undergone dramatic changes during the past century or two, especially in the United States. What will ultimately result from these developments remains to be seen. It is clear, however, that American judicial opinions are far more textual than opinions or judgments made in the past. It seems inevitable that this trend will have important implications for the concept of precedent and the nature of common law adjudication.

This Article begins in Part I by describing how the "unwritten" common law was prized by great lawyers like Coke, Hale, and Blackstone as being more flexible than legislation. In large part, the flexibility of the common law derived from the fact that judges did not enact the rules and principles in the way that the legislature enacted rules of behavior in statutes. The textual mode of interpreting legislation, involving close reading of the text, was therefore held to be inappropriate in understanding the common law. Instead, the principles of the common law had to be derived by means of legal reasoning from judicial opinions. Those opinions (or "judgments," as they are usually called in England) have traditionally been issued orally and seriatim. Of course, there was generally a lawyer in court who later created a written report of the proceedings, but the reports were not verbatim transcriptions and all too often were of questionable accuracy. This tradition has heavily influenced how opinions, as well as the notion of precedent more generally, are understood by English lawyers and judges.

We will then examine in Part II how the notion of precedent has changed in the United States. As opposed to customary English prac-

tice, American opinions are invariably written down by the judges themselves. Often a single opinion speaks in a unified voice for the majority. There is a clear hierarchy of courts, where lower tribunals must follow precedents established by higher courts. Moreover, the legal profession has authentic copies of the courts' opinions at its disposal. Finally, many American jurisdictions have adopted a rule that to function as precedent, an opinion must not just have been written, but it must have been ordered to be published (or "certified" for publication).

These practices have led to the common law in the United States becoming ever more textual. A hundred years ago judges tended to express their opinions in conceptual terms, indicated by the use of phrases such as "we think" or "in our opinion." Recently, they have become inclined to lay down fixed rules and principles, prefaced by the increasingly popular phrase "we hold."

The Article concludes in Part III by considering the consequences of these developments, especially as they influence what we mean when we say that our judicial system is governed by "precedent." Not surprisingly, the situation is in a state of flux because of rapid changes in the technology of writing and publication. An intriguing possibility, suggested by opponents of rules limiting the citation of unpublished opinions, is that we ought to return to a more pristine version of the common law, where all judicial decisions can function as precedents. But can we really turn back the clock? And if we can, should we?

It may be that because of the large size of the legal profession in the United States, the huge amount of case law that has developed in the past few decades, and the impact of technology, some measure of textualization of precedent is simply inevitable. Perhaps we should just learn to manage it as best we can.

I. THE "UNWRITTEN" ORIGINS OF THE COMMON LAW

Unlike statutes, which in some form or other were being written down at a relatively early stage, and which soon came to be known as "written law," the other major source of law in the Anglo-American legal system—the common law—was long glorified as "unwritten law."[4] Francis Bacon wrote that the common law "is no text law, but

4 *See* BLACKSTONE, *supra* note 1, at *63 ("The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law."). On the notion that judge-made common law was superior to written law, see Richard J. Ross, *The Memorial Culture of Early*

the substance of it consisteth in the series and succession of Judicial Acts from time to time which have been set out in the books which we term Year Books."[5] Several decades later, Matthew Hale, chief justice of the King's Bench in the mid-seventeenth century, described the distinction between written and unwritten law as follows:

> The Laws of *England* may aptly enough be divided into two Kinds, *viz. Lex Scripta*, the written Law; and *Lex non Scripta*, the unwritten Law: For although (as shall be shewn hereafter) all the Laws of this Kingdom have some Monuments or Memorials thereof in Writing, yet all of them have not their Original in Writing, for some of those Laws have obtain'd their Force by immemorial Usage or Custom, and such Laws are properly call'd *Leges non Scriptae*, or unwritten Laws or Customs.[6]

Hale goes on to observe that the notion of the common law being "unwritten" should not be taken too literally:

> I do not mean as if all those Laws were only Oral, or communicated from the former Ages to the later, merely by Word. For all those Laws have their several Monuments in Writing, whereby they are transferr'd from one Age to another, and without which they would soon lose all kind of Certainty . . . those Laws of *England* which are not comprized under the Title of Acts of Parliament, are for the most part extant in Records of Pleas, Proceedings and Judgments, in Books of Reports, and Judicial Decisions, in Tractates of Learned Men's Arguments and Opinions, preserved from ancient Times, and still extant in Writing. . . . I therefore stile those Parts of the Law, *Leges non Scriptae*, because their Authoritative and Original Institutions are not set down in Writing in that Manner, or with that Authority that Acts of Parliament are, but they are grown into Use, and have acquired their binding Power and the Force of Laws by a long and immemorial Usage, and by the Strength of Custom and Reception in this Kingdom.[7]

Thus, the mere act of writing did not by itself turn custom or the common law into *lex scripta*. Hale was essentially saying that the common law, at least in his day, had not been textualized in the sense that statutory law had. Judges did not issue written opinions or judgments

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Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560–1640, 10 YALE J.L. & HUMAN. 229, 313 (1998).

5 WILLIAM CRADDOCK BOLLAND, THE YEAR BOOKS 22 (1921) (quoting Francis Bacon).

6 MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 3 (John Clive ed., Univ. of Chi. Press 1971) (1713).

7 *Id.* at 16–17.

in the way that Parliament had come to enact statutes. In fact, even today, the common law of England remains remarkably oral.

We will see that during the past century or two, common law adjudication has become increasingly textual, especially in the United States. This change is gradually precipitating a different conceptualization of the notion of precedent. But before we move on to consider how precedent is being textualized, let us to consider the comments of Hale and other English lawyers, both before and after him, extolling the unwritten nature of the common law. Closely related, of course, is the notion that the decisions of judges, whether written down or oral, did not *constitute* the common law, but were merely *evidence* of it.[8]

A. Early Common Law

The term "common law" has always been somewhat vague. I will use it here to refer to the uncodified (or nonstatutory) rules and principles applied by judges to decide the cases that came before them. English judges generally claimed that the principles they used to decide cases were derived from, as Hale put it, "immemorial Usage and Custom."[9] No doubt, when there was an applicable custom that came to mind and suggested a reasonable resolution to a dispute, early judges would have used it. But many issues would not have been resolvable by custom or usage, and in such cases the invocation of custom might have been just a fiction that lent some legitimacy to the fact that the judges were actually making new law.

What is critical for our purposes is not the origin of common law rules, which has been much debated, but that this system of adjudication and judicial lawmaking could work, and for a long time did work, without deeming it necessary to set down its principles in authoritative written form. If the common law was written down, it was done by commentators, not by the judges who created it. In that sense it truly was *lex non scripta.*

It is worth observing that for a system of precedent to operate it is not necessary that judges encapsulate their decisions in writing, or even for a written record to be produced. What is essential is some type of institutional memory of how past cases have been decided. In medieval England, this institutional memory was possessed by a small, closely-knit group of judges and barristers (or serjeants) who dis-

8 BLACKSTONE, *supra* note 1, at *71 ("[W]e may take it as a general rule, 'that the decisions of courts of justice are the evidence of what is common law'. . . .").

9 *See* HALE, *supra* note 6, at 3.

cussed and debated the law both in court and out.[10] It did not hurt, of course, that in the formative period of the common law there was simply less law to remember.

Over time, the common law became more complex. Every year added to the body of decisions to be borne in mind. Although it might have been possible for long-practicing lawyers to remember the more important judgments being rendered in Westminster Hall, apprentices wishing to become members of the bar would have had a lot to learn. And even experienced lawyers and judges would have appreciated written notes of cases to bolster their memories. So, not long after the establishment of the royal courts and the legal profession over the course of the thirteenth century, we find written reports of cases made by people who were present in the courtroom. These documents, which came to be called *Year Books*, reported court proceedings from the end of the thirteenth century until around 1535. They were "reports" in the literal sense of the word: They reported speech that happened in the courtroom. All of them were written in Law French, which was most likely the predominant oral language of the profession at the time of the earliest *Year Books*.[11] After spoken court proceedings switched to English, reporting these cases would have involved translating spoken English into written French.[12]

Below is an example of an anonymous case dating from 1319. It is first presented in the original Law French. Each paragraph is then followed by a translation into modern English. The names of lawyers and judges were clearly well known to the writer and abbreviated in the original:

> Un Richard porta brief de dette vers un abbé et soun commoygne, et dit qe le moygne taunt com il fut seculer avoit apromté de ly x livres, a payer a certeyn jour, a quel jour il ne paya poynt; et de ceo tendist sute saunz especialté.
>
> [One Richard brought a writ of debt against an abbot and a monk of his house, and he said that the monk while yet secular had borrowed from him ten pounds, to be paid back on a certain day, and on that day the monk did not pay; and of this he tendered suit without showing specialty.]

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10 Hale mentions that the common law remained uniform because the judges were few in number, sat near each other in Westminster Hall, and commonly discussed cases and judgments. MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 255–56 (photo. reprint 2000) (1713).

11 J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 179 (4th ed. 2002).

12 *Id.* at 178–86. On the languages in which early reports are written, see Paul Brand, *The Beginnings of English Law Reporting*, *in* LAW REPORTING IN BRITAIN 1, 2 (Chantal Stebbings ed., 1995).

Migg'. Il demaunde ceste dette par resoun de un aprest fet au moygne taunt com il fut seculer, lequel homme est mort quaunt a la ley de terre en taunt com il est profés en religioun; et demaundoms jugement si a tiel demoustraunce devez estre resceu.

[*Miggele*: He demands this debt by reason of a loan made to the monk while he was yet secular. Now that man is dead as regards the law of the land, inasmuch as he has professed religious vows, so we ask judgement whether you should be received to make such a demonstrance.]

Scrop. Quant l'abbé resceit un moygne il se deit aviser q'il ne seit chargé de dette, quar il ly deit resceyvre ove sa charge auxi com le baroun fra sa femme.

[*Scrope*: When the abbot receives a monk he must consider whether he is not charged with debt, for he must receive him with his charge just as a husband shall his wife.]

Herle. Ceo n'est pas semblable, quar le moygne est mort quant a la ley, et si n'est pas la femme.

[*Herle*: That is a different matter, for the monk is dead at law and the wife is not.]

Berr'. Pur ceo qe vous n'avez qe sute, a quei homme ne put alayer, mes l'abbé ne put alayer le fet soun moygne, par quei agarde la court qe vous ne prengnez rien par vostre brief.

[BEREFORD, C.J. Since you only tender suit which can involve no wager of law, [since] the abbot cannot wage law upon the act of one of his monks, the court awards that you take nothing by your writ.]

Et *Toud'* et *Frisk'* disoyent qe cel jugement ust esté mesq'il ust eu fet; quar autrement ensuereit meschef, qe par fet de un seculer la mesoun purra estre chargé à touz jours. Set contra posissionem potest fieri opinabilis questio etc.

[And *Toudeby* and *Friskeney* said the judgement would have been the same even if the demandant had had a deed. Otherwise mischief would have resulted, for the house [would] be charged for all time by the deed of a secular. But against this position an arguable question could be raised.][13]

Notice that the report focused as much—perhaps more—on the arguments of the lawyers (Miggele, Scrope, and Herle) as on the statements by the judges or the outcome.

The lawyers' mode of argument, and the judges' reaction, would be familiar to any common law lawyer today. Miggele begins by arguing that the debtor, now a monk, is considered legally dead, sug-

13 Y.B. 12 Edw. 2, Hil. 39 (1319), *reprinted in* 70 SELDEN SOCIETY 89 (1953) (emphasis and footnote added).

gesting that a dead person should not be liable for debts. Scrope draws a different analogy, comparing the monk/abbot relationship to that of husband and wife. Because a husband would have been bound by his wife's premarital debts, the abbot should be bound by debts incurred by the monk before he joined the religious community. Herle then tries to distinguish these two cases by pointing out that a married woman—unlike a monk—is not considered legally dead. The judge, William de Bereford, ducks the issue on a procedural ground. Two other judges suggest in dicta that the result might would have been the same if the demandant had gotten the medieval equivalent of a promissory note, but the reporter is skeptical.

This type of report was fairly typical for this time. To the extent that they were indeed written by apprentices, the reports would have concentrated on what the lawyers said and did, because this is what they hoped to learn to emulate. Of course, the reaction of judges to the pleadings and arguments of the lawyers was also important, but in many of these early reports the actual decision—if reported at all—is anti-climactic.[14] The result, as Plucknett has pointed out, is that "use of cases as sources of law" was "well-nigh impossible."[15]

A final observation is that the last sentence seems to be an interjection (in Latin) by the reporter himself. Adding comments or observations to a report, or including "off the record" comments by lawyers and judges, remained common into relatively modern times.[16]

Although the reports in the *Year Books* seem to have been made largely for educational purposes, lawyers as early as the fourteenth century were referring to cases that they believed might bolster their arguments, and judges cited cases in response.[17] It is important to bear in mind that they were probably not referring to written judgments, although sometimes they might have had a report of some sort in their possession. Rather, they were referring to a decision that they remembered or had heard about. Some judges seem to have had remarkably clear memories of cases decided at least a decade before.[18] They had no citation system, of course, but might refer to "David of Fleetwick's case" or "the Bastard's Case," or they might just describe some salient facts. Another judge or opposing counsel might attempt to distinguish the case, perhaps by retorting *non est simile* (Latin for "that is not the same") or *n'est pas semblable* (Law French). We should

14 T.F.T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE 102 (H.A. Holland ed., 1958).

15 *Id.* at 104.

16 L.W. ABBOTT, LAW REPORTING IN ENGLAND 1485–1585, at 23–24 (1973).

17 CARLETON KEMP ALLEN, LAW IN THE MAKING 196 (7th ed. 1964).

18 *Id.*

not exaggerate the amount of case citation, however. Citing cases, especially by name, was hardly a routine practice in the way it is today.[19]

An innovation that began in the middle of the fifteenth century indicates that lawyers were beginning to treat descriptions of court proceedings not just as interesting or educational reports of what transpired in court, but to some extent as sources of law. Specifically, lawyers began compiling and printing "abridgments."[20] Similar to modern digests, the abridgments consisted of alphabetical headings, like *abatement* or *battery*, followed by synopses of cases dealing with that topic. This made it much more convenient for lawyers to find and cite cases dealing with a particular legal proposition.[21] Such abridgments strongly suggest that lawyers were beginning to view the common law as a system of rules or principles that could be placed in distinct categories. And those rules could be found in reports of judicial decisions.

Judges in the latter half of the fifteenth century were themselves beginning to recognize the notion of precedent or stare decisis—that once a legal issue is decided in a particular way, it ought to be decided in the same way in future cases raising the same issue. For instance, a judge observed in a 1496 case that "[o]ur decision in this case will be shown hereafter as a precedent" and suggested that therefore they should consider their judgment carefully.[22]

By the fifteenth and sixteenth centuries, therefore, it is possible to speak of an emerging case law system. This still did not mean, however, that the cases necessarily had to be in writing. Reports could be oral as well as written. Just as we can make an oral report of some event today, lawyers of the time could orally report what happened in court.[23] And judges continued to have long memories. Sir James Dyer, an Elizabethan judge, mentioned a "report of Baron Fortescue." According to L.W. Abbott, this "report" must have consisted of passing information by word of mouth, rather than by words on paper.[24] On another occasion, Dyer remarked: "Ask Catlyn, chief justice of England, whether he was not overruled on this point—in that the

19 *Id.* at 196–200.

20 BAKER, *supra* note 11, at 184.

21 *Id.* at 184–86.

22 ALLEN, *supra* note 17, at 199 (citing *Anon.*, Y.B. 11 Hen. 7, fol. 23a, at 10 (1496)).

23 Judges and lawyers were already citing cases during the *Year Book* period, but typically relied on their memories, rather than citing to written reports. *See* JOHN PHILIP DAWSON, THE ORACLES OF THE LAW 57 (1968).

24 ABBOTT, *supra* note 16, at 146.

bond was void—in the time of Queen Mary when he was a serjeant, and he will tell you that it was so."[25] Sir John Spelman notes in a proceeding from the sixteenth century that *vn case fuit remember* ("a case was remembered").[26] Even today, an unreported case can function as precedent in England, as long as a barrister vouches for its authenticity.[27]

Yet while writing may not have been essential, it clearly had its attractions. For example, even if members of the profession tried their best to follow precedents, and to remember them, they would most likely be able to recall no more than the general sense of what the judge had decided in a previous case, rather than the precise words that he spoke. There is a great deal of research showing that typically we remember the gist of what people say, not their exact words.[28] As a result, an oral precedent is almost inevitably more vague and flexible than written text.

Moreover, memory is fragile. In a system that is essentially oral, older precedents will gradually fade from view. In fact, judges of this era might sometimes conveniently have forgotten a precedent that they preferred not to follow. Writing, even if not essential, provided powerful evidence of what the judges had decided in an earlier case. Dyer once expressed doubts about the authenticity of certain cases because he had never seen references to them in any books.[29]

Written reports addressed some of these problems. There were many private compilations of cases before the invention of printing, and some of these manuscripts appear to have been widely copied.[30] At the same time, access to reports remained sporadic. Parchment was dear and every copy had to be laboriously made by hand. Most lawyers and judges would have had at best an eclectic sampling of cases and no easy way to find those that were most relevant to any particular point. Only the plea rolls, official records of the courts,

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25 1 REPORTS FROM THE LOST NOTEBOOKS OF SIR JAMES DYER 118 (J.H. Baker ed., 1994) [hereinafter DYER], *reprinted in* 109 SELDEN SOCIETY 118 (1994).

26 1 THE REPORTS OF SIR JOHN SPELMAN 196 (J.H. Baker ed., 1977), *reprinted in* 73 SELDEN SOCIETY 196 (1977).

27 It appears that solicitors now also have this privilege. GUY HOLBORN, BUTTERWORTHS LEGAL RESEARCH GUIDE 136 (2d ed. 2001).

28 *See* Jacqueline Strunk Sachs, *Recognition Memory for Syntactic and Semantic Aspects of Connected Discourse*, 2 PERCEPTION & PSYCHOPHYSICS 437, 442 (1967). For some legal implications, see LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME 98–116 (2005).

29 DYER, *supra* note 25, at 76.

30 DAWSON, *supra* note 23, at 54–55.

were anywhere near complete, but they were practically inaccessible to the profession.[31]

Equally important is that the accuracy and completeness of the reports—which were almost always anonymous—would have been highly uncertain. This would have been especially true if, as is often thought, many of the early reports were made by what essentially were apprentices or law students.[32] Even if such apprentices correctly understood what was happening, they reported primarily what was of interest to them. Through accident or omission, many relevant details might not appear in these reports at all. They were certainly not verbatim transcripts of what happened in court. On occasion, two reports of a case gave exactly contrary decisions.[33] As a result, even lawyers and judges who had ready access to the case reports in the *Year Books* and other sources would have been reluctant to rely on them too heavily.

The arrival of printing in England greatly improved the accessibility of case law. Printers quickly discovered that they had an audience in the legal profession. Reports of court proceedings became widely available as a result. Still, the modern notion of precedent was centuries away. This is indicated by the fact that the early printers, despite publishing large amounts of legal materials, made virtually no effort to print the most recent decisions. For example, several of the *Year Books* were printed starting in 1481, but they contained cases that were over two decades old. Cases from 1481 were not printed until 1520, around forty years later! In contrast, the printers often delivered statutes within a year of their enactment. It seems that while statutes were being viewed as sources of law, cases were still considered largely educational, and not authoritative or binding in the sense that they would later become.[34]

Of course, as reports became more widely available, attitudes began to change. This may have been due to some extent to the work of one of the early legal printers, Richard Tottel. He published a version of Fitzherbert's Abridgment that referred to *Year Book* cases.[35] He also reprinted some of those *Year Books* with cross-references to his edition of Fitzherbert.[36] This made it vastly easier to find cases on a

31 ALLEN, *supra* note 17, at 201.

32 *See* THEODORE F.T. PLUCKNETT, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 5 (Harold Dexter Hazeltine ed., 1922).

33 *See id.* at 3.

34 PLUCKNETT, *supra* note 14, at 111–12.

35 *Id.* at 112.

36 *Id.*

particular point and no doubt facilitated their use by lawyers and judges.

Relatedly, during the sixteenth and seventeenth centuries the legal profession came to focus less on the arguments of counsel and more on the decisions of judges. According to Holdsworth, the center of interest shifted from the *debate* in court to the *decision* of the court, a change that "led to the growth of the modern view as to the authority of decided cases; and this, in turn, led to the growth of the practice of constantly citing cases in court."[37] Although the modern conception of judicial decisions as authoritative or binding was still developing,[38] they were increasingly regarded as potentially persuasive and were thus of growing interest to the profession. The demand for accurate published decisions likewise grew.[39]

Reports became more reliable with the advent of named reporters around 1550.[40] Some of them, like Edmund Plowden and James Dyer, were eminent jurists.[41] Nonetheless, both Plowden and Dyer made their reports for their own use and neither intended them to be published. Plowden did ultimately decide to have his reports printed, but his main motive seems to have been to prevent the issuance of a pirated edition of his work.[42] A selection of Dyer's reports was published only after he died.[43]

Another prominent reporter of this period was Edward Coke, whose first volumes of reports were printed in the early years of the seventeenth century.[44] Coke's reports were highly regarded by his contemporaries. Through them he tried to bring order and logic to the law. Coke therefore concentrated less on the speeches of counsel and more on the judgments or opinions from the bench, regarding the judges as *lex loquens*, or "speaking law."[45] And he tried to report cases that were particularly important from a legal perspective.[46] In fact, his efforts to systematize the law by means of his reports may have been Coke's greatest weakness, for he was sometimes accused of sub-

37 5 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 372 (7th ed. 1972).

38 *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 346 (5th ed. 1956).

39 5 HOLDSWORTH, *supra* note 37, at 371–72.

40 DAWSON, *supra* note 23, at 65–66.

41 *Id.*, *supra* note 23, at 65–67.

42 David Ibbetson, *Law Reporting in the 1590s*, *in* LAW REPORTING IN BRITAIN, *supra* note 12, at 73, 80–81.

43 *Id.*

44 ABBOTT, *supra* note 16, at 249 & n.39.

45 *Id.* at 251.

46 *Id.* at 251–52.

stituting his own opinion for that of a court with which he disagreed.[47] As Plucknett remarked, a case in Coke's reports "is an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recondite legal history."[48]

Particularly interesting from our perspective is that Coke intended his reports to be printed and designed them to be used by legal practitioners.[49] In this sense he may have been ahead of his time. Whatever failings Coke's reports might have had from a modern point of view, his efforts show that the legal profession was beginning to value relatively contemporaneous and accurate reports as a source of decisions that could function as precedents.

Although counsel could refer to any previous case to support an argument in court, even if not reported at all, or if reported only in manuscript form, lawyers no doubt believed that referring to a series of printed reports would be to their advantage. Indeed, Ibbetson's examination of the arguments of lawyers shows that as early as the 1590s, lawyers were showing a marked preference for printed reports over remembered decisions or manuscript reports.[50] This was true even though the printed cases were often quite old, and even though more recent and more relevant cases were available in manuscript form.

