December 2000

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Recommended Citation

Carson, Bryan; Montgomery, Jack G.; and Strauch, Bruce (2000) "Legally Speaking-Written Law From Gutenberg to the Internet-A Historical Perspective," *Against the Grain*: Vol. 12: Iss. 6, Article 27.

DOI: <https://doi.org/10.7771/2380-176X.3113>

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LEGAL ISSUES

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Legally Speaking — Written Law from Gutenberg to the Internet: A Historical Perspective

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Imagine a world with no written law. A world where what the authorities say is the law. Would our fundamental freedoms survive? The publication of our laws constitutes one of the safeguards of our liberty.

Last month I discussed the history of the written law from the Sumarians through the ages. This month's column will trace the written law from the Gutenberg Press through the development of the Internet. I will be focusing on the English background of the Common Law system, since most of us are already familiar with the American legal system and its research sources. This is a lot of ground to cover, so fasten your seat belts; here we go. . . .

In the days before the invention of printing, books were often written or copied by hand. There were some methods for automating book production, but these methods were not very efficient. For example, wood block carvings were used to reproduce illustrations.¹ However, this was a very labor-intensive process that was not suitable for mass-production of the written word.

Around the year 1450, Johannes Gutenberg (d. 1468) improved several existing technologies, and combined them with a new invention. "The four components of the press - moveable type, ink, paper and the actual press were all familiar tools at that time. The combination of these four elements created a revolution in the printing industry."² His revolution was the beginning of the printed book.

The Gutenberg Bible [the Bible of Forty-Two Lines] was published on August 15, 1456.³ This is the oldest surviving printed book. "In thirty years the printed word spread across Europe and was one of the reasons for the Renaissance period, a period of learning and artistic endeavor. Although most of Europe still remained illiterate, those that could read could now share ideas in a printed format."⁴

Now that the printed word was widely disseminated, legal publishing could begin. This was especially important for the Common Law system used in England and her colonies. The English case reporters actually predate the printing press, but mass production led to mass knowledge.

The English system of common law started with Henry de Bracton (1215--1268). Bracton collected the decisions of his court in a series entitled the Note Books. Bracton's work is commonly credited with beginning of the use of precedents and the rule of stare decisis.⁵ Later, during the reign of Edward I (reigned 1272-1307), a new series of decisions was created. This new reporter was called the Year Books. The Year Books were published annually from 1291 to 1535.⁶ Statutory reform began during the time of Edward I, when the oral law was put into writing.⁷ This process of codifying the oral law was prominent during the time of Edward I, but lost favor until the late 16th and early 17th centuries when Elizabeth I (reigned 1558-1603) and James I (reigned 1603-25) revived the codified law. Sir Matthew Hale (1609-1676) noted that during the time of Edward I:

"We are therefore to know, That there are these several Kinds of Records of Things done in Parliament, or especially relating thereto, viz. 1. The Summons to Parliament. 2. The Rolls of Parliament. 3. Bundles of Petitions in Parliament. 4. The Statutes, or Acts of Parliament themselves. And, 5. The Brevia de Parlamento, which for the most part were such as issued for the Wages of Knights and Burgesses. . . ." ⁸ <http://www.yale.edu/lawweb/avalon/econ/hale01.htm>.

Initially, the Year Books and the statutes were limited by the difficulty of reproducing them. However, after the invention of the printing press, it became possible to make copies of these reports for dissemination to regional centers. It was not much later that individual authors began to publish treatises on the law.

During the period between 1523 and 1530, Christopher Saint German (1460?-1540) wrote The Dialogue in English, between a Doctor of Divinity, and a Student in the Laws of England.⁹ Dyaloge in Englysshe bytwyxt a doctoure of dyvynyte and a student in the lawes of Englande; Dialogve in English, betweene a doctor of diuinitie, and a student in the lawes of Eng-land; Dialogue in English, betweene a doctor of divinitie, and a student the lawes of England; Doctor and student. 1598 This work consisted of "a dialogue between a doctor of the civil and canon law and a student of the common law, composed with the main object of contrasting the relations between equity and common law, but incidentally affording a good introduction to the principles of both."¹⁰ Doctor and Student was published in 22 editions between 1530 and 1765, when Blackstone's Commentaries replaced Saint German's work as the standard text for lawyers and students.