The practices of reporters who followed in the footsteps of such luminaries as Plowden and Coke left much to be desired. During the seventeenth and eighteenth centuries, the quality of judicial decisions fluctuated wildly. Reporting remained a private enterprise, and the results depended on the interest and care of the individual reporters and printers, whose main motive was usually to make as much money as possible.[51] Most of those reporters were hardly the cream of the profession.

Some judges of the time became concerned that their reputations would be injured by the poor quality of the reporting. An exasperated Chief Justice Holt once remarked: "See the inconveniences of these scrambling reports: they will make us appear to posterity for a parcel of blockheads."[52] More serious, of course, was that in a system with growing reliance on precedent, inaccurate reports of previous decisions were highly problematic. Judges characterized some reports

47 *See* JOHN WILLIAM WALLACE, THE REPORTERS ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS 172–75 (4th ed., Boston, Soule & Bugbee 1882).

48 PLUCKNETT, *supra* note 38, at 281.

49 ABBOTT, *supra* note 16, at 247–48; Ibbetson, *supra* note 42, at 81.

50 Ibbetson, *supra* note 42, at 84–85.

51 *See* ROBERT MEGARRY, A SECOND MISCELLANY-AT-LAW 117–33 (1973).

52 *Id.* at 120 (quoting Slater v. May, (1704) 92 Eng. Rep. 210 (K.B.)).

from this time as being of "questionable authority"[53] or even "totally mistaken."[54] Another judge said of a reporter that he heard only half of what went on in court and that he reported the other half.[55] Siderfin's reports were deemed "fit to be burned."[56] Justice Park went a step further, actually burning his copy of Keble's reports.[57] Even eminent lawyers were not immune from criticism. Lord Mansfield claimed that Blackstone's reports were not very accurate.[58] Consequently, whether to follow a precedent to a large extent depended on the reputation of the reporter and the quality of the report, leaving judges "at liberty to attach different degrees of weight to different authorities."[59]

Moreover, it was the reporters and printers, rather than judges, who had control over what was published and what was not. A rather extreme example is that one reporter, Lord Campbell, is said to have censored his reports by refusing to include any case that he deemed improperly decided.[60] Campbell also strove to improve his reports by correcting the "blunders" of the judge.[61]

A further problem was that there were no official reporters and few impediments on private individuals who wished to enter the business. As a result, there could be, and often were, multiple reports of a single case, none of which were complete verbatim records of what had transpired.[62] Instead, they summarized the proceedings with varying degrees of fidelity and completeness. Sir James Burrow, who reported around the middle of the eighteenth century and whose efforts are generally well regarded, noted that he did not take down arguments and judgments verbatim, because he did not write shorthand, but he tried to convey the sense as well as possible in his own

53 *Id.* at 119 (quoting Cholmondeley v. Clinton, (1820) 37 Eng. Rep. 527 (K.B.)).

54 *Id.* (quoting The King v. Harris, (1797) 101 Eng. Rep. 952, 952 (K.B.)); *see also* W.H. Bryson, *Law Reports in England from 1603 to 1660*, *in* LAW REPORTING IN BRITAIN, *supra* note 12, at 113, 115 ("In consideration of these observations, one should not be surprised at the poor quality of the reports of this era.")

55 GLANVILLE WILLIAMS, LEARNING THE LAW 37 (A.T.H. Smith ed., 13th ed. Sweet & Maxwell 2006) (1945) (citing 54 L.Q.R. 368).

56 WALLACE, *supra* note 47, at 295 (citing 1 Shower 252).

57 *Id.* at 315.

58 MEGARRY, *supra* note 51, at 125 (citing Devon v. Watts, (1779) 99 Eng. Rep. 59, 64 (K.B.)). In Blackstone's defense, his reports were published posthumously by his executor, who was apparently not a lawyer. WALLACE, *supra* note 47, at 443–44.

59 ALLEN, *supra* note 17, at 222.

60 MEGARRY, *supra* note 51, at 131–32 (citing 5 Camp. L. CC. 376).

61 ALLEN, *supra* note 17, at 231.

62 Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 50 (1981).

words.[63] Reports of the same case by his competitors would inevitably have been somewhat different.

By the eighteenth and nineteenth centuries, publishers reduced the time lag to publication. At the same time, the quality of the reports remained an issue. Reliance on precedents would be problematic as long as reporting was an inexact science. Lord Mansfield is said to have disregarded what he considered to be poorly reported decisions.[64] And Sir Frederick Pollock pointed out that a report can always be contradicted by a more accurate report, "or even by the clear recollection of the Court or counsel."[65] Obviously, the common law of this time, though it was increasingly found in written documents, nonetheless remained largely "unwritten" in the sense of Hale.

As a consequence, the common law remained conceptually distinct from statutory law. What mattered was the court's decision and the general principle that underlay it, and not the precise words in which the decision was expressed. As Mansfield said: "The law does not consist of particular cases, but of general principles, which are illustrated and explained by these cases."[66] Mansfield also noted that "[t]he reason and spirit of cases make law; not the letter of particular precedents."[67] Likewise, Pollock observed:

> Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles recognized and applied as necessary grounds for the decision. Therefore it has never been possible for the courts to impose dogmatic formulas on the Common Law, and the efforts of text-writers to bind it in fetters of verbal definition have been constantly and for the most part happily frustrated . . . .[68]

There was also a purely practical factor that discouraged the profession from relying too much on the exact words or text of a decision. Not only were there different reports of any one case, but most courts of the time had multiple judges, each of whom would, in sequence, express his own opinion regarding how he would dispose of

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63 *Id.*

64 12 HOLDSWORTH, *supra* note 37, at 154.

65 FREDERICK POLLOCK, ESSAYS IN THE LAW 233 (1922).

66 ALLEN, *supra* note 17, at 217 (quoting The King v. Bembridge, (1783) 99 Eng. Rep. 679, 681 (K.B.)).

67 C.G. MORAN, THE HERALDS OF THE LAW 88 (1948) (quoting Fisher v. Prince, (1762) 99 Eng. Rep. 876, 876 (K.B.)).

68 Frederick Pollock, *Introduction* to JOHN HENRY WIGMORE ET AL., PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY, at xli, xliv (1918).

the case and why.[69] These are known as seriatim opinions. It would be foolish to take one judge's words and to elevate them over the words of a colleague who agreed with the result but for a different reason. The best that a lawyer could do is to try to extract from these opinions what the judges in the majority seem to have felt was the principle that guided their decision.

Of course, even if the lawyers and judges eschewed "exact words" and "dogmatic formulas," they were nonetheless concerned that reports be an accurate reflection of what had transpired. One step in this direction was to appoint authorized or official reporters. In 1865 the English bar set up its own reporting system, run by the Incorporated Council of Law Reporting.[70] This Council issues its own series of reports: the *Law Reports*, which have come to be treated as semi-official and should be cited in court when possible.[71] Private reports continue to exist, however.[72]

The growing importance of case reports as a source of law is also shown by the fact that, over the course of the nineteenth century, reporters began to reduce the space allotted to the arguments of lawyers. By the end of the century, some reporters began to omit the arguments of lawyers altogether.[73] As a result, reports were no longer summaries or descriptions of the verbal interplay between advocates and judges, as they were originally, but focused almost entirely on the judgment or opinion of the judges.

Since the reforms in the nineteenth century, English reports—particularly the *Law Reports*—are felt to have achieved a high degree of accuracy.[74] This is enhanced by the fact that judges now usually read and approve the text of their decisions before they appear in the *Law Reports*.[75] Other reports, like the *All England Law Reports*, are not normally screened by the judges. Interestingly, the lack of editing by judges is sometimes felt to be a virtue. There are apparently practitioners who prefer the private reporters because they are closer to

69 Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 189–91 (1959).

70 SUZANNE WARREN ET AL., LEGAL RESEARCH IN ENGLAND AND WALES 14 (rev. ed. 1996).

71 *Id.*

72 *Id.* at 15.

73 In England, the *Weekly Law Reports* do not usually contain argument of counsel. The same is true of the *All England Law Reports*. On the other hand, the *Law Reports* do often contain argument. *Id.*

74 MICHAEL ZANDER, THE LAW-MAKING PROCESS 312 (6th ed. Cambridge Univ. Press 2004) (1980) (quoting REPORT OF THE LAW REPORTING COMMITTEE (1940)).

75 Judges have to some extent been reading draft reports of their decisions since the end of the eighteenth century. *See* PLUCKNETT, *supra* note 38, at 281.

what the judge actually said, rather than what the judge, on reflection, would have liked to have said.[76] They are, in other words, more accurate reports of what actually happened.

It remains true in England that the same case can be reported in different ways. Although the differences are not nearly as extreme as they sometimes were in the past, they can be substantial, not just because the judges edit some reports (and not others), but especially because some reporters give more detail, while others present a summary.[77] In addition, reports are edited by professional editors before publication, which can compound the differences among reports of the same case.[78] Especially with reports of extemporaneous (oral) decisions, "published reports sometimes bear little resemblance to the judgments . . . upon which they are based."[79]

The House of Lords further elevated the significance of the written word when it abandoned the oral delivery of its judgments in 1963.[80] The law lords now draft their judgments after argument and provide them to reporters in written form. This seems to guarantee that there will no longer be differing reports of a case. All the reporter has to do is pick up the judgments, perhaps add some headnotes and a summary, and print the result. Judges on the Court of Appeal may also write out their opinions in some of the more important or difficult cases that come before them. But they still deliver many oral judgments, often directly after argument, which may or may not be reported.

B. Precedent Tightens its Grip

During the latter part of the nineteenth century and much of the twentieth, English appellate courts not only came to view precedent as an important source of law that should not be changed without good reason, but they went so far as to refuse to change their own precedents, even when they were felt to be wrong.[81] As J.H. Baker has observed, the duty of "repeating errors" is a modern innovation and may have resulted from the improved quality of law reports following developments in shorthand techniques, "which made the *ipsissima*

76 ZANDER, *supra* note 74, at 312.

77 Proposals to have shorthand writers take down the exact text of every judgment have been rejected. *Id.* at 312.

78 *See* MORAN, *supra* note 67, at 47–48, 100.

79 DELMAR KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 104 (1963).

80 Practice Direction, [1963] 1 W.L.R. 1382 (H.L.).

81 *See* DAWSON, *supra* note 23, at 91–94. The pivotal case was *London Street Tramways Co. v. London County Council*, [1898] A.C. 375, 378 (H.L.).

verba of the judges available as an authentic text and made bold distinguishing more difficult."[82]

Precedent had long been a feature of judicial reasoning, of course, but during much of the twentieth century it held English courts in a tighter grip than before. Previously, judges had followed precedent if there were several cases on a point that all reached the same conclusion, or if the courts deciding a case were particularly eminent, or perhaps if they believed that the profession had come to rely on a case. But by the first part of the twentieth century, a single relevant precedent was felt to be absolutely binding.[83]

A well-known example is *Beamish v. Beamish*,[84] in which Lord Campbell made the following point about a precedential case that he felt to be on point, but with which he disagreed:

> If it were competent to me, I would now ask your Lordships to reconsider the doctrine laid down in *R.* v. *Millis*, particularly as the judges who were then consulted complained of being hurried into giving an opinion without due time for deliberation . . . .
>
> But it is my duty to say that your Lordships are bound by this decision . . . and that the rule of law which your Lordships lay down as the ground of your judgment . . . must be taken for law till altered by an Act of Parliament . . . . The law laid down as your *ratio decidendi*, [is] clearly binding on all inferior tribunals, and . . . if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority.[85]

The House of Lords unshackled itself by means of a Practice Statement in 1966 that declared that it would henceforth feel free to disregard an earlier opinion "when it appears right to do so."[86] Nonetheless, according to a study published roughly fifteen years later, the lords have exercised their new-found liberty quite sparingly. They have held, for instance, that they will not overrule a previous decision

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82 BAKER, *supra* note 11, at 200. Also see DAWSON, *supra* note 23, at 80, who points out that "theories of precedent could not be strict until reports became reliable," which was around 1800.

83 Steve Hedley, *Words, Words, Words: Making Sense of Legal Judgments, 1875–1940*, *in* LAW REPORTING IN BRITAIN, *supra* note 12, at 169, 171–72.

84 (1861) 11 Eng. Rep. 735 (H.L), *quoted in* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 8 (4th ed. 1991).

85 *Id.* at 760–61.

86 DAWSON, *supra* note 23, at 94; *see also* CROSS & HARRIS, *supra* note 84, at 104–08 (discussing the constitutional basis for the change).

just because they believe that it was wrongly decided, but that there has to be some additional basis for refusing to follow it.[87]

Lower English courts continue to be bound by precedent; the freedom to overrule earlier decisions granted by the Practice Statement to the House of Lords quite pointedly does not apply to them, and the lords have quashed attempts by some justices on the Court of Appeal to have the rule extended.[88] This aspect of precedent—feeling oneself bound, or at least, strongly encouraged, to follow one's earlier decisions—is often called stare decisis.

There is a second way in which courts are bound by precedent: Lower courts must also follow precedents established by a higher court. Unlike stare decisis, which is basically a self-imposed restriction, this aspect of precedent is generally felt to be mandatory in the common law system. For example, in *Miliangos v. George Frank (Textiles) Ltd.*,[89] Lord Wilberforce of the House of Lords criticized the Court of Appeal for failing to follow a precedent (*In re United Railways of the Havana Regla Warehouse Ltd.*[90]) that had previously been established by the lords. But Wilberforce, relying on the 1966 Practice Statement, then suggested that the House should "depart from" the precedent itself.[91] Lord Fraser of Tullybelton agreed that the House should "decline to follow" the *Havana Railways* case.[92] Lord Simon of Glaisdale dissented, arguing that *Havana Railways* should not be overruled, and also suggesting that "it is better to avoid euphemisms like 'departed from'" and face the facts: the House had "overruled" a previous precedent.[93] The case illustrates quite nicely how seriously precedent is still taken in England.

Of course, the hierarchical aspect of precedent requires that there be a system where a superior court has the power to overrule a lower court for failing to follow one of the higher court's earlier decisions. The hierarchy of English courts, with the House of Lords on the top, was not clearly established until 1876, which is another reason that the binding nature of precedent reached its pinnacle in the late-nineteenth and early-twentieth centuries. Moreover, the House of Lords did not allow the systematic reporting of its decisions until roughly the middle of the nineteenth century, making it difficult to

87 ALAN PATERSON, THE LAW LORDS 154–69 (1982).

88 CROSS & HARRIS, *supra* note 84, at 108–09.

89 [1976] A.C. 443 (H.L.).

90 [1960] Ch. 52, 52 (C.A.).

91 *Miliangos*, [1976] A.C. at 470.

92 *Id.* at 501.

93 *Id.* at 471.

discern the rationales for its judgments and apply them to other cases.[94]

Thus, throughout most of the history of England, the reports of judgments were exactly that: reports of what the judges *said.* The rule of law, or holding, depended not so much on what was written in the reports, but on how the case was decided. A 1940 report of a committee established by the Lord Chancellor to study reporting practices observed that "the law of England is what it is, not because it has been so reported, but because it has been so decided."[95] Or consider the words of an Australian judge remarking on another case in 1971: "[M]ere infelicities of expression or slips of the tongue have no effect. Some latitude of construction should be applied, particularly to an extempore judgment. It is the reasoning of the court not its mode of expression, which is under appeal . . ."[96] Case law was not really unwritten, of course. But it clearly was—and in England still is—more conceptual than verbal.

The fact that in England the common law has remained unwritten in a certain sense—that it is something to be extracted from the decisions of judges rather than ascertained by close reading of the text of a judge's opinion—may help explain why it is possible for the courts to believe themselves absolutely bound by their own previous decisions. In such a rigid system there has to be an escape valve. It turns out that English judges and lawyers have several ways to avoid the force of a precedent, many of which are aided by the vestiges of orality in the English system.

For instance, because the judges normally do not lay out their holding by an authoritative formulation, leaving it up to later judges and lawyers to figure out the holding by means of deduction, it is always possible to recharacterize the ratio decidendi retrospectively, or to broaden or narrow its reach. As Carleton Kemp Allen has remarked, the ratio decidendi is "in a constant state of flux."[97] Subtle reconceptualization of a case's holding is facilitated by the fact that the reports of judgments are often not written by the judges themselves, and that there are sometimes multiple reports of a case, making reliance on the exact words of an opinion inherently risky.

What also gives English judges some freedom of movement is that it is still common to issue multiple or seriatim opinions, where all the

94 ALLEN, *supra* note 17, at 220.

95 MORAN, *supra* note 67, at 95 (quoting THE REPORT OF THE LORD CHANCELLOR'S COMMITTEE (1940)).

96 Churchill v. Badenochs Transp. Ld., [1971] 1 S.A. St. R. 63, 64–65.

97 ALLEN, *supra* note 17, at 260.

judges state their opinion, usually in order of seniority. This remains the prevailing practice in the English courts of appeal. As mentioned, the law lords now write their opinions instead of delivering them orally, but they continue to sound very much like speeches, and multiple judgments are common. As of the 1980s, all five law lords on a panel delivered a separate opinion in thirty-five percent of its cases.[98] Single dispositive opinions, in which the remaining lords concur without elaboration, are relatively rare.[99] Clearly, multiple opinions tend to make the determination of a holding more difficult. And, of course, they give lower court judges, as well as the lords themselves in later cases, a fair amount of freedom in how to characterize the holding.

Finally, English courts are bound only by the ratio decidendi of an earlier case on the same issue. They are not obligated to follow obiter dicta, or comments that are not directly on point. It is easy to see how a distinction between ratio and dicta would arise in a system where a reporter decides which of a judge's oral comments to memorialize for posterity. When speaking, people often say things that are not directly relevant. Writing, on the other hand, is generally planned and organized in advance. Irrelevancies and digressions, especially in formal styles of writing, tend to be frowned upon. Dismissing as dicta something that an esteemed judge has thought about and has personally reduced to writing is much more difficult than when the same thought occurs in an oral opinion delivered right after lawyers finish their argument.

The English legal system itself distinguishes between an extempore judgment, one that is delivered orally directly after argument, and a *reserved* judgment, where the judges have taken some time to think the matter over and deliver their judgments several weeks or even months later.[100] A reserved judgment is not inevitably written, in contrast to an extempore judgment, which is necessarily delivered orally. But it appears to be normal practice to deliver reserved judgments in writing. In any event, a reserved judgment is felt to have greater weight than one delivered extempore because the judges had time to consider the matter.[101]

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98 PATERSON, *supra* note 87, at 110.

99 *Id.* at 110–11.

100 The fact that judgment was reserved is usually indicated in the reports by the annotation *cur adv vult* (for *curia advisari vult*).

101 WILLIAMS, *supra* note 55, at 117. It is not clear that this is still as true as it once was. It seems that nowadays, judges who deliver an extempore judgment may later be giving a written copy to the reporters for publication. See *Cas. v. Hugh James*, [2000] 1

Thus, at a time when English common law was truly *lex non scripta*, rigid reliance on earlier decisions would have been unlikely to develop. Even after court proceedings came to be written down by reporters, it was possible for eminent lawyers like Francis Bacon, Matthew Hale, and William Blackstone to maintain that there was a fundamental distinction between the written law produced by Parliament and the unwritten law of judges. As written reports became ever more accessible and accurate, a more vigorous doctrine of precedent could and did develop. Oddly enough, however, the rigidity of English precedent during especially the twentieth century was to a large extent made possible by the fact that English law still maintained, in some important respects, vestiges of its oral past. In fact, the English common law remains remarkably oral, as we see in the fact that precedential value is still ascribed to extempore opinions. Even when decisions are written down by judges in their own words, there are still significant vestiges of the common law's original orality.

C. *Residual Orality in Modern England*

Although English judgments are becoming more written, there is still much evidence of orality. One reason, of course, is that many appellate judgments are still delivered by word of mouth. But even those judges, such as the law lords, who write their opinions, circulate them to be read by their colleagues, and then hand them out to reporters to be printed verbatim, are still to some extent operating in an oral mode. Their written opinions contain a fair amount of what linguists sometimes call oral residue—vestiges of oral traditions that have only recently started to die out, and which retain a surprising amount of vitality even today.[102]

The most obvious examples are the oral judgments given by English appellate courts. There are not a huge number of extempore judgments in the modern English reports. In most decisions that raise a novel question of law, and which are likely to be reported, judges will probably wish to take some time to consider the matter and then issue a written opinion. Nonetheless, a surprising number of oral decisions, many by the Court of Appeal, can be found in the reports, and many more are delivered without being reported. Such

All E.R. 289 (C.A.), which by all indications is an extempore judgment, but which is reported in [2000] 1 W.L.R. 1278 in essentially identical terms.

102 *See, e.g.*, Walter J. Ong, *Oral Residue in Tudor Prose Style*, 80 PUBLICATIONS MOD. LANGUAGE ASS'N OF AM. 145, 146 (1965) (defining "oral residue" as "habits of thought and expression tracing back to preliterate situations or practice, or deriving from the dominance of the oral as a medium in a given culture").

decisions tend to be relatively short and typically involve the consideration of a limited number of issues.

As one would expect, judges who deliver oral opinions usually refer to themselves as "I," even when they are part of a majority, since technically they can only speak for themselves. Because they have just heard argument by the parties' lawyers, whom they might very well know personally, it is not surprising that they often refer to the advocates by name. As is common in speech, and usually less acceptable in formal written modes of communication, judges might also express their emotions. Lord Justice Buxton had this to say about lawyers who failed to find and cite a relevant precedent:

> I cannot draw back from expressing my very great concern that the judge was permitted by those professional advocates to approach the matter as if it were free from authority when there was a recently reported case in this court directly on the point . . . . It is not only extremely discourteous to the judge not to inform him properly about the law, but it has also been extremely wasteful of time and money in this case . . . . I have, I fear, to say that the advocates who appeared below did not discharge their duty properly to the court . . . .[103]

In another judgment from the Court of Appeal the judge remarked: "I pause at this point to say that I find it most surprising that a letter of that kind was not copied to Mrs. Aparau or those advising her."[104]

Also consistent with what one would expect in the report of an oral decision is that there are no footnotes. Moreover, headings or divisions into sections are rare in extempore opinions, and if they exist are apparently inserted afterwards by a reporter or editor, or perhaps by the judge himself.

The Court of Appeal now sometimes delivers opinions of the court, but they are almost invariably written opinions in cases where judgment was reserved. In such cases, the use of *we* is almost obligatory, and the tentativeness of the seriatim opinions disappears. One such opinion eschews the standard reference to what the judges "would" do and boldly ends with the words: "We have therefore come to the conclusion that there is no basis for suspecting that any of the convictions for murder is unsafe. The appeals are accordingly dismissed."[105]

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103 Copeland v. Smith, [2000] 1 All E.R. 457, 459 (C.A.).

104 Aparau v. Iceland Frozen Foods Plc, [2000] 1 All E.R. 228, 233 (C.A.).

105 R. v. Boreman, [2000] 1 All E.R. 307, 319 (C.A.).

In the highest English court, the House of Lords, opinions have now been produced in writing for several decades.[106] After hearing argument, the lords confer among themselves. If they all agree on the outcome, they may assign one of their number to draft an opinion which is circulated among members of the panel, who can then either concur or write an opinion of their own. If there is no initial consensus, several or all of the lords may write a separate judgment.[107] What is interesting is that despite the transition to written opinions, cases are still presented in the reports as though they had been delivered orally. Each of the law lords hearing the case produces a separate opinion, in order of seniority. Often enough, the opinion is quite brief, and says nothing more than "My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. For the reasons he has given I would dismiss the appeal."[108]

Another indication of residual orality is that the lords do not hesitate to use the pronouns *I* or *my*, even though their use is generally discouraged in formal writing. In contrast, Justice Stephen Breyer recently caused a bit of a scandal by his use of the pronoun "I" in his draft opinion for the United States Supreme Court. To be exact, he wrote that "I will call" a certain decision "case two."[109] The result was a "legal frenzy" that motivated at least one law professor to send a note of complaint to the justice for his "nonstandard" usage.[110] When the opinion appeared in final form, the "I" was nowhere to be found.[111]

The fact that House of Lords opinions still appear seriatim in the reports, even though they are not really "delivered" nowadays, harks back to an earlier period when the judgments were, in fact, pronounced orally one after the other. According to Alan Paterson, who has studied and interviewed the law lords, there was some feeling among the lords that multiple opinions can be problematic, especially if they overlap, but there is no formal mechanism for dealing with the issue.[112] Most judges felt that it was good to have a single substantive opinion in criminal appeals, especially those that involve statutory

106 *Cf.* PATERSON, *supra* note 87, at 10 (noting that speeches have not been read out since 1963).

107 *Id.* at 92–96.

108 Coventry & Solihull Waste Disposal Co. v. Russell, [2000] 1 All E.R. 97, 99 (H.L.).

109 S. Cent. Bell Tel. Co. v. Alabama, 119 S. Ct. 1180, 1185 (1999).

110 Tony Mauro, *Justice's Supreme Use of "I" Sparks a Legal Frenzy*, USA TODAY, Apr. 2, 1999, at 11A.

111 526 U.S. 160, 167 (1999) (replacing "I" with "we").

112 PATERSON, *supra* note 87, at 97.

construction.[113] In difficult common law cases, on the other hand, they favored multiple opinions.[114] The main reason for the difference is probably that there is a greater need for certainty in the criminal law. In contrast, multiple opinions in common law cases, as discussed above, are one of the mechanisms by which the law can retain some flexibility in light of the coercive nature of precedent in the English system.

There are additional vestiges of orality in judgments from the House of Lords. For example, they tend to be somewhat less formal in tone than opinions of the United States Supreme Court, which is roughly comparable in standing. Formal language, of course, is common in writing, while speech is generally less formal. In addition, the opinions sometimes suggest face-to-face contact with other judges or with an audience, in contrast to the impersonal tone of most American Supreme Court opinions. For instance, the lords begin each opinion with the phrase "My Lords," as though they were speaking to a live audience. And they often refer by name to a specific barrister who argued the case, as did Lord Goff of Chieveley: "I was at first impressed by Sir Patrick's argument, particularly as developed by him in his reply. But on reflection I find myself unable to accept it."[115]

Lord Goff's statement reveals another way in which English practice remains relatively oral: Argument before the appellate courts is not subject to strict time limits, and the judges typically engage in extended verbal interaction with the lawyers. In one Court of Appeal case, the argument seems to have gone on for three weeks.[116] This applies also to the House of Lords, where according to Paterson's study the lords base their decisions primarily on oral argument, as opposed to written submissions.[117] In the United States, on the other hand, appellate judges rely far more on written briefing and usually impose strict time limits on oral argument, typically half an hour per side. Sometimes they refuse to allow oral argument at all.[118]

The primary reason for the much longer oral argument in English appellate cases is that English barristers do not provide the exhaustive briefs that American lawyers do. Consequently, judges normally do not research a case beforehand (unlike American practice,

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113 *Id.* at 98.

114 *Id.*

115 Scher v. Policyholders Prot. Bd., [1994] 2 A.C. 57, 101 (H.L.).

116 *In re* United Rys. of the Havana & Regla Warehouses Ltd., [1960] Ch. 52, 52 (C.A.).

117 PATERSON, *supra* note 87, at 35–36.

118 *See* KARLEN, *supra* note 79, at 19 (referring to practice before the New York Appellate Division).

where judges and their clerks have studied the briefs, usually done additional research, and often reached a tentative decision before any argument takes place). As opposed to American judges, who typically *read* important precedents and have time to study their exact wording, English lawyers normally *hear* about them during argument.[119] Although they presumably receive a copy of important cases from counsel, they normally do not have time to study the wording of a case in the way that an American judge can. And because there is relatively little case law in England, as well as the fact that bench and bar tend to be specialized, the judge may already know what the law is, making lengthy citation to precedents unnecessary.

Further evidence of oral residue is that the law lords, despite having written their opinions for decades, refer to them as "speeches." Likewise, they typically remark on what a judge "said" in a previous case, rather than what he "wrote." And they admit to emotions, something considerably more common in spoken interaction than it is in formal written texts. As one of the law lords once said: "My Lords, I must own that this question has caused me considerable anxiety."[120] Such statements are relatively unusual in an American Supreme Court opinion, certainly when the judge is part of the majority, as opposed to a dissenter.

A final indication that English appellate practice is still relatively oral is that courts will recognize unreported cases as precedents, as long as a barrister vouches for their authenticity.[121] As a reaction to the increasing number of unreported decisions that are now available online, citing to such cases before the lords requires first obtaining their leave, and other English courts also tend to discourage it.[122] But the mere fact that it is possible to rely on an unreported precedent indicates that Matthew Hale's view of the common law as *lex non scripta* retains remarkable vitality.[123]

So far the discussion may have seemed mostly of interest to legal historians or perhaps students of law and literature. I believe, however, that it has much broader implications than might at first appear. The essentially oral nature of English case law has led to a conception of precedent that differs markedly from that in the United States. To

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119 *Id.* at 93–94.

120 R. v. Preston, [1994] 2 A.C. 130, 169 (H.L.).

121 15 HOLDSWORTH, *supra* note 37, at 248.

122 ZANDER, *supra* note 74, at 321.

123 *See* KARLEN, *supra* note 79, at 89. Karlen concludes from this fact that "the common law of England is far more truly 'unwritten' than the common law of the United States." *Id.*

appreciate this difference, we must examine a bit more closely the English understanding of precedent.

D. Finding the Ratio

When English judges say that they are bound to follow a precedent, they do not mean that an earlier case must be followed in all particulars. One of the basic justifications for a legal regime based on precedent is that like cases should be decided alike. Thus, the first inquiry is necessarily whether the case to be decided has similar facts or raises roughly the same issue as a case that is a potential precedent. If the earlier case can be distinguished from the one at bar, it is not a "like" case, and judges deciding the later case need not follow it. Although any preceding case is a precedent in the broadest sense, I will assume for present purposes that a precedent is only a case that is sufficiently similar that judges agree that it provides some or all of the rule or reasoning needed to decide the case in question.

Even if we decide that a previous case should serve as a precedent in this sense, it does not follow that everything the judge said in the earlier judgment, or even every legal principle that he or she articulated, is binding on the later court. Judicial decisions are very different from statutes in this regard. A general rule for interpreting statutes is that every word has meaning and that nothing should be treated as surplusage.[124] This canon does not apply to judicial opinions, where lawyers and judges draw careful distinctions between rules or principles that are essential to the outcome (called the ratio decidendi or simply the ratio) and those that are not (called obiter dicta, or just obiter, or simply dicta). Obiter dictum translates approximately as "something said by the way" or "an aside." The received view is that while dicta may have some degree of persuasive force, often depending on which judge or court made the statements, they are not part of the precedent that must be followed. Consequently, one way to avoid the binding force of a rule or principle stated in a preceding case is to classify it as dictum. Particularly in England, where precedent is more difficult to sidestep than in the United States, lawyers and judges often debate whether a statement made in a previous case is or is not obiter dictum. As a judge in the Chancery Division recently mentioned, after quoting at length from an earlier case: "The final sentence provides support for Mr. Higginson's argument. But as Mr. Howe pointed out, the final sentence is obiter . . . ."[125]

124 *See* PETER M. TIERSMA, LEGAL LANGUAGE 64 (1999).

125 Memory Corp. v. Sidhu, [2000] 1 All E.R. 434, 447 (Ch.).

Closely related is the problem of determining exactly what the ratio decidendi is. Cross and Harris provide a working definition of the term's meaning: "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion . . . ."[126] Unfortunately, finding the ratio, though it is one of the most basic skills of a lawyer, can be an uncertain enterprise fraught with difficulty. Cross and Harris discuss the various approaches or methodologies proposed by legal scholars such as Wambaugh, Halsbury, and Goodhart,[127] but end up concluding that it is "impossible to devise formulae for determining the *ratio decidendi* of a case."[128] Nonetheless, according to Lord Reid of the House of Lords: "It matters not how difficult it is to find the ratio decidendi of a previous case, that ratio must be found."[129]

Traditionally, finding the ratio has required close analysis of the facts and outcome of a case. In theory, it is possible to determine the holding of a case even when no reasons are given for a decision.[130] An example is the famous *Peerless* case, decided in 1864 and more precisely entitled *Raffles v. Wichelhaus*.[131] The plaintiff made a contract to sell 125 bales of Indian cotton at a specified price, to arrive from Bombay on the ship named *Peerless*.[132] It turned out that there were at least two ships by that name, one leaving Bombay in October and the other in December.[133] The defendant buyers refused to accept the cotton. The report of the case, which consists of about one printed page, begins with a summary of the pleadings. It continues with the argument by counsel for the plaintiff seller, who is continuously interrupted by the obviously skeptical judges. The lawyer for the defendants then starts his argument by suggesting that there was evidence that the plaintiff meant one *Peerless* and the defendants intended to refer to a different *Peerless*.[134] As a result, there was "no consen[s]us ad idem, and therefore no binding contract."[135] According to the reporter, the lawyer "was then stopped by the Court."[136] With no discussion or elaboration, the judges abruptly declare: "There

126 CROSS & HARRIS, *supra* note 84, at 72.
127 *Id.* at 52–71.
128 *Id.* at 72.
129 Nash v. Tamplin & Sons Brewery Brighton Ld., [1952] A.C. 231, 250 (H.L.).
130 *See* CROSS & HARRIS, *supra* note 84, at 47.
131 (1864) 159 Eng. Rep. 375 (Exch. Div.).
132 *Id.* at 375.
133 *Id.*
134 *Id.* at 376.
135 *Id.*
136 *Id.*

must be judgment for the defendants."[137] This case is a classic in contracts law and is routinely included in contracts casebooks in the United States.[138]

Even though the *Raffles* court did not explain its reasoning in an opinion, it is held to have established the important principle that there can only be a contract if there has been *consensus ad idem*, or a "meeting of the minds."[139] Interestingly, this conclusion flows forth not just from analysis of the issue (was there an enforceable contract in this situation?) and its resolution (no), but also by considering the discourse that took place at oral argument. The judges appear to have resolved the case in the defendants' favor directly after his counsel argued that there was no meeting of the minds.[140]

Of course, English judges normally do give reasons for deciding as they do, although that does not mean that they always express the ratio in a succinct and understandable fashion. As Cross and Harris observe: "[I]t is comparatively seldom that a judge expressly indicates the proposition on which he relies as *ratio decidendi*."[141] Even when the judge attempts to describe the holding or ratio of a case, his or her statement of the rule of law may not end the matter. According to A.L. Goodhart, an expert on the English concept of precedent, "it is not the rule of law *set forth* by the court, or the rule *enunciated* . . . which necessarily constitutes the principle of the case. There may be no rule of law set forth in the opinion, or the rule when stated may be too wide or too narrow."[142] Instead, according to Goodhart, the principle underlying a decision must be discovered by means of analytic reasoning.[143] The judge's opinion regarding the principle of the case is obviously important, but it need not be decisive. Eugene Wambaugh, another English scholar, likewise made the point that it is

137 *Id.*

138 *See, e.g.*, EDWARD J. MURPHY ET AL., STUDIES IN CONTRACT LAW 393–96 (6th ed. 2003).

139 For more on this famous case, see A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships* Peerless, 11 CARDOZO L. REV. 287 (1989). For another example of a precedent without opinion, see Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

140 *Raffles* was not unique in this sense. *See* Hills v. Laming, (1853) 156 Eng. Rep. 109 (Ex.).

141 *See* CROSS & HARRIS, *supra* note 84, at 48.

142 Goodhart, *supra* note 139, at 165.

143 *Id.* at 172. Goodhart's method is to derive the principle of a case by finding (1) the material facts on which the judge based his decision and (2) the decision that the judge made based on those facts. *Id.* Thus, if the material facts are *A* and *B*, and the result is *X*, then in any future case with facts *A* and *B*, the result must be *X*. *Id.* at 169.

not the words or the language of judges that constitutes the force of precedent.[144] Blackstone was more blunt, stating that *the law* and *the opinion of the judge* are not the same thing, because the judge may mistake the law.[145]

The situation is further complicated when there is more than one opinion, as there often is in English appellate cases. For example, when three justices decide a case in the Court of Appeal, one may write an opinion in favor of the plaintiff for reason A, the second may write a separate opinion in favor of the plaintiff for reason B, and the third may deliver her own opinion in favor of the defendant.[146] The plaintiff has won the case, but on what ground? Can such a decision have any precedential value at all?

A more likely scenario is that two justices agree on the outcome and write separate judgments expressing overlapping but nonetheless distinct motivations for deciding as they did. Even experienced judges can have trouble identifying the ratio in such cases. One rule of thumb that has been developed is that the narrower ground for the court's decision should be viewed as the ratio decidendi of the case,[147] but this rule only helps if the two judgments differ merely in the breadth or narrowness of their proposed rule.

Finding the ratio is even more difficult if the case was decided by a court with more than three members, such as the House of Lords or the former Court of Exchequer Chamber. In one recent case, Aldous, L.J., of the Court of Appeal discussed a case that had been decided in the nineteenth century by the Court of Exchequer Chamber and in which several judges had expressed an opinion. Aldous began with the opinion of Erle, J., which Aldous found significant because several subsequent cases had referred to it, and quoted a paragraph consisting of around eighteen lines of text.[148] After a brief discussion, Aldous then recited another fifteen lines from Erle's opinion.[149] Aldous then quoted a long paragraph from the opinion of Vaughan Williams, J., in the same case, consisting of twenty-five lines of text.[150]

144 EUGENE WAMBAUGH, THE STUDY OF CASES 6–8 (Boston, Little, Brown & Co. 1891).

145 BLACKSTONE, *supra* note 1, at *70–71.

146 The same problem arises when a panel deciding a case has only two judges, as some Court of Appeal cases currently do, and they issue different judgments reaching the same result. *See, e.g.*, Enfield London Borough Council v. B (a minor), [2000] 1 All E.R. 255, 256–62 (C.A.).

147 CROSS & HARRIS, *supra* note 84, at 61.

148 Ord v. Upton, [2000] 1 All E.R. 193, 200 (C.A.).

149 *Id.* at 200–01.

150 *Id.* at 201.

This was followed by a relatively short six-line excerpt from the opinion of Cresswell, J.[151] Wrightman, J., was of a similar view, according to Aldous, as illustrated by the citation of twenty-one lines of text from Wrightman's opinion.[152] Aldous then quoted twenty-one lines from the opinion of Baron Parke, who elaborated on the points made by the other judges.[153]

Admittedly, extensive quotation of no less than five separate opinions from a single precedential case is not the norm in English appellate cases. But lengthy excerpts from opinions in previous cases, sometimes going on for several pages, are quite common. This practice shows, in my view, that while the gist or general principle of a case may be fairly clear from reading the various opinions, there is no way to identify in a definitive way the exact proposition for which the case stands when there are multiple substantive opinions that concur in the result.

Having fewer opinions does not always simplify matters. Consider the recent case of *Re Gilligan*,[154] decided by the House of Lords. The longest opinion was by Lord Steyn.[155] Lord Clyde delivered an opinion largely agreeing with Lord Steyn but nonetheless expressing his own views on the matter in three or four pages.[156] Lord Cooke of Thorndon also agreed with Lord Steyn but added two or three paragraphs of his own observations.[157] Lord Browne-Wilkenson agreed with Steyn, Cooke of Thorndon, and Clyde.[158] Lord Hope of Craighead agreed with Steyn and Clyde.[159] It stands to reason that the views expressed by Lord Steyn will be of great importance in determining the holding of this case, but the opinion of Lord Clyde must also be given serious consideration, and even the points made by Lord Cooke of Thorndon cannot be ignored entirely, since he also agreed with the outcome.

Because of the difficulty of extracting a precise ratio decidendi from multiple opinions, there now seems to be general agreement among English judges that in cases where a clear rule is desirable, the court should issue a single opinion that is delivered by one judge, and in which the remaining judges—or, at least, a majority—concur with-

151 *Id.* at 201–02.
152 *Id.* at 202–03.
153 *Id.* at 200–03.
154 [2000] 1 All E.R. 113 (H.L.).
155 *Id.* at 115–25.
156 *Id.* at 125–28.
157 *Id.* at 125.
158 *Id.* at 115.
159 *Id.* at 125.

out elaboration.[160] This is the reason that the criminal division of the Court of Appeal typically speaks with one voice, in the form of a single opinion of the court. A 1965 report on the Court of Criminal Appeal expresses the reasoning as follows:

> It is of considerable advantage we think that those who have to administer the criminal law and who are bound by the decisions of the court of Criminal Appeal should have one judgment only expounding the relevant law rather than having to consider several judgments in one case and possibly have to distil out of these a ground of decision which is common to all.[161]

Clarity is obviously of paramount importance in criminal matters, where the rule of law dictates that there be rules, that these rules be made and promulgated in advance, and that they be understandable to those who must follow them.[162] These efforts to promote clarity via single opinions come close to "codifying" the criminal law by essentially requiring that it be written down in definitive textual form.

Yet despite some exceptions, English lawyers and judges have generally resisted the textualization (or codification) of the common law. One avenue of resistance has been maintaining the traditional practice of delivering multiple opinions. As Lord Reid once said:

> With the passage of time I have come more and more firmly to the conclusion that it is never wise to have only one speech in this House dealing with an important question of law. My main reason is that experience has shown that those who have to apply the decision to other cases . . . seem to find it difficult to avoid treating sentences and phrases in a single speech as if they were provisions in an Act of Parliament. They do not seem to realise that it is not the function of noble and learned Lords or indeed of any judges to frame definitions or to lay down hard and fast rules.[163]

More recently, Lord Browne-Wilkinson referred to language in a Court of Appeal case, and commented that "words in a judgment should not be taken out of context and construed as though they were a statutory provision."[164] Clearly, when there are multiple opinions, it is almost impossible to single out a phrase or sentence or paragraph, taken from one of the opinions, as constituting the authoritative expression of the court. In such a system, judicial decisions remain

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160 PATERSON, *supra* note 87, at 98.

161 REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON THE COURT OF CRIMINAL APPEAL, 1965, Cmnd. 2755, at 57, *quoted in* CROSS & HARRIS, *supra* note 84, at 94.

162 *See* LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969); JOHN RAWLS, A THEORY OF JUSTICE 209 (rev. ed. 1999).

163 Cassell & Co. v. Broome, [1972] A.C. 1027, 1084–85 (H.L.).

164 Roebuck v. Mungovin, [1994] 2 A.C. 224, 236 (H.L.).

fundamentally distinct from legislation, where the exact words of a statute are agreed upon in advance by a majority of the legislature and enacted into law. To change the statute requires that a formal amendment procedure be followed. In contrast, the ratio decidendi retains a certain measure of fluidity. It is subject to interpretation and reinterpretation, in a way that an act of the legislature typically is not. In some very real ways, the common law of England, even today, remains *lex non scripta.*

But the winds of change are blowing. The move towards delivering opinions of the court, as is currently the practice in the Criminal Division of the Court of Appeals, seems to be leading to decisions that are decidedly more textual. We have seen that the tradition in England has been, and to a large extent still is, for judges to deliver their opinions seriatim, and that when doing so, it is customary for judges to state what they *would* do if it were up to them (as in "I would dismiss the appeal"). If the majority agrees, the appeal is dismissed. With opinions of the court, however, this tentativeness is disappearing. Below are a few examples from cases of the Criminal Division of the Court of Appeals:

> "[W]e regard the convictions as safe and the appeals against conviction must therefore be dismissed."[165]
>
> "The appeals are accordingly dismissed."[166]
>
> "We therefore dismiss the appeal."[167]

Not only do judges on the Court of Criminal Appeal announce their ultimate judgment more boldly, but they likewise seem much more inclined than English judges traditionally have been to set forth the ratio decidendi in a relatively succinct and clear fashion. In *Regina v. Sharkey,*[168] Lord Bingham of Cornhill's opinion for the court started as follows:

> The question raised by this appeal may be shortly stated: may a court dealing with an offender under s 40 of the Criminal Justice Act 1991 order the offender's return to prison to serve the unexpired part of his sentence, if at the time of making the order the offender is already in custody following his recall pursuant to s 39 of the 1991 Act?[169]

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165 R. v. M., [2000] 1 All E.R. 148, 159 (C.A.).

166 R. v. Boreman, [2000] 1 All E.R. 307, 319 (C.A.).

167 R. v. Sharkey, [2000] 1 All E.R. 15, 21 (C.A.).

168 [2000] 1 All E.R. 15 (C.A.).

169 *Id.* at 16.

After explaining its reasoning, the court finished with: "We conclude that the correct answer to the question posed at the outset of this judgment is Yes."[170] Notice how easy it is to extract a textual holding from this opinion, by turning the initial question into a declarative sentence:

> A court dealing with an offender under s 40 of the Criminal Justice Act 1991 may order the offender's return to prison to serve the unexpired part of his sentence, if at the time of making the order the offender is already in custody following his recall pursuant to s 39 of the 1991 Act.

It may also be that English judges feel a need to express their holdings more clearly when overruling an earlier case. In *Roebuck v. Mungovin*,[171] for instance, the House of Lords overruled a precedent of the Court of Appeal.[172] There was only one substantive opinion by Lord Browne-Wilkenson, in which the remaining four lords concurred without elaboration. Browne-Wilkenson's opinion concluded that the precedent in question should be overruled.[173] Perhaps because this might leave the state of the law in doubt, he continued by explicitly setting forth the new standard: "Where a plaintiff has been guilty of inordinate and inexcusable delay which has prejudiced the defendant, subsequent conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking-out order."[174] Because there were no separate concurring opinions, Lord Browne-Wilkenson's textual formulation essentially speaks for the entire court and makes the ratio of the case abundantly clear.

For the most part, however, English courts seem to resist expressing their holdings so directly. It may be that the phenomenon of a single opinion boldly announcing clear rules of law will be limited to a certain class of cases, particularly criminal appeals. Even in criminal cases it is not yet the norm, as far as I can tell. English courts therefore remain reluctant to textualize their holdings by expressing rules of law in authoritative form. As an expert on English law, A.W.B. Simpson, has written, "it is a feature of the common law system that there is no way of settling the correct text or formulation of the rules,

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170 *Id.* at 21.