Of course, the road to written law in England was not without a few bumps. In 1607, John Cowell (1554-1611), who was Regius Professor of Law at Cambridge, published The Interpreter. The Interpreter was a law dictionary. However, Cowell put his own spin on the definitions of law terms. "[U]nder such words as 'king,' 'parliament,' 'prerogative,' 'subsidy,' [Cowell] the theory of absolute monarchy. The champions of common law took alarm, caused Cowell to be reprimanded by the council, and his book to be burned by the hangman."¹¹ Cowell's dictionary was a good attempt to define the terms of law, but also showed that legal dictionaries can also be subjective.

One of the most important works from this time period was Maxims of the Law, and A Reading on the Statute of Uses, by Sir Francis Bacon (1561-1626). The Maxims were a simplification of the existing laws. The principles that the Maxims espoused were scattered

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throughout the judicial and statutory law, but Bacon put them together in one place. Bacon's principal objective was to provide simple and memorable rules for deciding cases.¹²

Sir William Holdsworth (1871-1944), in his important work *A History of English Law*, recognized the importance of the *Maxims*. "Many another lawyer could have stated legal propositions accurately. He [Bacon] alone had the philosophical capacity, the historical knowledge, and the literary taste needed to select the subject matter and to shape the form of the books in which English law was to be restated"... While his contemporaries explained law in terms of antiquity and usage, Bacon worked from the basis of policy and principle."¹³

Bacon's *Maxims* were both a restatement and an oversimplification of the law. At the same time that the body of published law was growing, there was a reaction by the common law lawyers. Many lawyers wanted to be able to memorize the entire law. "[M]emory's growing salience and complexity as a cultural discourse ran parallel to its diminishing importance as a carrier of legal knowledge, with print contributing to both parts of the process."¹⁴ The *Maxims* were memorized by unlucky law students from the 1600s through the first half of the 20th century. (Luckily for us, the only time that law students must now learn the *Maxims* is if the student elects to take a Remedies class.)

One of the most prolific writers of the English law was Sir Edward Coke (1552-1634). Coke was chief justice of the king's bench from 1613 to 1616. Coke's most famous books were the *Reports* and the *Institutes*. "In his *Reports* (eleven volumes, 1600-15), which are models of terse and vigorous statement, a highly authoritative and almost complete statement of contemporary common law is given. In his *Institutes* (four volumes, 1628-44), a mass of antique learning is brought to bear upon the explanation and defence [sic] of the English legal system. Coke's title to fame is that he adapted the medieval rules of common law to the needs of the modern state, and recast these rules in an intelligible form, collecting and condensing the obscure and chaotic dicta of the *Year Books* and the abridgments."¹⁵

One of the last writers to successfully put all of the law together in one great treatise was Sir William Blackstone (1723-80). Blackstone's *Commentaries on the Law of England*¹⁶ was "not only a statement of the law of Blackstone's day, but the best history of English law as a whole which had yet appeared."¹⁷ Blackstone's *Commentaries* was a combination of general legal treatise,

legal history text, and philosophical manifesto. He delved into the "law of nature" and the "law of revelation."¹⁸ Within the law of nature, Blackstone identified those items that are *malum in se*, or bad because they are against the laws of nature. He also discussed acts that are *malum prohibitum*, or "bad because prohibited." According to Blackstone, "An action that is *malum in se*, therefore, violates not only one's duty to God (to live life for His glory), but also violates duty to self in that it could potentially compromise one's health and well-being."¹⁹ On the other hand, acts which are *malum prohibitum* are based on the laws that are established by the government. "Government has the authority to pass laws that set forth a rule of civil conduct only, and such laws must be in accordance with the law of nature."²⁰

Blackstone's work was influenced by the philosophy of John Locke (1632-1704). Locke's theory was that groups are influenced by three factors. These factors are God, Government, and Public Opinion. "God's authority derives from his status as creator, and natural or moral law is his benevolent will for us. Locke's political theory concerns the authority of governments, which he takes to be, at bottom, the right of all individuals to uphold natural law transferred to a central agency for the sake of its power and impartiality."²¹ Blackstone's work was a judicial adaptation of Locke's philosophy. Blackstone's application of Locke was tremendously influential in many ways. As works of philosophy and jurisprudence, the natural law theories of Locke and Blackstone were familiar to Thomas Jefferson and the founders of the United States. Jefferson was building on the work of Locke and Blackstone when he declared that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."²²

Another way in which Blackstone influenced American law and legal publishing was through the work of St. George Tucker (1752-1827). Tucker was a law professor at William and Mary in Williamsburg, Virginia. In 1803, he produced an edition of Blackstone's *Commentaries with notes of reference to the constitution and laws of the United States and of the state of Virginia*.²³ This book was one of the first works on the growing body of law in the United States, and was prized by legal practitioners for most of the 19th century.