171 [1994] 2 A.C. 224, 236 (H.L.).

172 *Id.* at 236–37.

173 *Id.*

174 *Id.* at 236.

so that it is inherently impossible to state so much as a single rule in what Pollock called 'any authentic form of words.'"[175]

American courts, as we will now see, have journeyed quite a bit further on the road to textualization. In the United States, finding the correct text or formulation of a rule is not nearly as elusive as it once was.

II. PRECEDENT IN THE UNITED STATES

The situation in the American colonies was originally not all that different from that in England, whence their legal system largely came. Pre-revolutionary lawyers tended to rely on law books imported from England, including case reports. There were courts in the colonies, of course, and they produced judicial decisions, but reports of those decisions were not contemporaneously published.[176]

Interestingly, lawyers of the time often had manuscript reports of American cases that they either made themselves or copied from the notes of someone else who had been present in court. This practice, of course, is not unlike the *Year Book* period in England.[177] Also similar to earlier developments in England is that colonial lawyers were commonly trained by attending court sessions in colonial capitals and taking notes of the proceedings. These notes were useful not only for educating them in the profession, but might come in handy in their subsequent law practices.[178]

A. *The Formative Years*

After independence, printed law reports began to appear in the American states. Not surprisingly, reliance on English cases was felt to be inconsistent with independence and the development of a distinct American legal system. But if lawyers and judges were to rely on American cases, they needed accurate reports. Memory and hearsay could not keep up with an expanding body of case law. An early American reporter, Ephraim Kirby, explained the need to report and publish cases, commenting that "the principles of [judges'] decisions

175 A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE 89 (A.W.B. Simpson ed., 2d series, 1973) (citing F. Pollack, A FIRST BOOK OF JURISPRUDENCE (3d ed. 1911)).

176 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 59–61 (3d ed. 2005). A few pre-Revolutionary cases were published after independence. Dallas included some early Pennsylvania cases in early volumes of the United States Reports, for instance. *See, e.g.*, Stackhouse's Lessee v. Stackhouse, 2 U.S. (2 Dall.) 80 (Pa. 1766).

177 Surrency, *supra* note 62, at 50–51.

178 *Id.* at 48–50.

were soon forgot, or misunderstood, or erroneously reported from memory."[179]

These early reports were the result of private enterprise, although judges sometimes cooperated with the reporters. This was similar to English practice at the time. Also similar was that appellate judges delivered their opinions orally and seriatim. Thus, an American report of the time would have resulted from a private individual sitting in a courtroom, taking notes of what the lawyers argued and the opinions or judgments that the judges delivered, and publishing a synopsis of the proceedings.[180]

An example of early American reports are those by Dallas, who reported cases both by the Pennsylvania state courts and the United States Supreme Court, printing them all in a single volume entitled *United States Reports*. Dallas included in those reports a pre-Revolutionary case from the Pennsylvania Supreme Court, *Taxier v. Sweet*,[181] consisting of five pages of the facts and the arguments of counsel. Like cases from the *Year Book* period, it ends with a single short paragraph stating that the judges were divided on the issue of whether the plaintiff had a cause of action, but agreed that the court had jurisdiction.[182] In other cases from this period—perhaps those felt to be more important—the reports indicate that the judges delivered relatively lengthy seriatim opinions,[183] just as the House of Lords still does today. As one might expect, these opinions exhibit distinct signs of orality. In one case a lawyer refers to an apparently unreported decision that he personally witnessed.[184]

In the United States Supreme Court, opinions were also originally delivered seriatim. They likewise contain clear indications of orality, even though it seems likely that the Justices were speaking on the basis of notes or even reading from text they had written down beforehand. An illustration is *Georgia v. Brailsford*,[185] where the state of Georgia sought an injunction to stay a proceeding in the Circuit Court of Georgia. The report mentions that "after argument, the

179 EPHRAIM KIRBY, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, at iii (Litchfield, Conn., Collier & Adam 1789).

180 MORRIS L. COHEN ET AL., HOW TO FIND THE LAW 16–17 (9th ed. 1989); *see also* DAWSON, *supra* note 23, at 85–86 ("In law reporting the American states for a time . . . relied on private enterprise.").

181 2 U.S. (2 Dall.) 81 (Pa. 1766).

182 *Id.* at 85.

183 *See, e.g.*, Gorgerat v. McCarty, 2 U.S. (2 Dall.) 144 (Pa. 1792).

184 Pleasants v. Pemberton, 2 U.S. (2 Dall.) 196, 197 (Pa. 1793).

185 2 U.S. (2 Dall.) 402 (1792). The case caption misspells the second name as Braislford.

Judges delivered their opinions *seriatim*."[186] Justice Johnson speaks first, discloses his reasoning, and concludes that "in my opinion . . . there is not a proper foundation for issuing an injunction."[187] Next is Justice Iredell, who, after pointing out that he sat on the circuit court that decided the case at issue, ends his discussion by stating that "I think, that an injunction should be awarded."[188] Justice Blair concurs with Iredell's conclusion but adds some of his own reasoning. Wilson starts out with a personal observation that is reminiscent of the emotions and internal conflicts expressed even today by English judges: "I confess, that I have not been able to form an opinion which is perfectly satisfactory to my own mind, upon the points which have been discussed."[189] He refers to what is apparently an unreported case: "I remember an action was instituted and sustained, some years ago, in the name of *Louis* XVI. king of France, against Mr. *Robert Morris*, in the Supreme court of Pennsylvania."[190] He concludes rather lamely that he has "no objection" to the requested remedy.[191] Justice Cushing comes out against an injunction: "I think that an injunction ought not to be awarded."[192] Finally, Chief Justice Jay, like Iredell, begins with a personal observation: "My first ideas were unfavorable to the motion; but many reasons have been urged, which operate forcibly to produce a change of opinion."[193] His conclusion is also rather wimpy: "I am content, that the injunction issue."[194]

A year later the parties were once again before the Supreme Court in a futile attempt to have the injunction dissolved.[195] The report starts with an opinion by Iredell, who declares it "my misfortune to dissent from the opinion entertained by the rest of the court" and proceeds to explain why.[196] His words apparently struck a chord in Justice Blair, who delivers the next opinion: "My sentiments have coincided, 'till this moment, with the sentiments entertained by the majority of the Court; but a doubt has just occurred, which I think it my duty to declare."[197] After Blair is finished, Justice Jay, speaking for

186 *Id.* at 405.
187 *Id.*
188 *Id.* at 406.
189 *Id.* at 407.
190 *Id.* It seems likely that there would have been some sort of report of this case, but Wilson provides no citation (unless the reporter omitted it).
191 *Id.* at 408.
192 *Id.*
193 *Id.*
194 *Id.* at 409.
195 Georgia v. Brailsford, 2 U.S. (2 Dall.) 415 (1793).
196 *Id.* at 415–17.
197 *Id.* at 417–18.

the rest of the Court, continued the injunction.[198] Blair's spontaneous change of heart suggests that in this era oral opinions were still possible on the Supreme Court.

At the same time, it seems likely that American judges at the close of the eighteenth century were already beginning to draft their opinions in writing, certainly in difficult cases, and giving the text to the reporter after they read it or summarized it in open court.[199] In a case decided in 1800, *Bas v. Tingy*,[200] Justice Chase makes a revealing comment when his turn to speak arrives:

> The Judges agreeing unanimously in their opinion, I presumed that the sense of the Court would have been delivered by the president; and therefore, I have not prepared a formal argument on the occasion. I find no difficulty, however, in assigning the general reasons, which induce me to concur in affirming the decree of the Circuit Court.[201]

Chase was evidently caught by surprise; he had expected the matter to be handled by an opinion of the court prepared by the chief or most senior associate justice, rather than seriatim opinion delivery. That did not stop him from delivering an oral opinion on the spot, which suggests that it was not unusual to do so. But the incident also reveals that it had become customary to "prepare[ ] a formal argument" beforehand.

Given that the American notion of precedent and the case law method were borrowed from the English motherland, it stands to reason that the American conception of precedent during the latter half of the eighteenth century and the first half of the nineteenth would be similar to that in England. As did the English, the early American legal profession viewed the common law as something distinct from decided cases. The cases were merely evidence of the law, which existed independently. Moreover, the opinions of judges could be stronger or weaker evidence. Sometimes several cases would be needed to establish a point. On other occasions, even that was not enough. As Chancellor Kent remarked, "[e]ven a series of decisions are not always conclusive evidence of what is law."[202] American lawyers would probably have agreed with the traditional English notion that the common law resided in the collective memory of the legal

198 *Id.* at 418–19.

199 See Johns v. Nichols, 2 U.S. (2 Dall.) 184, 188 (Pa. 1792), where it is specifically noted that the Chief Justice provided a draft of an opinion to the reporter.

200 4 U.S. (4 Dall.) 37 (1800).

201 *Id.* at 43.

202 JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW *444.

profession, rather than in the text of judicial opinions contained in printed reports.[203]

Early on, however, American practice in the delivery and reporting of decisions began to diverge from its English roots in significant ways. This would eventually lead to a very different—and eventually, more textual—conceptualization of the notion of precedent.

B. American Innovations

1. Opinions in Writing

A major American innovation is that appellate judges came to be required, often via legislation or even constitutional provision, to issue their opinions in writing.[204] Connecticut adopted such a statute in 1785, and many states followed suit.[205] Other courts, like the United States Supreme Court, adopted the practice on their own initiative.[206]

Today, although some states allow appellate judges to deliver what are called "memorandum opinions," in which they decide the case with only a summary opinion or no opinion at all, the majority of states require their highest court to deliver all decisions in writing.[207]

Other states, like California, require not only its supreme court, but all courts of appeal, to make decisions "in writing with reasons stated,"[208] a rule that mandates a full written opinion in all appellate cases. Because it is generally only appellate cases that function as binding precedent, this effectively means that in most American jurisdictions, only written opinions can have precedential value.

While the shift in the mode of delivering opinions might not seem all that significant, it signals an important development in the nature of precedent. Recall that in England, it is possible (though not common) for a case to function as a precedent without any opinion at all. *Raffles* is a famous example.[209] Knowing the state of existing law, it is possible to deduce a principle of decision from the facts and the outcome. In *Raffles*, the argument of counsel was also very helpful. Requiring written opinions suggests that the precedential value of a case consists not in how it was decided, but in the reasons and analysis

203 *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 37–38 (1959).

204 Surrency, *supra* note 62, at 55.

205 *Id.*

206 *Id.*

207 DAWSON, *supra* note 23, at 86–87.

208 CAL. CONST. art. VI, § 14.

209 Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 375 (Exch. Div.); *see* discussion *supra* notes 131–40 and accompanying text.

expressed in the writing. Eventually it will no longer be the *decision* that functions as a precedent, but the judge's *opinion* justifying that decision.

2. Official Reporters

Another American development is that during the first half of the nineteenth century, states began to appoint official reporters.[210] Massachusetts did so in 1804.[211] The statute required the reporter to obtain "true and authentic" reports of the decisions of the state's Supreme Judicial Council and to publish them annually.[212] The Federal Supreme Court was authorized by Congress to appoint an official reporter in 1817.[213] By 1850, most states had official reporters for their highest courts.[214] As opposed to England, where even today there is no completely authoritative version of case reports, the practice of appointing reporters eventually led to the notion that the reports produced by that reporter—and only those reports—are deemed the "official" version of the court's decision. While private reporters can and do exist in the United States, the reports that they publish must be true to this official version. Thus, there can generally be only one fully authoritative text of any particular opinion.

Even though books containing judicial opinions are still called "reports" in the United States, they are no longer the result of a "reporter" going to court and "reporting" the proceedings. Because appellate judges must generally issue written opinions, the "reports" consist almost entirely of opinions drafted by the judges themselves, and they are normally published verbatim. All the reporter does is obtain a copy of the opinion from the court, add some information (typically, a summary and headnotes), and print it.[215] Any unofficial reports do essentially the same thing, although the summary and headnotes will obviously be different. Where there are multiple reports of a single case, the only real difference in the text of the opinions consists of relatively trivial distinctions like the font used, the pagination, and the citation format. Interestingly, the use of one publisher's pagination by another publisher has led to lawsuits for copyright infringement, which highlights how little the modern reporter

210 Surrency, *supra* note 62, at 56.

211 *Id.*

212 *Id.*

213 3–4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 389 (Paul A. Freund & Stanley N. Katz, eds., 1988).

214 DAWSON, *supra* note 23, at 86 (footnote omitted).

215 *See* Surrency, *supra* note 62, at 60.

contributes to the content of a report.[216] Another indication of the relatively minimal contribution by American reporters is that for the past century and a half, the reports are no longer identified by their names (e.g., *Cranch's Reports*), but by the jurisdiction (e.g., *United States Reports*).

At the same time, reporters have become more professional. The earliest American reporters were often practicing lawyers for whom reporting was only a sideline. Being a lawyer has the advantage that the reporter better understands what is happening, which is no doubt the reason that English reporters—while no longer having judges among their ranks—are traditionally barristers. But problems can arise when *practicing* lawyers act as reporters. One is that they may have their own views on an issue involved in a case that they have to report. For instance, Henry Wheaton, who reported decisions of the Supreme Court in the early 1800s, had strong opinions on admiralty law, which was one of the major preoccupations of the Supreme Court at the time. Although Wheaton's reports were generally of good repute, his views on admiralty law may have influenced how he reported a couple of cases in which he was particularly interested.[217] The difficulties are multiplied if the reporter is simultaneously arguing cases before the court. Wheaton did so on several occasions. It would only be human nature—to which Wheaton occasionally succumbed—to give greater prominence to one's own arguments in the reports, and to give short shrift to those of one's opponents.[218]

Gradually the level of professionalism increased, but concurrently the office became more bureaucratic and less creative. Wheaton eventually decided that the reporter's job was "mechanical drudgery" and that he was born for better things.[219] A New York reporter, George Caines, came to a similar conclusion, writing that he did little more than "arranging the materials received, and giving, in a summary manner, the arguments adduced."[220]

The reliability of the printed text remained an issue throughout the nineteenth century. Even though most courts had an official reporter, reporting practices were still not exact enough to promote particularly close reading of the text. Judges produced handwritten

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216 In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834), the Supreme Court held that a reporter did not have a copyright in the cases he reported. On the issue of whether pagination is covered by copyright, see *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693 (2d Cir. 1998).

217 3–4 WHITE, *supra* note 213, at 392–400.

218 *Id.* at 392.

219 *Id.* at 401.

220 FRIEDMAN, *supra* note 176, at 243.

manuscripts that were often hard to decipher, and printers were prone to make errors in setting the text. Around 1850, the situation began to improve when printers provided proofs of majority opinions to the justices who wrote them, allowing them to be corrected before publication.[221]

American reporters today, although they generally still have legal training, do not normally practice law and have become part of the bureaucracy of the courts. They are professionals who receive the text of opinions from the court (or sometimes directly from the judge) and are expected to reproduce them verbatim, with only minor editorial adjustments. The reporter then provides copies to the publishers (including online publishers) as well as to the public. The reporter also generally supervises printing of the opinions in the official reports, if the jurisdiction has them.[222]

Even unofficial reports, whether in the United States or England, generally adhere to high professional standards. Unofficial publishers typically add their own summaries, headnotes, and other materials, but it would be a serious problem if they altered the judge's opinion in any substantive way.

As a result, there is generally only one authoritative text of a judicial opinion in the United States, even if it appears in different sets of reports. The authoritativeness of the text derives not just from its accuracy, as guaranteed by professional reporters, but even more from the fact that a legal actor herself wrote the words. The judge thus speaks through the words of the text, unmediated by a reporter writing down or summarizing what the judge said. Those words are published exactly as he drafted them.

3. The Elimination of Seriatim Opinions

American judges also departed from English practice by eliminating seriatim opinion delivery. Recall that seriatim opinions are still used in some of the English appellate courts, notably the House of Lords and the civil branch of the Court of Appeal. In its purest form, this method of opinion delivery requires each member of the court to

221 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64, at 311 (Paul A. Freund ed., 1974).

222 *See, e.g.*, Arkansas Judiciary, Reporter of Decisions, http://courts.state.ar.us/courts/rd_info.html (last visited Jan. 16, 2007); Clerk of the Supreme Court, Reporter of the Supreme Court, http://www.kscourts.org/clerk.htm (last visited Jan. 16, 2007); New York State, Law Reporting Bureau, http://www.courts.state.ny.us/reporter (last visited Jan. 16, 2007); Supreme Judicial Court of Massachusetts, Office of the Reporter of Decisions (1804—present), http://www.massreports.com (last visited Jan. 16, 2007).

express his views on how the case should be decided, and why. Until the early-nineteenth century, the United States Supreme Court often delivered its opinions seriatim, even in cases raising difficult constitutional issues.[223]

Chief Justice Marshall ended the practice when he was appointed to the Supreme Court in 1801. Marshall laid heavy emphasis on producing opinions of the court, in which one opinion was delivered (usually by Marshall himself) that spoke for all the judges, and which was almost certainly written out in full beforehand. The delivery of a single opinion lent a strong sense of cohesiveness and legitimacy to the early decisions of the Marshall era.[224]

Scholars have often commented on the high degree of unanimity exhibited by the Marshall court in its early years, a time during which most cases were disposed of by an opinion of the court with few separate concurring and dissenting opinions.[225] This might suggest that judicial opinions of this time, and particularly the text of those decisions, would have a very high degree of authority, leading us to conclude that during the Marshall era there was a distinct tendency towards textualizing case law. In reality, this would be the wrong conclusion. The perception of unanimity was in some senses misleading. The remarkably collegial nature of the Court at the time (they generally ate and boarded together) discouraged the justices from writing separate opinions. Moreover, the fact that the opinion was not usually circulated before being delivered made it practically quite difficult to write a concurrence or dissent. As a historian of the Court has observed:

> The result of noncirculation was to make an opinion of the Court a highly individualized product that certainly cannot be considered a concerted effort of a united court. An opinion of the Court merely reflected one Justice's effort to advance a formal justification for a majority decision made orally and informally. Thus the perception of a united Court speaking in one voice that represented all its members is illusory.[226]

Consequently, although the Court at the time delivered "opinions of the Court," those opinions could not really be viewed as products of collective authorship where each of the Justices agreed with its exact words. Often they had not even read the opinion before they

223 2 HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15 pt.2, at 382–83 (1981).

224 *Id.* at 382–89.

225 3–4 WHITE, *supra* note 213, at 186–87.

226 *Id.* at 189.

heard it delivered. At best, the opinion would have represented their views only in a relatively general sense.

The practice of delivering a single unanimous opinion began to decline in the mid 1820s, when an increasing number of concurring and dissenting opinions started to appear.[227] The Court began to speak primarily through majority opinions, as it still does today, rather than mostly through unanimous opinions of the court.

Although it may seem counterintuitive, the presence of concurring and dissenting opinions can actually make the text of majority opinions more authoritative. If judges can read the text of a proposed majority opinion, with the opportunity to draft a concurring or dissenting opinion, one can assume that members of the majority who did not write separately endorse the wording of the opinion. The writer of a majority opinion has to take into account the views of all judges who sign it, and must therefore produce a text that has been read and approved by them all. This is not unlike legislation, where the text of a statute is debated and changed until a majority of lawmakers is willing to vote for it.

4. Declining Significance of Headnotes and Argument of Counsel

Two ways in which reporters traditionally added value to their product was by prefacing each case with one or more headnotes, as well as by summarizing the arguments of the lawyers. Arguments of counsel were considered important not only because they provided some context to the judge's decisions, but also because they were intrinsically useful in understanding the law. The lawyers who argued before the courts were normally experts in their field and may well have known more about a specialized subject than the judges.

Reporters could likewise be quite knowledgeable about the law. As mentioned above, some of them were prominent lawyers. What a reporter wrote about a case might therefore be considered almost as important as what the deciding judges said in their opinions.[228] Especially at a time when judges were issuing seriatim opinions, the synopsis of a reporter in the form of a summary or headnote could be extremely helpful in finding the ratio decidendi of the case.

The nature of headnotes underwent a subtle change after Richard Peters was appointed reporter for the Supreme Court in 1828.[229] Peters added headnotes with references to the page where the particu-

227 *Id.* at 193.

228 *See supra* notes 202–03 and accompanying text.

229 3–4 WHITE, *supra* note 213, at 406.

lar point could be found.[230] Similar headnotes remain a feature of modern reports. They can send lawyers directly to the part of the opinion that addresses an issue of concern to them. It can save lawyers the burden—if it is one—of reading the entire opinion. The downside, of course, is that the context provided by reading the complete opinion can easily be overlooked in favor of concentrating on a few crucial sentences or paragraphs. It encourages lawyers to look for the bits of text in the opinion that are useful to their cause, and to ignore the rest.

A contemporary criticism of Peters' headnotes is revealing: that he did little more than to extract sentences or paragraphs from the opinion, rather than to correctly and succinctly summarize the holding.[231] As historian G. Edward White has observed, "Peters merely copied down the Court's language," forcing readers "to make their own judgments about the precise holdings of cases, the very task that headnote summaries were supposed to perform."[232]

The implication is that it was usually not possible in those days to find a few sentences in an opinion where the court *itself* expressed its holding in a succinct and authoritative fashion. It was still necessary to conduct traditional legal analysis to find the ratio decidendi of the case, and apparently Peters was not up to the task. But the idea of having a series of headnotes, each linked to a specific part of the case, continues to this day. It clearly fosters a more textual reading of an opinion.

During the mid-1800s reporters still routinely included a summary of the arguments of counsel, although whether they should do so was a matter of debate. One posited reason for including the arguments was that the opinions expressed by judges did not *constitute* the law, but were merely *evidence* of independently existing principles. This, of course, harked back to the view long espoused in England that the opinions of its judges were merely evidence of the common law. It had an interesting implication for how opinions should be reported. The arguments of distinguished counsel, it was suggested, or perhaps even the perceptive analysis of the reporter, might sometimes be better evidence of the state of the law than the opinion of a mediocre judge.[233] That point of view eventually lost out, of course, and summaries of the arguments of counsel disappeared from the reports, as did any commentary by the reporter. By the end of the

230 *Id.* at 407.

231 *Id.* at 407–08.

232 *Id.* at 408.

233 5 SWISHER, *supra* note 221, at 297–98.

nineteenth century it was clear that the American common law was no longer viewed as something contained in the minds of the legal profession. Rather, it consisted of the written words of judges.

5. Hierarchical Organization of the Courts

Finally, the words of American appellate judges were more authoritative than those of their English counterparts in another sense. In England at the time, the judges of the royal courts maintained a certain collegiality, often discussing legal matters in the inns of court or formally gathering in the Exchequer Chamber to collectively decide an important issue.[234] There were certainly disputes and rivalries between the courts, but following precedent did not normally involve one court imposing its will upon another. Instead, precedent consisted of the notion that once judges decided a question in a particular way, they and their colleagues should decide that issue in the same way in future cases.[235] Precedent was a matter of judicial economy (not having to relitigate a question), fairness (parties in different cases should be treated the same), and predictability.[236] This aspect of precedent, as noted earlier, is generally referred to as stare decisis.

American courts, in contrast, were organized hierarchically virtually from the beginning. The typical system is for a state to have trial courts, whose decisions are reviewed by courts of appeal. Decisions by the courts of appeal are subject to discretionary review by the state's supreme court. Trial judges are not bound by the decisions of other trial judges, nor are they necessarily bound by their own previous decisions. For the most part, only opinions written by appellate judges can function as precedent.[237] Those cases generally act as precedent in two ways: They are considered binding not only on other appellate judges in the same court, but on any lower courts as well. Thus, precedent has come to mean not just that judges, as a policy matter, *should* normally follow their *own* previous decisions, but that lower courts *must* follow the decisions of judges above them in the hierarchy. From the perspective of the lower court judges, the word of the higher courts—in particular, the written word—is law.

In summary, during the first full century following American independence, the courts of the United States undertook a number of innovations that laid the groundwork for a more textual conception

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234 DAWSON, *supra* note 23, at 60.

235 *See* ALLEN, *supra* note 17, at 205–19.

236 *Id.*

237 FRIEDMAN, *supra* note 176, at 241–44 ("With few exceptions, official reports contained only *appellate* opinions.").

of precedent. The tradition of seriatim opinions came to an end under Justice Marshall, ultimately to be replaced by majority opinions that were read and subscribed to by the Justices who agreed with them. The office of the reporter was made official and later became bureaucratized, resulting ultimately in reports that were more authoritative textually. Judges began to examine the proofs of their opinions, further ensuring their accuracy. Headnotes gave lawyers easy access to the part of the opinion that contained the exact language that they sought. And "extraneous" matter, such as the arguments of counsel, disappeared.

It is probably fair to say that by the middle of the eighteenth century, the modern American notion of precedent and of common law decisionmaking was already beginning to form. The profession was no longer adhering to the notion that judges merely declared the common law. Rather, judges could establish principles and rules for deciding cases in their opinions. And increasingly, a single case on point could bind a later court.[238]

At the same time, judges did not normally write opinions in a way that made it possible to identify a specific sentence or paragraph as containing the holding of the case. It was still too soon to speak of precedent being textualized. But the essential ingredients were in place. During the twentieth century the tendency to view precedent as textual would only intensify.

C. The Codification Movement

If judicial opinions were gradually becoming more textual over the years, there was another American phenomenon that involved turning the common law into authoritative text in one fell swoop. This was the codification movement.

European countries (aside from Great Britain) have been familiar with codification for centuries. The most notable example is the famous *Code Napoléon*, which influenced the development of codes throughout Europe and much of the rest of the world.[239] Typically, civil law countries have a number of different codes, such as a civil code and a criminal code. These codes are the primary source of law in such countries. Significantly, there is nothing quite like the com-

238 *See* Kempin, *supra* note 203, at 41.

239 Louis Baudouin, *The Influence of the Code Napoleon*, 33 TUL. L. REV. 21 (1958).

mon law on the continent. At least in theory, judges do not make law; all they can do is interpret and apply the code.[240]

The great advantage of a code is that all the law on a particular subject is in one place. If a French or German lawyer needs to research a question about the criminal law, she theoretically need only to consult the code. In practice, of course, things are never this simple. The code may not answer the French lawyer's question, forcing her to research judgments of the courts and other legal literature. The hope entertained by Jeremy Bentham and the French revolutionaries, among others, that a code could be made so clear that ordinary people could understand it, and that lawyers would become superfluous, has never been realized.[241] Lawyers and judges are inevitably needed to interpret a code's provisions. But only the code is truly law.

If an English or American lawyer wants to know the law on a particular subject, she first needs to find out whether there is an act or statute that bears on the question. This is not always easy because traditionally acts were bound together into books that contained all the acts that were passed in a particular year, regardless of subject. And then the lawyer has to find any judicial opinions on the matter, which are also usually organized by the year in which they were delivered. Of course, the English or American lawyer's task is simplified by digests of cases according to subject matter, as well as private compilations of statutes, also organized by subject. Nonetheless, the concept that all the law on a particular topic should be available in one place—a code—is clearly an attractive one.

In England, the great champion of codification was Jeremy Bentham, who is credited with inventing the term.[242] He was motivated by a strong distaste for lawyers and the common law, at one point urging citizens of the United States to "shut your ports against our *Common Law*, as you would shut them against the plague."[243] According to Bentham, the common law was chaotic, confused, and impossible for the layman to understand. His proposed remedy was to systematize

240 *See generally* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 19–47 (2d ed. 1985) (explaining statutory interpretation and the role of the judge in countries that have a civil code).

241 *See id.* at 28.

242 Helmut Coing, *An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries*, *in* PROBLEMS OF CODIFICATION 16, 16 (S.J. Stoljar ed., 1977).

243 JEREMY BENTHAM, PAPERS RELATIVE TO CODIFICATION AND PUBLIC INSTRUCTION 136 (London, Jeremy Bentham, 1817).

the law into orderly codes, much as the emperor Justinian tried to rationalize Roman law.[244]

While the notion of reducing centuries of law into a single coherent code, eliminating conflicts and confusion, seems appealing, the English legal system was extremely reluctant to allow the common law to be restated by Parliament in authoritative form. There was a serious attempt to enact a comprehensive criminal code in the mid-nineteenth century. But judges and lawyers strongly resisted the effort, arguing that the common law was superior to written codes. As one opponent of codification said: "[T]o reduce unwritten law to statute is to discard one of the greatest blessings we have for ages enjoyed in rules capable of flexible application."[245] English judges were not giving up their treasured common law without a fight. As a result of such opposition, and despite Bentham's prodigious efforts, codification never made much headway in his native land.[246]

Codification was more successful in the United States, where the common law was not as deeply rooted. Initially, however, the former colonies were reluctant to write down the principles of the common law in an authoritative form. Thomas Jefferson wrote in *Notes on the State of Virginia* that it was "dangerous to attempt to reduce it to a text" and that it should be "collected from the usual monuments of it."[247] But by roughly the middle of the nineteenth century, there was growing sentiment in favor of codification. Joseph Story, for example, suggested that codification would add "certainty, clearness, and facility of reference" to the law; it was therefore "desirable . . . that the laws, which govern the rights, duties, relations, and business of the people, should . . . be accessible to them for daily use or consultation."[248]

New York held a constitutional convention in 1846 which required the appointment of commissioners to "reduce into one written and systematic code . . . the whole body of the law of this state, or so much or such parts thereof as to the said Commissioners shall seem

244 MAURICE EUGEN LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA 33–35 (1924).

245 Parliamentary Papers 1854, vol. 53, p. 391, per Talfourd J., *cited in* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 251 (3rd ed. 1990).

246 *See* BAKER, *supra* note 11, at 217–20; LANG, *supra* note 244, at 40–58.

247 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 137 (William Peden ed., Univ. of N.C. Press, 1954) (1787).

248 JOSEPH STORY, REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS, OR ANY PART THEREOF 31 (Boston, Dutton & Wentworth 1837).

practicable and expedient."[249] The goals of this codification were noble but overly optimistic, "in order that the people may know the legal and equitable rules by which they must be governed—that litigation may be diminished, and justice more speedily administered."[250] The methodology would be to collect all of the existing law, eliminate inconsistencies, improve it where needed, write it down in a logical and systematic way, and have the resulting code adopted by the legislature.[251] The New York bar, like the legal profession in England, generally opposed the idea. Nonetheless, New York eventually adopted a Code of Procedure (later called the Code of Civil Procedure) that was widely imitated by other states.[252] Efforts to codify the substantive law, or even to codify the entire common law, as David Dudley Field proposed, were met with more limited success.[253]

Codification had greater appeal in the West, which did not have the more established legal traditions and entrenched bar that New York did. North and South Dakota have complete systems of codes, for instance.[254] Further west, California also has a comprehensive system that includes not only codes of civil procedure and criminal law, but also roughly thirty separate codes dealing with matters such as Business and Professions, Commerce, Corporations, Education, Elections, Finance, Fish and Game, Food and Agriculture, Government, and even Harbors and Navigation, to list just a few.

Yet despite the plethora of codes that occupy a considerable amount of shelf space in many a lawyer's office, the common law is hardly dead in states that have embraced codification. If Bentham's or Field's goal was to supplant the common law with a series of codes, the codification movement failed, even in places like the Dakotas and California. As a lawyer licensed to practice in California, I can attest that there are some areas of California law where the codes are extremely important and cover most of the territory. Examples are the Code of Civil Procedure, the Penal Code, and the Probate Code. But even in these areas, judicial opinions are essential not only to interpret the code, but also to fill in the many gaps that almost any

249 WILLIAM G. BISHOP & WILLIAM H. ATTREE (REPORTERS), REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 1846, at 588 (Albany, Evening Atlas 1846).

250 LANG, *supra* note 244, at 118 n.2 (quoting BISHOP & ATTREE, *supra* note 249, at 124).

251 *Id.* at 122.

252 *Id.* at 128, 130.

253 *Id.* at 135–36. New York did adopt a Penal Code and a Code of Criminal Procedure. *Id.* at 148.

254 *Id.* at 152–54.

code will contain. In other areas, including the basic principles of contract and tort law, the civil code does little more than provide a broad outline that must be filled in by case law, with the exception of certain areas in which the legislature has taken an unusual interest.[255]

Even though the codification movement was only partially successful in the United States, it has had the effect of converting broad swaths of the common law into statutory text. Judges are reduced to being interpreters of that text. Even in states that have not attempted to codify entire areas of the law, legislatures often haphazardly textualize bits and pieces of the common law. More and more areas that were once the province of the common law have been subjected to legislation.

Following the decline of the codification movement in the nineteenth century, there were other attempts to tame the unruly and still somewhat "unwritten" common law. One of the more ambitious of such campaigns has been the uniform laws movement. Unlike codification, which aimed to rationalize the law and make it accessible to the common person, the main objective of the uniform law movement has been to create a body of law in specific subject areas that would be adopted by many or all states, thus making it consistent across state borders.[256]

Since 1892, the National Conference of Commissioners on Uniform State Laws has drafted various uniform laws, including the Uniform Probate Code,[257] the Uniform Child Custody Jurisdiction and Enforcement Act,[258] the Uniform Partnership Act,[259] and the Uniform Interstate Family Support Act.[260] After the Conference approves a proposed uniform act, it is sent to state legislators, who are encouraged to enact it without change. There is great variation in the success of the various uniform acts that the Conference has proposed in the past century or so.[261] Some have been widely adopted; others

255 On the California Civil Code and its interaction with the common law, see Izhak Englard, Li v. Yellow Cab Co.—*A Belated and Inglorious Centennial of the California Civil Code*, 65 CAL. L. REV. 4, 9–12 (1977).

256 See Koen Lenaerts & Kathleen Gutman, *"Federal Common Law" in the European Union: A Comparative Perspective from the United States*, 54 AM. J. COMP. L. 1, 66 (2006).

257 UNIF. PROBATE CODE (amended 1993), 8 U.L.A. 1 (1998 & Supp. 2006) (first approved and promulgated in 1969).

258 UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997).

259 UNIF. P'SHIP ACT (1997), 6 U.L.A. 1 (2001 & Supp. 2006) (superseding Uniform Partnership Act originally adopted in 1914).

260 UNIF. INTERSTATE FAMILY SUPPORT ACT (2001).

261 *See* Uniform Law Commissioners, http://www.nccusl.org/Update (follow "Final Acts and Legislation" hyperlink) (last visited Jan. 16, 2007).

have met more resistance and have been incorporated into the law of only a few states.[262]

Uniformity of law is probably most important in commerce, which often involves transactions across state borders and where the legal rules governing the buyer and seller could come into conflict. It is in this domain that the most important and successful uniform law was enacted: the Uniform Commercial Code (UCC). The UCC was promulgated in the 1940s and 1950s, and by 1968 it had been enacted by forty-nine of the fifty states.[263]

Whatever the benefits of having the same law throughout the states, the adoption of such acts inevitably textualizes large expanses of the law that were formerly governed by judicial decisions. Article 2 of the UCC, which governs sales, deals with all aspects of contract law, including offer and acceptance, the interpretation of agreements, and remedies, which were once the exclusive domain of case law in most American jurisdictions. All of these areas are now ruled by text, leaving to the common law the largely ancillary role of interpreting ambiguities and plugging gaps.[264] This does not mean that contract law has been entirely textualized. Outside the area of sales, the common law of contracts still plays a significant role. But even here, the influence of the UCC is substantial.

State law relating to torts or property is far less susceptible to uniform acts and has retained much of its case law character. Nonetheless, there is another phenomenon that is effectively textualizing even these remaining bulwarks of the common law: the Restatements.

D. Restating the Law

The Restatements of the Law are an initiative of the American Law Institute (ALI), which was founded in 1923.[265] One of the main reasons that it was established was the perceived uncertainty that resulted from "lack of agreement among the members of the legal

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262 For example, the Uniform Commercial Information Transactions Act (UCITA), which was drafted with the aim of unifying the law of software licensing, has only been adopted by two states, Virginia and Maryland, and only by them in modified form. MARK A. LEMLEY ET AL., SOFTWARE LICENSING AND INTERNET LAW 315 (2d ed. 2003).

263 JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 10 (3d ed. 1990). Louisiana adopted parts of the UCC in 1974. *Id.* The UCC was the product of cooperation between the National Conference of Commissioners on Uniform State Laws and the American Law Institute. *Id.*

264 *See* U.C.C. § 1-103 (2001).

265 American Law Institute Certificate of Incorporation (Feb. 23, 1923), *available at* http://www.ali.org/ali/AR99_Certificate.htm.

profession on the fundamental principles of the common law."[266] Lack of clarity was another concern.[267]

The ALI therefore convened groups of legal experts, including lawyers, judges, and academics, to "restate" the law in a number of subject areas.[268] In the next couple of decades, Restatements were published on the law of agency, contracts, judgments, property, restitution, torts, and trusts.[269] In recent years, the original Restatements have been updated, and additional Restatements of other areas of the law have been adopted.

Unlike the uniform law movement, the Restatements cover some of the most basic areas of the common law. At the same time, it is not apparently the aim of the Restatements to textualize the law. In contrast to uniform acts, which are intended to be enacted into statutory law by state legislatures, thus making the text of the act binding within that jurisdiction, the Restatements are attempts by experts to summarize general common law principles in a relatively clear fashion. Because each state has its own variations on the common law, usually modified to some extent by legislation, the Restatements may or may not accurately reflect the law of any particular jurisdiction. They are thus nothing more than the opinion of a group of experts on what the majority rule on some area of the law is, or perhaps what it ought to be.[270] In the view of most lawyers, the Restatements are influential, but they are not sources of law. When the director of the ALI referred to the Restatement of the Law of Contracts as "an authoritative exposition of the subject,"[271] he could have meant only that it was highly regarded, not that its rules were "authority" in the sense that a statute is.

In fact, the most useful application of the Restatements has probably been as a teaching tool. Because almost all law schools in the United States teach generalized rules of American law, rather than the

266 *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of an American Law Institute*, 1 A.L.I. PROC. 8 (1923) [hereinafter *ALI Report*].

267 *See id.*

268 *Id.* at 2–3, 12–18.

269 For more on the background of the founding of the ALI, see Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239 (1979); N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55 (1990).

270 *See* Harvey S. Perlman, *The Restatement Process*, 10 KAN. J.L. & PUB. POL'Y 2, 4–6 (2000).

271 Herbert Wechsler, *Foreword* to RESTATEMENT (SECOND) OF CONTRACTS at vii, vii (1981).

law of any particular state, the Restatements are an excellent resource for law professors and the compilers of casebooks.

Yet although the Restatements were not meant to be adopted as a code,[272] they have nonetheless had a certain textualizing effect on the law. There have always been those who viewed the Restatements as more than just the unofficial "restating" of existing practice. An early proponent, Elihu Root, proclaimed that "we will have a statement of the common law of America which will be the prima facie basis on which judicial action will rest."[273] Root's predictions have not been entirely borne out. There is no "common law of America." But some courts have begun to explicitly adopt portions of a Restatement. In doing so, they might intend merely to embrace a principle of law contained in that Restatement. But often enough, they adopt the exact language of the provision in question. The text, after all, is there for the taking. Unlike messy judicial opinions, the Restatements contain carefully-crafted rules.

Thus, just as the legislature can adopt some or all of a uniform act, judges can adopt sections of a Restatement. It is not unusual to find statements such as the following in judicial opinions:

> "We adopt Restatement (Third) of Property: Mortgages § 8.3 . . . ."[274]
>
> "[W]e adopt Restatement (Second) of Torts § 362 (1965) . . . ."[275]
>
> "We adopt Restatement (Second) of Judgments [§] 68 . . . ."[276]
>
> "We adopt Restatement (Second) of Torts § 411 . . . ."[277]

Not surprisingly, it appears to be the less populated states (which tend to have a less fully developed case law) that are particularly inclined to incorporate provisions of the Restatements into their law. An enthusiastic Arizona court has gone so far as to declare that "[t]his court, when not bound by previous decisions or legislative enactments, follows the Restatement of the Law."[278]

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272 The founders of the ALI stated that they did not anticipate that the principles of the restatements would be "adopted as a code." G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 12 (1997) (citing *ALI Report*, *supra* note 266, at 23). *But see* Crystal, *supra* note 269, at 244 (discussing the code-like form of the *Restatements*).

273 KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY 465 (2d ed. 1996).

274 Krohn v. Sweetheart Props., 52 P.3d 774, 783 (Ariz. 2002).

275 Baker v. Pena, 36 P.3d 602, 604 (Wyo. 2001).

276 Himes v. MacIntyre-Himes (*In re* Marriage of Himes), 965 P.2d 1087, 1101 (Wash. 1998).

277 Dexter v. Town of Norway, 715 A.2d 169, 172 (Me. 1998).

278 Pilafas v. Ariz. Zoological Soc'y, 836 P.2d 420, 423 (Ariz. Ct. App. 1992).

In and of itself, adopting the rule of a Restatement does not necessarily mean incorporating the exact text of the rule, as opposed to the general principle, into the state's jurisprudence. Moreover, the language of the Restatements is usually at a fairly high level of generality. The Restatements do provide more detailed guidance, however, in the form of comments and illustrations. Such comments and illustrations limit what courts can do with the more general language of the provisions themselves, but even with comments the language of the Restatements is a far cry from the dense and detailed language that is found in the average statute. Even courts that incorporate some or all of a Restatement verbatim thus leave themselves a measure of flexibility. This seems to be what the ALI originally intended. According to Lawrence Friedman, proponents of the Restatements were generally hostile to codification and viewed their efforts as strengthening the common law rather than undermining it.[279]

Nonetheless, it seems to be hard to resist viewing the provisions of the Restatements, once they are formally adopted by a state's courts, in a relatively textual way. Some commentators have suggested that recent Restatements, unlike the earlier ones, are more statute-like.[280] Likewise, Sidney DeLong has observed that in applying the famous Section 90 of the Second Restatement of Contracts, which deals with promissory estoppel and which has been adopted by many states, courts follow the rule without reference to its rationale. In his view, "[m]ost courts are inclined to treat Restatement sections as they would statutes, once they have been adopted for that jurisdiction."[281] Randy Barnett has made a similar point:

> Courts are increasingly treating the Restatement as a statute. Judges typically look to the Restatement, rather than to even very practical and accessible legal scholarship, to ascertain the prevailing contract doctrine. . . . Thus, though the Restatement undoubtedly hastened the improvement of contract doctrine in some areas, it has also served to stultify further improvement.[282]

279 FRIEDMAN, *supra* note 176, at 302.

280 Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 454 (1997) (referencing RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY §§ 37, 49, 62 (1996)).

281 Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 1000.

282 Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518, 527 (1996).

Or, in the words of Michael Sinclair: "Some people even treat the Restatements as though they were statutes, parsing them as if they had been enacted into law."[283]

The common law is hardly dead, but there is no denying that substantial areas that were once core elements of the common law system have been textualized by means of codification, the uniform act movement, and to a lesser extent, by the development of the Restatements. Most of those threats have come from the outside. It turns out that the common law tradition is also under attack from within. We have seen how American judicial opinions have over time come to be written in a highly authoritative form by judges themselves. We now proceed to consider further developments along these lines during the latter half of the twentieth century.

E. The Publication Requirement

Recall that in England, with some limitations, unreported (i.e., unpublished) decisions can be cited in most courts. The recent advent of computerized databases in England has made reference to unreported decisions even easier and, as we observed earlier, has induced the House of Lords to enact a rule that generally prohibits citation of an unreported (unpublished) opinion.[284] In other English courts, however, virtually any decision made by the higher courts has the potential of functioning as a precedent.[285]

The concern that the House of Lords had with the advent of computerized databases—that they would be inundated with precedents, many of questionable value—had already been raised in the United States at the end of the nineteenth and beginning of the twentieth centuries. Computers did not exist at the time, but the book publishing industry was at the height of its glory. West Publishing Company, among others, aggressively marketed reports of cases from throughout the United States.[286] The result was that the eighteen published volumes of American reports in 1810 had grown exponentially to over 8000 volumes a century later.[287]

Lawyers were overwhelmed by precedent and a number of solutions were proposed. One was that publishers should be more selec-

283 Michael B.W. Sinclair, *What Is the "R" in "IRAC"?*, 46 N.Y.L. SCH. L. REV. 457, 464 (2003).

284 HOLBORN, *supra* note 27, at 175.

285 *See supra* Part I.D.

286 Thomas J. Young, *A Look at American Law Reporting in the 19th Century*, 68 LAW LIBR. J. 294, 302 (1975).

287 FRIEDMAN, *supra* note 176, at 475 (citing CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 557 (1911)).

tive in what they printed. Another possibility was to have a committee of the bar sift through decisions and decide which merited publication. Legislation was also considered. None of these proposals was seriously implemented, however.[288] Consequently, appellate judges kept on handing opinions to the printers (usually via the reporter of decisions or the court clerk), who were only too happy to have more material to print and sell.

Eventually, many jurisdictions came to address the problem by enacting rules that effectively declare that only certain appellate cases can function as precedents.[289] Generally, these rules state that a case must have been published (usually in an official report) before it can be cited in court. Unpublished opinions have no precedential value, although in some jurisdictions they may be considered as "persuasive authority."[290] As opposed to the English practice, it is usually the appellate courts themselves that decide which cases merit publication—and thus function as precedents—in the United States.[291] Typically, courts are said to "certify" a case for publication, or they simply order that it be published.[292]

The guidelines for publication usually specify that a case must present an important constitutional issue or an issue of first impression, or that it must establish new precedent or modify existing precedent.[293] Some states, like California, add that a case should also be certified for publication if it involves a legal issue of continuing public interest or "makes a significant contribution to the legal literature."[294] The converse is that opinions in cases that do not raise important or novel questions, and are therefore of interest mainly to the parties themselves, should not be published.[295]

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288 Young, *supra* note 286, at 301–05.