The printing press has always had a great impact on United States law. The "prolific use of the printing press was just one way in which this 'new' technology shaped our

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and political ideology [sic] during revolutionary times.”²⁴ <http://desktoppub.about.com/compute/desktoppub/library/weekly/aa980226.htm> Another use of printing to disseminate viewpoints was with the publication of *The Federalist Papers* (also known as *The Federalist*), a discussion of the principles of constitutional government written by Alexander Hamilton, James Madison, and John Jay. The purpose of these essays was to persuade Americans to ratify the proposed constitution. The *Federalist Papers* consisted of 85 essays written anonymously under the name “Publius.” Although originally published in newspapers, J. and A. McLean published a bound edition in 1788.²⁵

For the first century of its existence, the United States relied on the case law reporters of individual states. Nominative reporters such as *Tyler’s Reports* in Vermont, *Lockwood’s Reported Cases* in New York, and *Cranch’s Reports* for the U.S. Supreme Court were the only way to find the law. Then, in 1879, a Minnesota lawyer named John B. West created a revolution in the retrieval of law.

West’s innovation was the creation of the “National Reporter System,” which published cases from all over the country. His first publication was the *North Western Reporter*, which covered cases from Minnesota and the north central region of the United States. This was followed by reporters for other regions, and sets to cover federal cases. “Until the advent of the *North Western Reporter* . . . the prompt publication of opinions was practically unknown to the legal profession in this country. In each State lawyers were compelled to wait in the first instance, on the convenience of their State reporter. . . and in the second place, upon the delays incident to the conflicting business demands of the local publishers.”²⁶ West’s publications “thus made it possible for lawyers to collect the judicial opinions of all states easily.”²⁷

At roughly the same time, a law book salesman in Chicago named Frank Shepard (1848-1900) noticed lawyers writing notes in the margins of cases to indicate whether they had been overturned on appeal or overruled by a later case. In 1875, Shepard began selling stickers that contained references to the later cases. Shepards evolved into the citator we are familiar with today because of a decision that “Rather than exercise editorial judgment on which cases ‘affected’ earlier cases (as lawyers did in their marginalia), the assumption was made that anytime one case is cited by another the link is worth noting.”²⁸

With West and Shepard, the modern legal publication system came into being. After the creation of the “National Reporter System” and *Shepards Citations* in the 19th century, the system of legal publishing became static. In the 1970s Lexis and Westlaw created new ways to search the law, but did not really change the way that law was recorded. However, in the 1990s, the availability of free Internet-based research provided a wealth of data for lawyers, librarians, and other researchers. Many courts and legislative bodies began to publish their data electronically. “As Gutenberg’s printing press ignited the Renaissance, computers, the Internet and networking are igniting the Digital Renaissance. . . .”

In 1997, the U.S. Federal Court System considered a proposal to change their accepted citation format. The new format, which was proposed by the American Bar Association, would have allowed lawyers to cite to documents found on the Web, as well as documents that are published in the official reporters or the West National Reporter System. The “vendor neutral citation” proposal (called that because it did not refer to the publications of any one particular company) would have allowed attorneys to cite cases by stating the year, a designator of the court, and the sequential number of the decision. Para-