289 Surrency, *supra* note 62, at 64–65.

290 *See* Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 489 n.117 (2003).

291 Surrency, *supra* note 62, at 65 (tracing the rule to a decision made by the Ninth Circuit Court of Appeals in 1973).

292 See generally Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287 (2001) and Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119 (1994) for the history of such rules.

293 *See, e.g.*, 4TH CIR. R. 36(a); MONT. SUP. CT. INTERNAL OP. R. § 1(3)(c). For additional examples see Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251, 253–85 (2001).

294 CAL. R. CT. 976(b)(4).

295 *See* State v. Gonzales, 794 P.2d 361, 370–71 (N.M. Ct. App. 1990).

Many jurisdictions that limit publication also mandate that unpublished cases should not be cited in court. Thus, Kentucky's rules provide that "[o]pinions that are not to be published shall not be cited or used as authority in any other case in any court of this state."[296]

The rules of practice before the Supreme Court of Oklahoma may provide the most detailed statement of these rules and their justification:

> Opinions shall be published in the official reports and on the Oklahoma Supreme Court World Wide Web site only when they satisfy the standards set out in this rule. Disposition by memorandum, without a formal published opinion, does not mean that the case is considered unimportant. It does mean that no new points of law making the decision of value as precedent are believed to be involved. A memorandum opinion shall not be published unless it is ordered to be published by the Supreme Court . . . .
>
> All memorandum opinions, unless otherwise required to be published, shall be marked: "Not for Official Publication." Because unpublished opinions are deemed to be without value as precedent and are not uniformly available to all parties, opinions so marked shall not be considered as precedent by any court or cited in any brief or other material presented to any court, except to support a claim of res judicata, collateral estoppel, or law of the case. Opinions marked Not for Official Publication shall not be published in the unofficial reporter, nor on the Supreme Court World Wide Web site, nor in the official reporter.[297]

California may have the nation's strictest publication requirements. As in many other jurisdictions, only published cases can function as precedents, and counsel must not cite to unpublished opinions.[298] In addition, however, the powers of the appellate courts to regulate publication are extensive. For example, a court may certify only part of an opinion for publication.[299] Most controversially, the state's supreme court has the power to "depublish" an opinion that a lower court certified as being worthy of publication.[300] The

296 KY. R. CIV. P. 76.28(4)(c); *see also* WASH. R. APP. P. 10.4(h) (stating that unpublished opinions of the court of appeals may not be cited as authority). Most no-citation jurisdictions have an exception, allowing citation to cases "when relevant under the doctrine of law of the case, res judicata, and collateral estoppel." *See, e.g.*, 9TH CIR. R. 36-3(a).

297 OKLA. SUP. CT. R. 1.200(b) (internal numbering omitted).

298 CAL. R. CT. 977(a). The customary exceptions regarding related cases apply. R. 977(b).

299 CAL. R. CT. 976.1(a).

300 CAL. R. CT. 979.

lower court's disposition stands, but its opinion does not become a precedent that could cause mischief in other cases.[301]

The depublication process, although not widespread, nonetheless shows how critical the text of an opinion has become. Because the process does not affect the outcome of the case, the only reason to depublish a case is that the state supreme court disagrees with some or all of the text of the lower court's opinion.[302] The process emphasizes that in the United States, it is the text of the opinion, not how the case was decided, that constitutes its precedential value.

Not all American jurisdictions are so devoted to the published word. Some allow citation to unpublished cases if there is no reported case on point. Thus, several of the federal circuits, while declaring that citation to unpublished cases is "disfavored," nonetheless permit it if counsel believes that an unpublished opinion has precedential or persuasive value regarding a material issue in a case and that no published opinion would serve as well.[303] Several state courts likewise allow the citation of unpublished dispositions as "persuasive" authority.[304]

We will revisit the publication requirement, which has recently become hotly contested, at the end of this Part. For now, the critical point is that in the past, all judicial opinions by appellate courts counted as precedents, although the precedential value (or authority) of any opinion could vary.[305] An old unreported decision would have relatively little precedential force, while a recent unanimous supreme court opinion would have a great deal. In jurisdictions that have adopted limited publication rules, however, the concept of precedent has turned into a binary opposition. A decision may or may not function as a precedent that binds later courts, depending on whether it was certified for publication.

A precedent is thus no longer any preceding opinion. Rather, it is a written decision that has been authoritatively selected for publication, which is the only way that it can achieve full precedential value.

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301 *See* Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514, 521–22 (1984). Arizona has a similar rule. Michael A. Berch, *Analysis of Arizona's Depublication Rule and Practice*, 32 ARIZ. ST. L.J. 175, 186–90 (2000).

302 Grodin, *supra* note 301, at 522, notes that the practice is most often used when the court believes that the result in the lower court was correct, but where the reasoning of the opinion is felt to be wrong or misleading.

303 *See, e.g.*, 4TH CIR. R. 36(c); 6TH CIR. R. 28(g).

304 *See, e.g.*, Yellow Book of NY L.P. v. Dimilia, 729 N.Y.S.2d 286, 288–89 (N.Y. Civ. Ct. 2001); Carrillo v. State, 98 S.W.3d 789, 794 (Tex. Ct. App. 2003).

305 *See supra* Part II.A.

It should be clear that this change has the potential to promote a more textual conception of the nature of precedent.

F. Precedent as Text

The end result of these two centuries of development in the United States is that what an appellate judge says—for example, during or after oral argument—is completely irrelevant. What matters, for legal purposes, is what judges write in their opinions. Because the text comes straight from the horse's mouth, so to speak, lawyers focus intently on the judges' exact words. The practice of having a single majority opinion, when possible, imbues the text of the opinion with further power, since is it normally no longer necessary to extract a ratio decidendi from two or more opinions that reach the same result but differ in their reasoning.

These developments are leading to a different conceptualization of precedent, a notion that is at the core of the common law. In this context it is instructive to consider that what we in the United States call a judicial "opinion" is generally known in England as a "judgment." In the older common law, the precedential value of a case lay in its outcome, or judgment. As we have seen, it is still theoretically possible in the English system to have a case operate as a precedent without any judge expressing an opinion.

In the United States, on the other hand, most lawyers have come to think of a precedent as something to be found in the text of a majority opinion. In fact, for many American lawyers the text of the majority opinion seems to have become synonymous with the notion of precedent. The outcome of the case is almost an afterthought, something that matters only to the parties.

Precedent, in other words, is being textualized. Today, the notion that the common law is *lex non scripta* would seem downright silly to most American lawyers. Not only have large areas of the common law been codified or authoritatively restated, but the sources in which the common law is to be found—judicial opinions—are becoming quintessentially *lex scripta*. The language of opinions is increasingly being viewed as authoritative text, not all that different from statutes.

III. Creeping Textualization

It should be evident by now that current American opinions are very much "written" law and that, in determining the holding or ratio decidendi of a case, there is substantial emphasis on the court's exact words. Half a century ago there were still prominent American legal

scholars, like Roscoe Pound, who could insist that the language of judicial opinions was not authoritative, but that it is the result that counts.[306] Likewise, Edward Levi's influential book on legal reasoning stated that where case law is concerned, the judge "is not bound by the statement of the rule of law made by the prior judge even in the controlling case."[307] Henry Hart and Albert Sacks could still seriously maintain, in their influential teaching materials on the legal process, that the common law was "unwritten."[308] They likewise concluded that the ratio decidendi of a case "is not imprisoned in any single set of words" and that it therefore "has a flexibility which the statute does not have."[309] Yet even as these scholars were writing, the ground beneath them was starting to shift. The language of judicial opinions was, and still is, becoming ever more textual.

What was once aptly described as a "case law" regime is well on its way to becoming an "opinion law" system. In other words, the precedential value of a case is nowadays determined not so much by analysis of the facts, the issue, and the outcome, but by careful scrutiny of the words written in the opinion. Especially noteworthy is that American courts are beginning to state their holdings explicitly, and that those statements of the holding are being treated more and more like a statute. Judicial opinions—or at least, the part that we regard as precedent or the holding—are gradually being textualized. The process is only in its infancy, so it is now a good time to stand back and to ponder its implications. As will become clear, however, the growing number of lawyers in the United States, the increasing complexity of the law, and the advent of electronic publication will almost certainly intensify this trend.

A. Explicit Statements of the Holding

One sign of the gradual textualization of case law in the United States is the growing tendency of courts to explicitly state the case's holding, or the ratio decidendi, in their own words. Recall that in the English and older American practice, finding the ratio could be a daunting task that often required sophisticated legal reasoning.[310] Courts certainly did not lay it out on a platter for easy consumption.

306 Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 8 (1941).

307 EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1949).

308 HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 341 (William M. Eskridge, Jr. & Philip P. Frickey eds. 1994).

309 *Id.* at 126.

310 *See supra* Parts I.D. & II.A.

Instead, lawyers had to figure out the holding by analyzing the relationship of the facts to the outcome of the case while at the same time reconciling two or three opinions explaining in somewhat different terms why the court had decided as it did. If lawyers were lucky, a particularly able reporter would have added a headnote to the case with a good synopsis or analysis of the holding. In fact, even today headnotes often start with the word "Held," signaling that this was precisely their function.

Traditionally, the verb "hold" in the context of a judicial decision was purely *descriptive.* The verb was almost always in the past tense. Lawyers or a reporter might have to determine what a court held in a particular case (as in, "the court *held* . . ."). Likewise, judges might need to figure out what other judges held in an earlier case (as in, "the Supreme Court *held* . . .").

What one does not often encounter in older cases is judges using the verb "hold" in a *performative* sense, where the verb is in the first person, present tense (as in, "we therefore *hold* . . .") followed by a specific principle or rule of law. When using such language, a court performs the act of holding, rather than just describing what another court did in the past.[311]

An overview of the U.S. Supreme Court cases decided in 1850 reveals that the phrase "we hold" is relatively rare, occurring only seven times.[312] In a majority of cases, the phrase is found in the argument of counsel or in the statement of facts.[313] Only two cases from 1850 employ the phrase in the body of the opinion. In the first, the court notes simply that "we *hold* there was no error,"[314] which is a legal conclusion rather than a proposition of law. In the other example, the court uses the phrase to limit its holding: "All we *hold* is . . ."[315] Finally, there is a single occurrence of the phrase "this court holds,"

311 Peter Meijes Tiersma, *The Language of Defamation*, 66 TEXAS L. REV. 303, 312–14 (1987).

312 Westlaw search conducted on December 19, 2006, on the "U.S. Supreme Court Cases—before 1945" database (SCT-OLD) and using the search string "we" +2 "hold" & "da(aft 01/01/1850)" & "da(bef 12/31/1850)."

313 United States v. Mayor of Phila., 52 U.S. (11 How.) 609, 636 (1850); United States v. Girault, 52 U.S. (11 How.) 22, 27 (1850); Wash., Alexandria, & Georgetown Steam Packet Co., 51 U.S. (10 How.) 419, 427 (1850); Henderson v. Tennessee, 51 U.S. (10 How.) 311, 322 (1850).

314 Landes v. Brant, 51 U.S. (10 How.) 348, 376 (1850) (emphasis added). On the same page the Court observes: "That the lands of the deceased debtor could be seized and sold under the judgment according to the then laws of the state of Missouri, we *hold* to be free from doubt . . . ." *Id.* (emphasis added).

315 Greely v. Thompson, 51 U.S. (10 How.) 225, 239 (1850) (emphasis added).

which is equivalent to "we hold" but it occurs in a headnote rather than in the opinion proper.[316]

In contrast, the past tense "held" occurs no less that sixty-six times in Supreme Court cases decided during 1850.[317] Some of these occurrences do not describe the holding of a previous case (as in "the land was *held* by so-and-so"). But there are a large number of instances where "held" is used to describe a previous court's ruling on a proposition of law. As might be expected, the word very often appears in the headnotes or case summary:

> The emigration of the Cherokee Nation to the west of the Mississippi was conducted by their own agents, the chief of whom received from the United States large sums of money to defray the expenses thereof, including an estimate for wagon hire. *Held*, that a citizen of the Cherokee Nation, supplying wagons under contract with the chief agent, could not maintain an action against him for their hire.[318]

During oral argument, lawyers also frequently used the phrase to describe a precedent that they believed to be relevant: "But the Circuit Court treated the defendant as the head or executive of a foreign and independent nation, and *held* that, having received the money as such, he was responsible only to the nation, and could not, *jure gentium*, be personally liable."[319]

Likewise, the Court itself used the term to describe various precedents by other courts, as well as its own previous holdings: "In the case of *Woodruff* v. *Trapnall*, decided at the present term, this court *held* that the twenty-eighth section in the charter constituted a contract between the state and the holder of the bills of the bank."[320] In fact, the phrase "this court held" occurred nine times in the cases decided in 1850, all of them describing a previous holding by the Court.[321]

When the Court expressed its views on a proposition of law during this period, or reached a conclusion on the basis of a legal princi-

316 Phila., Wilmington, & Balt. R.R. v. Maryland, 51 U.S. (10 How.) 376, 377 (1850). Westlaw search conducted on December 19, 2006, on the "U.S. Supreme Court Cases—before 1945" database (SCT-OLD) and using the search string "this court" +2 "holds" & "da(aft 01/01/1850)" & "da(bef 12/31/1850)."

317 Westlaw search conducted on December 19, 2006, on the "U.S. Supreme Court Cases—before 1945" database (SCT-OLD) and using the search string "held" & "da(aft 01/01/1850)" & "da(bef 12/31/1850)."

318 Parks v. Ross, 52 U.S. (11 How.) 362, 363 (1850).

319 *Id.* at 369 (emphasis added).

320 Paup v. Drew, 51 U.S. (10 How.) 218, 222 (1850) (emphasis added).

321 Westlaw search conducted on December 19, 2006, on the "U.S. Supreme Court Cases—before 1945" database (SCT-OLD) and using the search string "this court" +2 "held" & "da(aft 01/01/1850)" & "da(bef 12/31/1850)."

ple, it generally used words or phrases such as "we are of the opinion" or "it is our opinion." Thus, the Court observed that "we are of opinion, that the Surveyor-General had no authority to change the location of the grant, and to split up the surveys, as was done in this instance."[322] A search for the words "we are of the opinion" and related expressions revealed that such phrases occurred in twenty-three cases in 1850 Supreme Court cases.[323] Another common expression was the phrase "our opinion," as in "our opinion is, that if more had been required than the open and notorious adverse possession and occupation of the premises, and the court had given an instruction in general terms as above set forth, it would be erroneous."[324] This phraseology occurred thirteen times during 1850.[325] Also quite popular was the phrase "we think," as in: "After full consideration, we think that the time of procurement was the proper time for appraising the value, and it seems to us to have been stated in the instruction in conformity with both the express language of several acts of Congress, and the reason of the case."[326] This phrase is found in thirty-four cases decided during 1850.[327]

Clearly, language referring to the mental state of the justices was vastly more common than the phrase "we hold." It is easy to make too much of such distinctions, of course. Judges may become accustomed to a particular style just because they heard or read their predecessors using the same terminology. But it is nonetheless revealing that in the middle of the nineteenth century, the Supreme Court's justices strongly favored terms that reflected their mental state, which is consistent with a view of the common law as being more conceptual than textual. In fact, the very phrase "judicial opinion" suggests that it is a court's *thinking* that matters.

Fifty years later, in cases decided by the Supreme Court in 1900, the words "we hold" had become considerably more common, occur-

322 Villalobos v. United States, 51 U.S. (10 How.) 541, 555 (1850).

323 Westlaw search conducted on December 19, 2006, on the "U.S. Supreme Court Cases—before 1945" database (SCT-OLD) and using the search string "we" +5 "opinion" & "da(aft 01/01/1850)" & "da(bef 12/31/1850)."

324 Landes v. Brant, 51 U.S. (10 How.) 348, 375 (1850).

325 Westlaw search conducted on December 19, 2006, on the "U.S. Supreme Court Cases—before 1945" database (SCT-OLD) and using the search string "our opinion" & "da(aft 01/01/1850)" & "da(bef 12/31/1850)."

326 Greely v. Thompson, 51 U.S. (10 How.) 225, 235 (1850).

327 Westlaw search conducted on December 19, 2006, on the "U.S. Supreme Court Cases—before 1945" database (SCT-OLD) and using the search string "we" +3 "think" & "da(aft 01/01/1850)" & "da(bef 12/31/1850)."

ring in twenty-eight cases.[328] Most of the examples do not involve declaring an elaborate rule of law, however. An illustration is a case where the Court concluded with the statement: "In fine, we hold that the act does not conflict with the 14th amendment in the particulars named."[329]

By the millennial year 2000, the Supreme Court had become much bolder in explicitly declaring textual holdings. The phrase "we hold" (sometimes separated by an adverb like "now" or "therefore") occurred in forty-six cases decided during that year.[330] In fact, it has become common practice for the Court to state the holding of the case (usually prefaced by "we hold" or its close cousin "we conclude") in either the introductory or concluding paragraph of the majority opinion. Often enough, as in the 1900 cases, the holding is a relatively straightforward legal conclusion, making it hard to worry too much about case law being textualized. An example is *Dickerson v. United States*,[331] where the Court pledged its allegiance to the *Miranda* warnings:

> We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.[332]

On other occasions, however, the Court uses the phrase "we hold" to announce a very rule-like decision that leaves little room for traditional legal reasoning. An example comes from a 2000 case that dealt with the writ of habeas corpus and its interaction with recent legislation:

> We are called upon to resolve a series of issues regarding the law of habeas corpus, including questions of the proper application of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). We hold as follows:
>
> First, when a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition after April 24,

328 Westlaw search conducted on December 19, 2006, on the "U.S. Supreme Court Cases—before 1945" database (SCT-OLD) and using the search string "we" +2 "hold" & "da(aft 01/01/1900)" & "da(bef 12/31/1900)."

329 Williams v. Fears, 179 U.S. 270, 276 (1900).

330 Westlaw search conducted on December 19, 2006 on the "U.S. Supreme Court Cases" database (SCT) and using the search string "we" +2 "hold" & "da(aft 01/01/2000)" & "da(bef 12/31/2000)."

331 530 U.S. 428 (2000).

332 *Id.* at 432.

> 1996 (the effective date of AEDPA), the right to appeal is governed by the certificate of appealability (COA) requirements now found at 28 U.S.C. § 2253(c) (1994 ed., Supp. III). This is true whether the habeas corpus petition was filed in the district court before or after AEDPA's effective date.
>
> Second, when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.
>
> Third, a habeas petition which is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a "second or successive" petition as that term is understood in the habeas corpus context. Federal courts do, however, retain broad powers to prevent duplicative or unnecessary litigation.[333]

In this example the Court is laying down the law in a way that is hard to distinguish from a federal statute or administrative rule. Its obvious purpose is to establish clear procedures for inferior judges to follow.

Such detailed rules might be expected when the Court fulfills its role of supervising the federal courts, as is true with habeas corpus proceedings, where the Court has taken a particularly aggressive role in attempting to limit the discretion of the federal judiciary. But textual holdings seem just as common in the far more conceptual area of constitutional law, where the Court likewise increasingly tends to pronounce rule-like and sometimes quite detailed holdings, as in a discussion about when a lawyer must discuss a possible appeal with a client:

> We . . . hold that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.[334]

Not only does the Court here lay out a fairly elaborate holding in its own authoritative words, but it does so by means of a two-part test. Every lawyer has become familiar with such tests. One of the best known is that relating to obscenity. In *Miller v. California*,[335] the Court

333 Slack v. McDaniel, 529 U.S. 473, 477–78 (2000).

334 Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000).

335 413 U.S. 15 (1973).

specifically noted that it was undertaking "to formulate standards more concrete than those in the past."[336] The Court continued:

> State statutes designed to regulate obscene materials must be carefully limited . . . . We now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.[337]

Although the Court in *Miller* did not use the phrase "we hold," it was consciously setting forth a textual standard that was meant to be implemented verbatim. The phraseology has indeed been quoted word for word in hundreds of subsequent cases.[338]

The observation that the Supreme Court has become inclined to set clear guidelines for lower courts to follow, often via multi-part tests, is not novel. Robert Nagel has observed the tendency of the Court during the past few decades to use a "formulaic style" of opinion writing in constitutional cases, a style that makes much use of "elaborately layered sets of 'tests' or 'prongs' or 'requirements' or 'standards' or 'hurdles.'"[339] He suggests that the elaborateness and detail of the formulae in constitutional cases is "an obvious effort to achieve control and consistency."[340] Unlike an earlier era, where judges were subject to "simple and undefined maxims," modern courts are bound by "rules that are specific and multiple."[341]

Frederick Schauer has also addressed the notion that modern judicial opinions, especially in constitutional cases, "read more like statutes than like opinions of a court."[342] Schauer's view is that it is especially courts lower in the hierarchy that are likely to interpret a judicial opinion like a statute: "[I]t is not what the Supreme Court *held* that matters, but what it *said* . . . . [O]ne good quote is worth a

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336 *Id.* at 20.

337 *Id.* at 23–24.

338 Westlaw search conducted on December 19, 2006, on the "All Federal & State Cases" database (ALLCASES) and using the search string "prurient interest in sex" & "da(aft 01/01/1973)."

339 Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 165 (1985).

340 *Id.* at 178.

341 *Id.* at 197.

342 Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1455 (1995).

hundred clever analyses of the holding."[343] The language of an opinion therefore "takes on a special significance" in the lower courts and "operates like a statute."[344] As a consequence, the opinion's language "will be carefully analyzed, and discussions of why one word rather than another was used will be common."[345]

Likewise, Charles Collier has discussed the tendency of lawyers to view the text of judicial opinions as "direct and authoritative sources of legal rules" whose language "is studied and analyzed in much the same way that one would puzzle and agonize over the precise wording of a statute, a constitution, or a literary work."[346] He observes that the language of an opinion "begins to command authority in its own right, rather than merely as a report on how the decision was reached. Ultimately, the opinion is viewed as itself an original text or primary source."[347] Although none of these scholars uses the term, they are essentially describing the effects of textualization.

The academic discussion has concentrated largely on opinions by the United States Supreme Court that deal with constitutional questions. But textualization is by no means limited to such cases. Most of the real case law adjudication in the United States takes place in state courts. Many of these courts have also begun to textualize their holdings in the same way that the U.S. Supreme Court tends to do. An example is an important torts case from California, *Foley v. Interactive Data Corp.*,[348] which explains—right at the beginning—exactly what the holding will be:

> We will hold that the Court of Appeal properly found that plaintiff's particular *Tameny* cause of action could not proceed; plaintiff failed to allege facts showing a violation of a fundamental public policy. We will also conclude, however, that plaintiff has sufficiently alleged a breach of an "oral" or "implied-in-fact" contract, and that the statute of frauds does not bar his claim so that he may pursue his action in this regard. Finally, we will hold that the covenant of good faith and fair dealing applies to employment contracts and that breach of the covenant may give rise to contract but not tort damages.[349]

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343 Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (book review) (emphasis added).

344 *Id.*

345 *Id.*

346 Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 813–14.

347 *Id.* at 814.

348 765 P.2d 373 (Cal. 1988).

349 *Id.* at 374.

When a holding is set forth in such a textual form, it becomes much harder for a court lower in the hierarchy to avoid it by ignoring it or distinguishing it in some way. In fact, an appellate court itself will find it difficult to tactfully avoid mentioning an embarrassing precedent. In this sense, modern courts resemble legislatures, which at one time could ignore the problem of anachronistic statutes by assuming that they had been forgotten or were practically inaccessible. Today, of course, legislatures tend to explicitly repeal such statutes. Likewise, courts can no longer conveniently forget older decisions, nor can they easily dismiss them by suggesting that the case no longer seems to be valid authority or even that the court disagrees with the earlier holding.

Instead, it is increasingly common for courts to explicitly overrule a previous decision. Thus, the Supreme Court stated in two recent opinions: "To the extent that *Meek* and *Wolman* conflict with this holding, we overrule them,"[350] and "[w]e now overrule *Evans* insofar as it holds that the Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax."[351] To the same effect is the use of the phrase "we disapprove," which is literally an expression of the court's state of mind, and is therefore purely descriptive, but which actually has come to have the same function as "we overrule." For example, "[h]aving now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of [specified] cases to the extent that they are inconsistent with our holding today."[352]

A similar phenomenon occurs when higher courts review judgments of lower courts. Technically, a higher court reverses a lower court's *judgment*, it does not reverse the *opinion* that justifies the judgment. A very common way to do so in the past was to use language similar to the following: "[*W*]*e therefore reverse the decrees* of the Circuit Court of Appeals for the Ninth Circuit and of the Circuit Court of the United States for the District of Washington, Northern Division, and remand the case to the Circuit Court for further proceedings in accor-

350 Mitchell v. Helms, 530 U.S. 793, 835 (2000).

351 United States v. Hatter, 532 U.S. 557, 567 (2001).

352 Edelman v. Jordan, 415 U.S. 651, 671 (1974). For some of the many ways in which modern American courts overrule the holdings of previous cases, see Pintip Hompluem Dunn, Note, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 493 (2003).

dance with this opinion."[353] Implicitly, of course, the lower court's opinion regarding the law is also called into question. Even today, it often suffices for a higher court to say nothing more than "we disagree" to overrule a lower court's decision.[354]

Now that courts are expressing more textual holdings, however, it has become more common to expressly reverse the holding, or part of the holding, of the lower court. Thus, a court might write: "[W]e reverse the district court's holding that appellant could only bring her claims in the court that issued the original discharge order and remand for the district court's consideration of enforcement of § 524 through § 105,"[355] or "[w]e reverse the district court's holding that § 14–306.1 violates equal protection."[356] The practice of explicitly reversing a holding is still relatively rare, but it is fully consistent with the trend towards textualization.

There thus appears to be a growing tendency of American courts—the United States Supreme Court is but one example[357]—to express the holding or ratio decidendi of a case in an authoritative fashion that is apparently aimed at laying down a relatively precise rule for the future. If this is so, it would follow that lower courts will tend to treat the language in which a precedent is expressed as being particularly authoritative. As we will now see, this indeed appears to be the case.

B. Quoting the Holding

How judges write their opinions and establish precedents is just one side of the coin. The other side is how those who are bound by a precedent read the opinion that establishes it. In other words, if it is true that judges are expressing their opinions in a more textual way these days, does it follow that those reading the opinions are interpreting them more textually, and less conceptually?

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353 United States v. Bellingham Bay Boom Co., 176 U.S. 211, 218 (1900) (emphasis altered).

354 *See, e.g.*, Smith v. Robbins, 528 U.S. 259, 272 (2000) ("The Ninth Circuit ruled that this final section of *Anders*, even though unnecessary to our holding in that case, was obligatory upon the States. We disagree.").

355 Bessette v. Avco Fin. Serv., 230 F.3d 439, 446 (1st Cir. 2000).

356 Helton v. Hunt, 330 F.3d 242, 244 (4th Cir. 2003).

357 For example, California state opinions also show this tendency. A Westlaw search conducted on December 19, 2006, on the Reported "California Cases" database (CA-CSR) and using the search string "we" w/2 "hold" & "da(aft 12/31/2002)" & "da(bef 01/01/2004)" indicated that the phrase "we . . . hold" occurred in 289 cases.

One way to approach the issue is by examining whether and how judges quote precedential opinions. It is instructive to compare American opinions with those produced by English judges. I have already suggested that the English notion of precedent is more conceptual, while the modern American notion is more textual. It turns out that both English and American judges quote extensively from the language of precedential cases. Yet the style of quotation is radically different.

Any American lawyer who reads a few English appellate opinions will immediately be struck by the lengthy quotations they contain, often set apart in indented paragraphs that sometimes extend over several pages. Recall the case from the English Court of Appeal, in which Judge Aldous refers to a nineteenth-century precedent decided by the multi-judge Court of Exchequer Chamber. Aldous first quotes a paragraph of around eighteen lines of text by Judge Erle. Later he quotes another fifteen lines from Erle's opinion. Aldous then recites twenty-five lines of text from the judgment of Judge Vaughan Williams. It is followed by excerpts of text consisting of seven lines, twenty-one lines, and another twenty-one lines from the opinions of three other judges.[358] The point, of course, is to try to determine the ratio decidendi of the case, which can only be done by reading lengthy portions of text from the opinions of a number of judges who agreed on the outcome, but for somewhat divergent reasons. This is admittedly a rather extreme case, but it is still common practice for English judges to quote lengthy excerpts from the opinions of two or three judges in trying to ascertain the holding.

In fact, extensive quotations are the norm in England even when a single opinion seems to capture the essence of the case. Consider a judgment of the Court of Appeal discussing *Regina v. Gough*,[359] a 1993 decision by the House of Lords. "The gist of that decision," according to the Court of Appeal, was contained in "two brief extracts from the leading speech of Lord Goff."[360] It then quoted twelve lines of text (129 words) from Lord Goff's opinion. It was followed by a second quotation from Lord Goff on the same point, consisting of twenty-three lines (276 words).[361]

358 Ord v. Upton, [2000] 1 All E.R. 193, 200–03 (C.A.); *see supra* text accompanying notes 148–53.

359 [1993] 1 A.C. 646 (H.L.).

360 Locabail (UK) Ltd. v. Bayfield Prop. Ltd., [2000] 1 All E.R. 65, 73 (C.A.).

361 *Id.* at 73–74.

Compare the English approach to an American case, *Chambers v. Nasco, Inc.*,[362] where the U.S. Supreme Court discussed its own precedents regarding recovery of attorney's fees:

> As we explained in *Alyeska*, these exceptions [to the American rule against fee shifting] fall into three categories. The first . . . allows a court to award attorney's fees to a party whose litigation efforts directly benefit others. *Alyeska*, 421 U.S. at 257–258. Second, a court may assess attorney's fees as a sanction for the "'willful disobedience of a court order.'" *Id.*, at 258 (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, (1967)). . . .
>
> Third, and most relevant here, a court may assess attorney's fees when a party has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska, supra*, at 258–259 (quoting *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)). . . . In this regard, if a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled," it may assess attorney's fees against the responsible party, *Universal Oil, supra*, at 580, as it may when a party "shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order," *Hutto*, 437 U.S. at 689, n. 14. The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of "vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy." *Ibid.*[363]

This excerpt not only contains quotations within quotations, but the quoted segments all consist of brief snippets of text, ranging from six to twenty-eight words.

Short quotations from precedential cases appear to be the rule in American opinions. A survey of ten modern United States Supreme Court opinions revealed that the average quotation from other (precedential) cases was around nineteen words long.[364] In contrast, the

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362 501 U.S. 32 (1991).

363 *Id.* at 45–46 (footnotes and parallel citations omitted).

364 Oklahoma v. New Mexico, 501 U.S. 221 (1991); Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991); McNeil v. Wisconsin, 501 U.S. 171 (1991); Toibb v. Radloff, 501 U.S. 157 (1991); Burns v. United States, 501 U.S. 129 (1991); Gollust v. Mendell, 501 U.S. 115 (1991); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991); Melkonyan v. Sullivan, 501 U.S. 89 (1991); Chambers v. Nasco, Inc., 501 U.S. 32 (1991); Connecticut v. Doehr, 501 U.S. 1 (1991); Deposit Prot. Bd. v. Dalia, [1994] 2 A.C. 367; Hunt v. Severs, [1994] 2 A.C. 350; Rhone v. Stephens, [1994] 2 A.C. 310; Cambridge Water Co. Ltd. v. E. Counties Leather plc, [1994] 2 A.C. 264;

average quotation from precedential cases in ten House of Lords opinions from the same time period contained around seventy-seven words, about four times as many. Moreover, in the American sample, only one quotation was over 100 words. In the English sample there were sixteen quotations consisting of more than 100 words, along with several over 300 words, and one quotation containing more than 400 words.

It might be argued that the quotation practices of English and American judges should be considered mainly a matter of style. If so, it is a stylistic distinction that reveals underlying differences in how the judges view precedent. The American custom of quoting snippets of text from the holding of a previous case suggests that the courts are approaching precedential cases as a type of authoritative text. American judges seem to be looking for "sound bites" that encapsulate some or all of the holding of a case.

Judges writing the precedents seem increasingly happy to provide those judicial sound bites. As noted above, they conveniently mark the textual holding with the prefatory phrase "we hold." The ease with which a holding can be found is illustrated by a California appellate case, where the court described a precedential case as follows:

> The Supreme Court held: "In sum, we hold that the instant complaint, seeking the recovery of property seized and wrongfully withheld by defendants, does not involve a claim for 'money or damages' within the meaning of section 905, and thus would not fall within the presentation requirements of sections 911.2 and 945.4."[365]

Judges do not always signal their holdings so clearly, of course, but there seems to be a strong tendency to codify the rule of the case in a sentence or two, making it that much easier for lawyers and lower courts to find. Thus, in *Brady v. Maryland*,[366] the Supreme Court stated its holding as follows: "We now hold that the suppression by the

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Attorney Gen. v. Associated Newspapers Ltd., [1994] 2 A.C. 238; Roebuck v. Mungovin, [1994] 2 A.C. 224; Birmingham City Council v. H. (a minor), [1994] 2 A.C. 212; Regina v. Preston, [1994] 2 A.C. 130; Racz v. Home Office, [1994] 2 A.C. 45; Ackman v. Policyholders Prot. Bd., [1993] 3 All E.R. 384. The research was done in 1995. It is based on the first ten cases by the House of Lords in the then most recent bound volume of the Law Reports, Appeal Cases, which was 1994, Volume 2. I did the same for the U.S. Supreme Court, choosing the first ten cases in what was then the most recent bound volume of the United States Reports, Volume 501 (October Term, 1990).

365 TrafficSchoolOnline, Inc. v. Clarke, 5 Cal. Rptr. 3d 408, 412 (Ct. App. 2003) (quoting Minsky v. City of Los Angeles, 520 P.2d 726, 734 (1974)).

366 373 U.S. 83 (1963).

prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[367] Headnote number three in West's Supreme Court reporter repeated this language virtually verbatim, minus a few definite articles: "Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution."[368] In many cases, all the headnote editors have to do is to find the appropriate sentence stating the holding, a task that is vastly simplified when the court prefaces it with the "we hold" phraseology, as it did here. Subsequent courts can use the same strategy to determine what the holding is, as did the Ninth Circuit in a case entitled *Anderson v. Calderon*[369]: "In *Brady v. Maryland,* the Supreme Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'"[370] As opposed to the headnote editor, the Ninth Circuit left in the definite articles.

A final indication of how the holding of cases is being textualized is that the rules or standards or tests developed by American courts are now often named for very brief snippets of authoritative text. In other words, the test has been named for the text. Consider the "grievous wrong" standard,[371] the "outcome determinative" test,[372] or the "clear and present danger" rule articulated by Justice Oliver Wendell Holmes in *Schenck v. United States.*[373] Another celebrated Supreme Court case, *United States v. Carolene Products Co.*,[374] contained a textual standard, "discrete and insular minorities," in a footnote,[375]

367 *Id.* at 87.

368 83 S. Ct. 1194, 1194 (1963).

369 232 F.3d 1053 (9th Cir. 2000).

370 *Id.* at 1062 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)).

371 Ruffo v. Inmates of Suffolk County Jail, 502 U.S. 367, 393 (1992).

372 Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). The test is referred to as such by *Hanna v. Plumer,* 380 U.S. 460, 475 (1965).

373 249 U.S. 47, 52 (1919).

374 304 U.S. 144 (1938).

375 *Id.* at 152 n.4 (1938). Note that the use of footnotes is itself an indication of a literate mode of thinking. With their more oral tradition, English judges virtually never use them.

but its obscure location did not hinder it from being quoted and followed in literally hundreds of cases.[376]

Even if not intended to do so, textual standards of this sort—often consisting of no more than two or three words—tend to be interpreted in a more textual and less conceptual way, as indicated and encouraged by their enclosure within quotation marks in subsequent cases. As Michael Sinclair has observed, referring specifically to the footnote in *Carolene Products* that "[l]egal actors in lower decision-making roles take the reasons and verbal formula of higher courts as governing . . . following authoritative words, rather than rational analysis."[377]

Obviously, the point that I am making can be overstated; there are many modern cases where American courts do not expressly textualize their holdings. It would be foolhardy for law schools to stop teaching traditional legal reasoning. But it is true that, in general, English lawyers and judges concentrate on the concepts and reasoning contained in precedents, struggling to figure out what the judges meant and why they decided the cases as they did. To do so, you need as much evidence as possible, hence the lengthy quotations. Modern American judges are looking more closely at the exact words that the judge wrote in the precedential opinion. They therefore concentrate on extracting critical excerpts of text that they regard as authoritative. More and more, American judges are reading cases in a way that resembles how they read and interpret statutes.

C. The Publication Requirement and the Demand for More Text

A final manifestation of the increasingly textual nature of case law is a growing, almost insatiable, demand for more precedent. If the answer to a legal question can be found through close analysis of judicial texts, rather than through reasoning by analogy, then it follows that the more text you have, the better. This is the point of view of many lawyers, who during the past few years have argued, some quite forcefully, in favor of allowing the citation of unpublished opinions in the United States. It brings us back to the issue of the publication and citation of judicial opinions.

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376 A Westlaw search conducted on December 19, 2006, on the "All Cases" database (ALLCASES) using the search terms "discrete and insular minority" resulted in 417 cases.

377 Michael B.W. Sinclair, Anastasoff *versus* Hart*: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695, 738–39 (2003).

Recall that in many American jurisdictions, both state and federal, only opinions that are certified for publication can function as binding precedents. I will refer to this as the *limited publication rule.* The name of the rule is actually somewhat of a misnomer, because publication per se is not the issue. The fact that someone may have published a case does not transform it into a precedent. What matters is that some court, usually the one that issued the opinion, certified it for publication or ordered that it be published. The result of the publication requirement is that it is the judges who decide which of their cases are legally considered to be precedents.[378]

A related issue is the legal status of unpublished cases (i.e., those not certified for publication). In a jurisdiction that holds that such cases are not binding precedent, do they nonetheless have any weight in a court of law? In some such jurisdictions, unpublished opinions do not have binding precedential force, in that they do not establish general principles of law that *must* be followed in later cases. I will refer to this as the *no-authority approach.* A few jurisdictions allow an unpublished case to have precedential value when there is no published case on the issue. I will refer to this as the *limited-authority approach.* In addition, a fair number of state and federal courts consider unpublished cases to be persuasive authority, rather than being binding precedent. I will refer to this as the *persuasive-authority approach.* Recall also that jurisdictions adhering to the no-authority approach typically forbid any citation to unpublished cases.[379] Not only are such cases deemed irrelevant, but in theory lawyers who violate the no-citation rule are subject to discipline.[380]

No-citation rules have recently drawn a great deal of opposition. Some have intimated that the rules raise the specter of "secret law" that is inaccessible not only to average citizens, but to the legal profession as well. In fact, no less a figure than Supreme Court Justice John Paul Stevens once criticized a federal appellate court for not publishing a case and thereby creating "secret law."[381] Abolishing secret law has become a *cause célèbre* for some lawyers, as well as members of the public, as indicated by the mission statement of a group (or person?) calling itself the Committee for the Rule of Law: "The Committee for

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378 Remember that in the English system, it is reporters and printers who decide what to report, something that is sometimes felt to be a weakness in their system. *See supra* note 60 and accompanying text, notes 78–79 and accompanying text.

379 *See supra* notes 291–303 and accompanying text.

380 *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1158–59 (9th Cir. 2001); Sorchini v. City of Covina, 250 F.3d 706, 708 (9th Cir. 2001).

381 County of Los Angeles v. Kling, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting).

the Rule of Law maintains that any rule restricting citation of, or which allows, secret, hidden, or unpublished opinions encourages expedient, not careful, consideration as the basis for judgment, and constitutes an invitation to error, incompetence, corruption and tyranny."[382] Others have intimated that these rules amount to censorship,[383] or have suggested that they are Kafkaesque or belong in a totalitarian state.[384]

While the term "secret law" sounds rather ominous, the fact is that all judicial opinions, published or not, are matters of public record and available to the anyone who is seriously interested.[385] While in the past unpublished opinions may have been hard to find and obtain, the Internet has made them widely accessible. Moreover, in states that follow the no-authority approach, unpublished opinions have no precedential force and are therefore simply not "law" in the first place.

The real animus behind the "secret law" argument seems to be that some appellate judges are making decisions without publicly explaining their reasons. William Reynolds and William Richman, who conducted a careful study of the impact of limited publication in the federal courts of appeals during the late 1970s, found that relatively few cases with significant precedential value were not being published.[386] After an extensive review of a year's worth of opinions, they did indeed find a few examples of cases that should probably have been published, but concluded that overall, there was no widespread "hiding" of potentially significant precedents.[387] They did recom-

382 The Committee for the Rule of Law, Mission Statement, http://www.nonpublication.com (last visited Jan. 16, 2007). The Committee seems to be largely the work of one lawyer, Kenneth Schmier, who is at least partly motivated by having lost a California appeal, brought on his own behalf, that was disposed of via an unpublished case, and that purportedly caused him to lose $700,000. *See Unpublished Judicial Opinions: Hearing Before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 20, 22 (2002) [hereinafter *Hearings on Unpublished Decisions*] (statement of Kenneth Schmier, Chairman, Comm. for the Rule of Law).

383 David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133 (2002).

384 Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 249 (1988).

385 *See* Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (2000) (en banc).

386 William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 606–07 (1981).

387 *Id.* at 608.

mend, however, that publication standards be broadened to include certain cases that might be of public interest, as well as to avoid the temptation for judges to sweep problems under the rug via an opinion that is essentially off the books.[388]

A more serious issue identified by Reynolds and Richman is that in a substantial number of cases, the federal circuit courts were disposing of cases with extremely cursory opinions that had so little substance that they might suggest that judges had not given the matter the attention that it deserved.[389] The solution to this issue, which can be a very legitimate concern, is to require that all appellate decisions be accompanied by a written justification, even if it is relatively brief and not officially published, explaining the result and the reasons for it. As long as this is provided to the parties, and is available as a public record, there is little danger of our court system secretly making tyrannical decisions. Any interested reporter can obtain a copy of an unpublished decision and cite it in a newspaper or on a website.[390]

The real issue, it seems to me, is not that courts are making secret law. Nor is the controversy really about no-citation rules. After all, if a jurisdiction deems some of its appellate decisions without precedential force, there is no point to citing them. The crux of the matter is that many lawyers simply want more law. They want more precedent. It would be pointless for opponents of no-citation rules to argue that they should be allowed to cite unpublished cases unless they had some precedential force. They are really attacking the limited-publication rule, that is to say, the power that American judges have bestowed on themselves to determine the precedential value of their opinions.

The opposition to limited publication raises an intriguing possibility. Perhaps allowing unpublished opinions to function as precedents can moderate the trend towards the textualization of precedent. After all, they are typically drafted with less care than opinions certified for publication. As a result, they are likely to be more speech-like. Moreover, if American courts allowed citation to any opinion, published or not, as binding precedent, our system would more closely resemble that of England, where unreported decisions have traditionally been citable. Yet as we will see, allowing the citation of unpublished opinions will probably only accelerate the textualization of precedent.

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388 *Id.* at 610–11.

389 *Id.* at 621. For a more somber assessment, see David R. Songer et al., *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 975–76 (1989) (concluding that many controversial cases are being decided in cases with unpublished opinions).

390 *See* Martineau, *supra* note 292, at 131.

1. The Evolving Meaning of "Publication"

The rallying point for the movement to allow citation of unpublished opinions is *Anastasoff v. United States*,[391] which we will discuss below. But the movement was actually precipitated by events a decade or two earlier, when the major online legal databases, Lexis and Westlaw, began to make ever more unpublished cases available to lawyers. The result was that lawyers looking for a good precedent would find what seemed to be the perfect case, only to discover on closer examination that it was unpublished. Those who practiced in a no-citation jurisdiction, and to a lesser extent those in limited-authority or persuasive-authority jurisdictions, would have felt that the rules deprived them of just the case they needed to win a lawsuit. Consider the analogy to the Garden of Eden, where Adam and Eve had forbidden fruit dangling temptingly before their eyes, only to be told by God that they could not touch it.[392] The online databases dangle the fruit, but the courts forbid its consumption. Like Eve, many lawyers would love to eat of the tree of knowledge.

It is worth observing that with the rise of computers and the Internet, the meaning of publication has changed substantially. Previously, "unpublished" was effectively a synonym of "unprinted," because printing was the only practical means of broadly disseminating the text of an opinion. Electronic publication has not only made printed legal materials more widely accessible, but also has published many materials that would not have been printed in the past. Once those previously unprinted materials became easily available, it is natural that some lawyers would want to use them.

2. *Anastasoff* and the Controversy About Limited Publication

Anastasoff began as a routine tax dispute raising a relatively straightforward legal issue: whether a taxpayer's claim for a refund arrived within the statutorily-mandated time if it was received a day late, even though it was mailed before the deadline.[393] The district court decided that the statute referred to when the claim arrived, and that it was therefore untimely.[394] Anastasoff appealed to the Eighth Circuit, which affirmed the district court's decision.[395]

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391 223 F.3d 898 (8th Cir. 2000).

392 *See* Joshua R. Mandell, Note, *Trees that Fall in the Forest: The Precedential Effect of Unpublished Opinions*, 34 LOY. L.A. L. REV. 1255, 1294 (2001).

393 *Anastasoff*, 223 F.3d 898.

394 *Id.*

395 *Id.* at 899.

What provoked a great deal of attention from the legal world was not the court's holding on the minutiae of tax law, but how it reached its decision. Judge Arnold, who wrote the opinion for a three-judge panel, held that the court was bound by a previous *unpublished* Eighth Circuit case.[396] According to the Eighth Circuit's rules at the time, unpublished opinions "are not precedent and parties generally should not cite them," although they can be cited "if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well."[397] Under this rule, the parties were free to cite the unpublished case. The judges on the panel could have looked at the previous case, could have decided that they were *persuaded* by it, and could then have written an opinion that tracked the reasoning of the unpublished case. This they did not do. Rather, they declared themselves *bound* by the previous decision, regardless of whether they agreed with it.[398] The reason, according to the panel, was that the rule giving only persuasive effect to the court's unpublished decisions was unconstitutional.[399]

According to Judge Arnold's opinion, Article III of the Constitution requires that every prior decision by a court, as well as any decision by a court that is above it in the hierarchy, must be obeyed.[400] In other words, courts do not have the power to declare which of their opinions are to have binding precedential effect; *all* of their opinions must have such force. Thus, "Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional."[401]

We can leave the constitutional issues to scholars more competent to address them, but it is worth examining the court's historical observations. The Circuit's rule violated Article III, according to Judge Arnold's opinion, because the framers of the Constitution were familiar with the doctrine of precedent and therefore implicitly adopted the common law system of adjudication that was used when the Constitution was ratified.[402] Yet a closer analysis of the history of the concept of precedent suggests that it would be highly problematic

396 *Id.*

397 8TH CIR. R. 28A(i).

398 *Anastasoff*, 223 F.3d at 900.

399 *Id.*

400 *See id.*

401 *Id.* at 905.

402 *Id.* at 899–900.

for modern courts to try to replicate conditions that existed over two hundred years ago, even if they felt obligated to do so.[403]

It is probably true that when the Constitution was ratified, any previous case, published or not, could be cited in American courts. That did not mean, however, that a single case that was on point would invariably bind a later court. Certainly in England, judges gave greater or lesser deference to a precedential decision depending on factors such as the judge's reputation, how old the case was, the status of the court, and the quality of the reports in which it appeared. Moreover, a case could function as an influential precedent even if there was no opinion at all, as we saw in our discussion of *Raffles v. Wichelhaus*.[404] It is simply not correct that in the late-eighteenth century, any previous case was binding authority in the way it is today.[405]

Roughly the same conditions existed in the United States when the Constitution was adopted.[406] Consider the problems posed by uneven reporting, the delivery of oral seriatim opinions that were published without review by the judges who delivered them, a court system that had no clear hierarchy, and the notion that the common law was unwritten and resided in the collective memory of the legal profession. It seems unlikely that a court would consider itself strictly bound by a single decision under such circumstances, and even more unlikely that it would hold itself compelled to follow an unreported decision. Even if we believe that it matters what the Framers thought, it is bizarre to suggest that they would have wanted every facet of the common law system of adjudication to be forever frozen in time.[407]

Even more significant is that reporting practices of the time effectively created a system that is similar to the limited-publication rules in most American jurisdictions. Recall that English judges, even today, deliver oral opinions that might or might not be reported. Whether to report a case is up to the discretion of the reporter or printer. In theory, if not always in practice, reporters would generally publish cases presenting a novel issue of law or making a change in existing law.[408] Although unreported cases could, and to some extent still can, function as precedents, it is hard to believe that an unreported case

403 *See* Mandell, *supra* note 392, at 1276–90.

404 *See supra* text accompanying notes 132–41.

405 As we have seen, even a century later, when English judges felt themselves absolutely bound by a single precedent, there were various escape valves that mitigated the force of that rule. *See supra* notes 142–56.

406 On precedent in early America, see Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 73–91 (2001).

407 *See* Hart v. Massanari, 266 F.3d 1155, 1162–69 (9th Cir. 2001).

408 *See supra* text accompanying notes 16–24.

that a barrister claimed to remember would have binding force, in the way that written precedents currently bind subsequent or inferior courts. Basically, most unreported decisions in the late-eighteenth century would have been treated in much the same way that we currently treat persuasive authority. This historical approach is actually quite similar to the rule in the Eighth Circuit, which the *Anastasoff* court found unconstitutional: published opinions are binding precedent, while unpublished cases can sometimes be cited for their persuasive value. The major difference resides in who decides what to report or publish. When the Constitution was ratified, it was the reporters who made this decision. Currently it is done in the United States by judges.

If the concept of precedent became fixed when the Constitution was ratified, we would have to give back to private reporters the power to decide which opinions merit publication. And we would also return to oral seriatim opinion delivery and the notion that judges do not make law, but merely discover it.[409] As Michael Sinclair has pointed out, the fact that the framers of the Constitution most likely adhered to the declaratory theory of the common law, which has long since been abandoned, is highly problematic for any originalist approach to this issue.[410]

The *Anastasoff* case itself soon faded from view. The Internal Revenue Service did the right thing and gave Ms. Anastasoff her refund. As a result, the case became moot and the opinion was vacated.[411] Nonetheless, the controversy lives on. The Ninth Circuit, in an opinion by Judge Alex Kozinski, addressed the same issue as that in the *Anastasoff* case but came to the opposite conclusion, holding that the circuit's no-citation rule does not violate Article III, and expressly concluding that federal judges have the power to decide which cases are precedential.[412]

Those who oppose rules that limit citation or that deprive certain cases of precedential force advance a number of arguments. A practical concern, as mentioned, is that lawyers feel that they are being deprived of cases that might benefit their clients. In addition, judges should be held accountable for the decisions that they make. Because unpublished opinions are short and sometimes difficult to find,

409 Interestingly, Judge Arnold suggests that the Framers adhered to the declaratory theory of adjudication. Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (2000) (en banc). For a contrary view, see *Hart*, 266 F.3d at 1163–64.

410 Sinclair, *supra* note 377, at 711.

411 *Anastasoff*, 235 F.3d 1055.

412 *Hart*, 266 F.3d at 1180.

judges may be treating such cases with less careful consideration or might even be making decisions based on whims rather than the law.[413] And it might be more difficult to obtain review from a higher court.[414] Moreover, critics have argued that judges are not particularly good at deciding which opinions have precedential value and should therefore be published.[415]

A particularly interesting criticism is that unpublished opinions are suspect because they constitute unwritten law. Written law, in contrast, is held to function as a check on governmental power. It is a bastion of freedom that defends us against tyranny.[416] A somewhat more nuanced argument along the same lines is made by Reynolds and Richman, who suggest that "[t]he discipline of providing written reasons . . . often will show weaknesses or inconsistencies in the intended decision that may compel a change in the rationale or even in the ultimate result."[417] In an interesting historical about-face, the legal profession's former glorification of the *unwritten* nature of the common law as a bastion against tyranny and legislative meddling has been turned on its head.

In the opposing camp, advocates for these rules point out that when an opinion is ordered to be published, and thus becomes precedential, the judge who writes it must take a great deal of time to set out the facts, and, more importantly, to present the court's disposition of the case in a way that is comprehensible and legitimate.[418] Not only must the court consider the case before it, but it must also take into account how the rules or principles it adopts might be applied to future cases. The views of other judges who join in the opinion must also be taken into account. All of this takes a great deal of time and effort, making it impossible for judges to give such extensive treatment to every case that they decide. In the Ninth Circuit, for instance, judges write around 150 opinions a year, and they must read hundreds of others.[419] It simply is not practical to expect extensive and carefully-written decisions in so many cases. For this reason, the

413 Reynolds & Richman, *supra* note 386, at 621.

414 *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 282–84 (1996).

415 Reynolds & Richman, *supra* note 386, at 581.

416 Milton J. Silverman, *The Unwritten Law: The Unpublished Opinion in California*, 51 CAL. ST. B.J. 33, 33–34 (1976).

417 Reynolds & Richman, *supra* note 386, at 603.

418 Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43, 43.

419 *Id.*

judges in that circuit produce published opinions in about twenty percent of all cases, all of which are binding precedent; the rest may not be cited.[420]

Because most of these other cases involve routine application of existing law to the facts, there is felt to be no need to publish them or to allow lawyers to cite them. In fact, defenders of no-citation rules argue that permitting opinions in such cases to be cited is not just a waste of everyone's time, but could also be problematic because the opinions are simply not drafted with the care that goes into a published case. In unpublished cases, according to Judges Kozinski and Reinhardt, "the result is what matters . . . not the precise wording of the disposition."[421] Consequently, "conscientious judges would have to pay much closer attention to their precise wording" if lawyers could cite unpublished dispositions, and that would place an impossible burden on the courts.[422]

The debate rages on. Congress has recently held hearings on the issue.[423] A few jurisdictions have abolished their no-citation rules.[424] And in April of 2004 the Advisory Committee on Appellate Rules of the Judicial Conference of the United States recommended the adoption of a rule of appellate procedure that would prohibit federal courts from placing restrictions on the citation of unpublished or nonprecedential decisions.[425] Rule 32.1 has been approved by the Supreme Court and will go into effect at the beginning of 2007.[426] The new rule does not, however, address what is really at the heart of the matter: whether judges should be able to decide that only certain cases or opinions can operate as precedent.

D. Can We Detextualize Precedent?

The arguments for and against the various publication and citation rules raise an intriguing possibility. Critics would like to be able to cite all cases. Judges typically respond that it would be too much of a burden to carefully craft so many opinions, focusing closely on the precise wording of each one. An obvious solution is to revert to the

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420 *Id.* at 43–44.

421 *Id.* at 44.

422 *Id.*

423 *See Hearings on Unpublished Decisions*, *supra* note 382.

424 *See* Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix*: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 3–7 (2002).

425 *Judicial Conference Backs Proposal to Ease Restrictions on Citing Unpublished Opinions*, 72 U.S.L.W. 2626, 2626 (2004).

426 *Supreme Court Approves Rule Changes on E-Discovery, Unpublished Opinion Citation*, 74 U.S.L.W. 2617, 2617 (2006).

golden age of the common law, before precedent became textualized. Unlike Judge Arnold's proposal in *Anastasoff*, which mixes the modern concept of binding and authoritative written opinions with the historic notion that all cases are precedents, a more interesting approach would be to turn the clock back completely two or three hundred years. At that time, all cases were precedents, but no one paid excessive attention to the exact wording of opinions. Reports did not consist of opinions written by the judges themselves, but were summaries made by a private reporter of oral proceedings in court. Unreported decisions had no written text at all, making it highly unlikely that a judge or lawyer who remembered a case decided ten years before, and who wished to use it as a precedent, would have been able to remember anything beyond the outcome and the general gist of what the judges had said. Books of printed reports were an important tool, but did not constitute the common law. The common law truly was unwritten in the sense that its essence resided in the minds of judges and lawyers.[427]

While turning back the clock might seem like a mind game or an antiquarian fantasy, some participants in the controversy surrounding no-citation rules have in fact made proposals that, if successfully implemented, have the potential to reverse the gradual textualization of precedent that has been taking place during the past two or more centuries. For example, David Greenwald and Frederick Schwarz have argued, based largely on free-speech grounds, that all appellate opinions should be citable.[428] Recognizing that this would place a severe burden on federal appellate judges, and that an expansion of the size of the judiciary is not likely, they suggest allowing appellate courts to dispose of routine cases by delivering oral judgments, as in England.[429] These opinions would be recorded and perhaps transcribed, not just for the benefit of the parties, but also for anyone else who might wish to cite the opinion.[430] The proposal would have the advantage of giving judges a relatively easy way of publicly presenting the reasons for a decision, thus avoiding the specter of "secret law." The critical point from our perspective is that spoken delivery, especially if done directly following oral argument, would necessarily produce less textual opinions.[431] Lawyers would be unlikely to focus

427 *See supra* Part I.

428 Greenwald & Schwarz, *supra* note 383, at 1133–34.

429 *Id.* at 1134.

430 *Id.* at 1169–70.

431 The authors also recognize that because of the informal nature of these opinions, they would generally constitute less forceful precedents than their written counterparts. *Id.* at 1170. For a similar proposal, see Richard B. Cappalli, *The Common*

intensely on the words of such an opinion, since it would have been delivered without the extensive planning, editing, and revision that is common with published decisions.

A more interesting and radical proposal is to deconstruct the current notion of precedent entirely, particularly the bright-line distinction that American lawyers and judges tend to draw between precedential and nonprecedential opinions. Stephen Barnett, for example, has suggested that there are five varieties of precedent: binding precedent, overrulable precedent, "precedential value," persuasive value, and citable precedent.[432] This categorization eliminates the strict dichotomy between precedential and nonprecedential opinions.

If we follow these ideas to their logical conclusion, the notion of precedent could return to its origins by referring to any preceding opinion. Judges who deliver an opinion would no longer be able to decide whether it should be binding. The precedential value of their decision would be made by later judges who are called upon to apply it in a subsequent case.

What would gain prominence under such a system are the things that arguably *should* matter: the quality of the lawyers and arguments before the court; the training, experience, and prominence of the judges on a particular panel; the thoroughness of the judges' research and the persuasiveness of their reasoning. An opinion that scores highly on such criteria would have great precedential force and would be impossible to ignore. One that scores lower would have less influence on a later court's decision. Of course, if courts are in a hierarchical relationship, it would generally be prudent for lower courts to follow even those opinions that they do not find particularly persuasive, because the higher court can and probably will use its power to reverse a decision with which it does not agree. But later panels of the same court would have much more flexibility than they now have to avoid a badly-reasoned precedent.

Moreover, eliminating the dichotomy between cases that are precedential and those that are not would reduce the almost inevitable pressures to textualize the common law. When a court declares that a case is precedential (i.e., certifies it for publication), those who read the case are aware that a great deal of effort has gone into drafting the exact words of the text, and that most likely all the judges who sign the opinion have reviewed that text carefully. In essence, a

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Law's Case Against Non-Precedential Opinions, 76 S. CAL. L. REV. 755 (2003) (suggesting that those cases that currently result in an unpublished opinion should instead be resolved by short opinions that can be treated as precedential).

432 Barnett, *supra* note 424, at 9–12.

majority of the judges have voted to "enact" that exact text as the opinion of the court, not unlike a legislature enacting a statute.

Because there is a symbiotic relationship between encoding and decoding a text, those who interpret a text that has been meticulously drafted will tend to decode or interpret it with similar meticulousness.[433] They will, in other words, almost inevitably focus closely on the exact words of the opinion. In that sense, rules relating to limited publication and citation, which have made the texts of published opinions highly authoritative, have clearly promoted the textualization of precedent, as also observed by Richard Cappalli.[434] Eliminating those rules is probably the most practical way of reversing the trend. Another possibility might be a rule of appellate procedure that prohibits judges from expressing overly textual holdings, but it is hard to imagine that such a rule would be adopted. In contrast, proposals to eliminate the no-citation rule have already been made and adopted, and a companion provision depriving judges of the power to declare which cases are precedential would be easy to add.

Of course, the judiciary has a great deal of influence over the rules that govern courts and procedures. Even the relatively modest proposal to allow lawyers to cite unpublished opinions, without making any change to the status of those cases, has encountered serious opposition from the bench.[435] While it is possible that surviving no-citation rules (still common in many states) will be eliminated, it seems unlikely that judges will relinquish their ability to declare that some opinions are precedential and binding, and that others are not.

Beyond these practical considerations, there are reasons to suspect that, in light of changes in society and the legal system, and especially because of current technology, a return to an earlier state where all cases are precedential will not really serve to detextualize common law adjudication. At first this conclusion might seem counterintuitive. Modern innovations like e-mail and websites have in many ways made the processes of communication and publication far less textual and more oral than before. Our e-mails, typically dashed off quickly, are far more speech-like than letters were in the past. Websites allow virtually everyone to publish his or her views on just about any topic,

433 Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy and Statutory Interpretation*, 76 TUL. L. REV. 431, 449–50 (2001).

434 Cappalli, *supra* note 431, at 775 (arguing that under a limited-publication approach, as defended by Judge Kozinski, "a precedent controls not through its ideas, but through its verbal expression").

435 The proposal to eliminate the no-citation rule on the federal level was immediately controversial. *See Judicial Conference Rules Committee Agrees to Propose New E-Discovery Rules*, 72 U.S.L.W. 2766, 2767 (2004).

usually without the selectiveness and editorial oversight that were common in the print media. Electronic communication and publication tends to be relatively less formal and considerably more speech-like than written communication and printed publication was in the past.[436]

In other ways, however, new technology is likely to promote a more textual approach to the common law. Consider that if you send an e-mail to a friend or acquaintance, you can often dispose of a matter with a few quick informal sentences. Spelling errors may not necessarily be corrected, and formal words of salutation and a signature may not be necessary. But if you send a similar e-mail to a large group of people, or to someone whom you do not know, you will compose it with greater care. It will more closely resemble a traditional letter. Thus, judges are not being disingenuous when they claim that the elimination of no-citation rules will force them to spend more time drafting opinions which were formerly unpublished. If an opinion is written not just for the parties, as is currently the case with unpublished dispositions, but is instead likely to be read and cited by a much broader audience, judges will inevitably spend more time in drafting it. Such opinions will not be as informal as they now are, but will come to have the look and feel of the published opinions that populate the bound reports. Once they are drafted with more attention paid to text, they will tend to be interpreted correspondingly, i.e., in a more textual way. Perhaps judges and lawyers can resist these temptations, but history is not encouraging.

Moreover, the legal profession has changed dramatically since the days when all opinions were precedents. We have seen that at one time it was not a wild exaggeration to suggest that the common law resided in the minds of the legal profession, rather than in the texts of published reports. Until relatively recently, the number of English barristers numbered in the hundreds and there were perhaps a dozen royal judges before whom they practiced. The judges and lawyers regularly met at the inns of court, where they debated how to resolve difficult legal issues.[437] The situation in early America was not all that different.

As the number of courts, judges, and lawyers grew, especially in the United States, and as the legal profession left the proximity of the courts and dispersed throughout the country, the notion of the com-

436 *See generally* NAOMI S. BARON, ALPHABET TO EMAIL 188–89 (2000) (arguing that writing has increasingly come to mirror speech as various technologies, from television to cell phones, have undercut traditional written forms).

437 *See supra* note 234 and accompanying text.

mon law being common knowledge in the profession rapidly became a myth. Access to accurate written texts of opinions was now essential, and various reporters and publishing houses supplied the ever-increasing demand. At this point, it would be fair to say that the common law resided in published reports. The adoption of limited publication rules only buttressed a conclusion that had already become a practical inevitability. The printed books of reports had not merely become essential to the practice of the common law; they *were* the common law.

During the past decade or two, the growth of online legal databases of case reports has begun to undermine the supremacy of print. As the volume of cases continues to expand, online databases will grow ever more essential. If no-citation rules are eliminated, electronic databases will be the only game in town.[438] At that point, the common law will reside in the memory banks of computers.

As case law is increasingly stored in machine-readable format, the way in which lawyers and judges research it has begun to change. The most practical way to access such a large database is by searching for collocations of text. Natural language searching, although the idea sounds appealing, cannot really locate concepts. For now, at least, any search algorithm must in some way or other concentrate on strings of words. There is currently no way of escaping text.

Paradoxically, even though computers reduce everything to a binary code, and therefore do not store text as such, the digitization of the law is likely to make the common law even more textual than it was before. When the law was contained in books of reports, there was no way to search for specific words or strings of text. A lawyer who wished to research an issue generally had to access case law by means of a digest, a legal encyclopedia, or perhaps a treatise. All of these tools result from human mediation and analysis. Also important is that they are organized conceptually. If you wish to use traditional research tools to find out whether in your jurisdiction a person can get a prescriptive easement against a water district, you will have to consult a treatise on property law, or look at a digest or legal encyclopedia under "property" or "easement" or a related topic until you find the information you seek.

Critically, all of those research tools were compiled by human beings with legal training. In addition, each of these resources (especially legal encyclopedias and treatises) provides a great deal of context. The lawyer doing the research can easily place his search into

438 *See* Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1701–03 (2000).

the more general context of easements, or easements against a governmental agency. Finally, once the lawyer finds some potentially relevant cases, he will have to look them up in books, so that he has the entire case before him, starting with the first page. He might not read it all, but he would at least skim it, thus giving him some notion of the context in which the case was decided.

I suspect that today, a lawyer doing similar research will access an online database and conduct a search for the term "prescriptive easement" within a few words or within the same paragraph as "water district." The database's search engine would take her straight to the relevant paragraph of an opinion. Although digests, treatises, and tools like the West key numbering system remain available, lawyers—especially younger lawyers who have limited experience with books—tend to do the majority of their research by searching for text. We have already seen that the traditional analysis of the holding or ratio decidendi of a case is being replaced by searching for and reading snippets of critical text. Clearly, the capability and convenience of doing textual searches can only promote that trend. In fact, if we treat all appellate decisions as precedent, vastly increasing the bulk of decisional law, textual searches may become the only practical way to conduct research.[439] As Robert Berring has observed, it will become far too costly for traditional resources to keep up with such a mass of case law.[440]

The transfer of the common law from books of reports to online databases is almost certainly unstoppable. The information age is upon us. It does not mean, however, that all information is equal. We all know that some of the information we obtain on the Internet is of high quality and very reliable, while much other information is at best worthless and at worst false, deceptive, or mendacious. In between those extremes is a vast amount of information whose usefulness and truth is difficult to determine.

Traditional publishers have generally performed a gatekeeping function with respect to information flow. Academic publishers subject proposed books and articles to peer review. Commercial printing houses are probably in some ways less rigorous in evaluating the quality and accuracy of the material they publish, but even they need to be concerned about their reputations and the reaction of the market-

439 Frederick Schauer has noted that just as lawyers read only part of a statute, modern online sources make it easy to find and read just part of an opinion. Schauer, *supra* note 342, at 1471–72.

440 Robert C. Berring, *Collapse of the Structure of the Legal Research Universe*, 69 WASH. L. REV. 9, 27 (1994).

place. In both settings, editors work with authors to guarantee a certain level of professionalism.

The Internet has made it possible to avoid the gatekeepers. Virtually anyone can be a publisher, at minimal cost, by posting material on a website or by emailing it to hundreds or thousands of recipients. Much of it is junk, of course, or otherwise irrelevant. So far, nothing in cyberspace fulfills the gatekeeping function traditionally performed by publication.

The relevance of these concerns to the notion of precedent should be evident. Maybe it's not such a bad idea to have someone sift through the masses of decisions and tell us which of them were carefully drafted after careful consideration of the facts in the case and the implications that the decision might have in the future. At some point, it might have been debatable whether reporters or judges should be making that gatekeeping decision, but currently judges seem to be the only viable option. In any event, it seems that judges are generally in the best position to decide which of their cases have received the sort of care and consideration that would qualify them as precedential.

CONCLUSION

Although American courts use a common-law system of adjudication in which precedent is a source of law, our notion of precedent has become distinctly different from its English roots. In a nutshell, American precedents are more textual, and relatively less conceptual, than they were in the past. A precedent in the United States is no longer simply a decision in a preceding case, but instead consists of words that have been written on paper by the judge herself and that have been published in an authoritative source. It is premature to conclude that judicial opinions have become textualized and are therefore being interpreted in the way that statutes are. But it is unquestionably true that lawyers are paying much closer attention to the exact words of opinions than they did in the past. The words of an opinion are not *evidence* of the law, as they once were. They *are* the law.

Despite the initial attraction of turning back the clock, we cannot realistically hope to restore the common law to a state where it resides in the minds and memory of its practitioners, and where judicial decisions are merely evidence of what the common law is. The world has changed too much, and we have ventured too far down the road towards textualization to turn back.