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Endnotes

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2. “Johannes Gutenberg: a biography” (2000), at http://www.lysands.com/History/People/johannesgutenbu_tpy_ly.htm.
3. Tanya Demjanenko, “Johann Gutenberg” (2000), at <http://publish.uwo.ca/~tdemjane/johann.htm>.
4. Marino.
5. “BRACON, Henry de” *The LAW Museum Hall of Fame* (1999) at <http://www.wvliu.org/hallfame.htm>.
6. *id.* See also, John Maxcy Zane, *The Story of Law* 455-456 (2nd ed.) Liberty Fund (1998).
7. Zane at 456.
8. Matthew Hale, *The History of the Common Law of England: Part I*. Avalon Project (1997). At <http://www.yale.edu/lawweb/avalon/econ/hale01.htm>.
9. According to the OCLC Worldcat record, “The 1st was published (in 1530?) under title: Hereafter foloweth a dialyge in Englysshe bytwyxt a doctoure of dyuynyte and a student in the lawes of Englande, of the groundes of the sayd lawes and of consyence. The 2nd was published in 1530 under title: The secu[n]de dialyge in Englysshe bytwene a doctour of dyuynyte and a student in the lawes of Englande. Both dialogues published anonymously. Both are by Christopher Saint German. Cf. St. German’s Doctor and student / edited by T.F.T. Plucknett and J.L. Barton. 1974. P. xvi-xviii and 12ff./ The first dialogue is a modified translation of the author’s ‘Dialogus de fundamentis legum Anglie et de conscientia.’” Other Titles (from OCLC): *Dyaloge in Englysshe bytwyxt a doctoure of dyuynyte and a student in the lawes of Englande*; *Dialogue in English, betwene a doctor of diuinitie, and a student in the lawes of England*; *Dialogue in English, betwene a doctor of diuinitie, and a student in the lawes of England*; *Doctor and student*. 1598.
10. “Law Reports,” in *The Cambridge History of English and American Literature in 18 Volumes* Volume VIII, Chapter XIII, §12 (1907-1921), <http://www.bartleby.com/218/1312.html>.
11. *id.*
12. George S. Grossman, *Legal Research: Historical Foundations of the Electronic Age* 117 Oxford University Press (1994). Grossman is quoting Bacon in the inside quotation.
13. Allen D. Boyer, “Francis Bacon,” 92 *Michigan Law Review* 1622-1636 (1994). Quoting William Holdsworth, *A History of English Law* 489 (2d ed.) (1937). <http://ecl.st.usm.edu/paprzycka/spr97/sci/bacon.html>.
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15. “Equity and Common Law: Bacon and Cowell; Coke,” in *The Cambridge History of English and American Literature in 18 Volumes* (1907-21) V. VIII, Chapter XIII, §13, <http://www.bartleby.com/218/1313.html>.
16. Sir William Blackstone, *Commentaries on the Laws of England* 1st ed. Clarendon Press (1765). At <http://www.exlaw.com/library/bls-102.shtml>.
17. W. S. Holdsworth, *The historians of Anglo-American Law* 22 (Lawbook Exchange ed. 1994) Columbia University Press (1928).
18. Susan Richmond, “James Wilson, William Blackstone, and the Common Law” (2000), at <http://history1700s.about.com/homework/history1700s/gi/dynamic/offsite.htm?site=http://www.neopolitique.org/Np2000/Pages/Essays/Articles/jan98%2DWilson.html>.
19. Richmond.
20. Richmond.
21. “John Locke” *Routledge Encyclopedia of Philosophy* (CD-ROM Version 1.0) Routledge (1997).
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23. St. George Tucker, *Blackstone’s Commentaries: Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia. In five volumes. With an Appendix to Each volume, Containing Short Tracts upon such subjects as appeared necessary to form a connected view of the Laws of Virginia, as a member of the Federal Union* (Constitution Society ed. 2000) William Young Birch and Abraham Small (1803). <http://www.constitution.org/tb/tb-0000.htm>.
24. Jacci Howard Bear, “Volume Printing: Now and Then: Historical perspective and fun facts (or, ‘Why desktop printers and copy machines are so cool!’)” (2000), at <http://desktoppub.about.com/compute/desktoppub/library/weekly/aa980226.htm>.
25. *The Federalist*, (*The Federalist Papers*) <http://lcweb2.loc.gov/const/fed/fedpapers.html>.
26. John B. West, “A Symposium of Law Publishers” 23 *American Law Review* 396, 400 (1889). Excerpted in Grossman at 74.
27. Grossman at 76.
28. Grossman at 67.
29. “Comment on proposed citation rules,” E-mail from Bryan M. Carson to Joan Countryman, United States Judicial Conference (March 4, 1997), at <http://www.hyperlaw.com/jccite/054.txt>.
30. The 8th Circuit Rules of Appellate Procedure reads as follows: **Citation of Unpublished Opinion.** Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party who cites an unpublished opinion in a document must attach a copy of the unpublished opinion to the document. A party who cites an unpublished opinion for the first time at oral argument must attach a copy of the unpublished opinion to the supplemental authority letter required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion’s unpublished status. 8th Cir. R. 28A(i) (1998). <http://www.ca8.uscourts.gov/rules/local1298.pdf>.
31. *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir., 2000).
32. Vendor-neutral citation formats have been adopted in North Dakota, Louisiana, Maine, Mississippi, Montana, New Mexico, Oklahoma, South Dakota, Utah, and Wisconsin, as well as the U.S. Court of Appeals for the Sixth Circuit. See, Peter W. Martin, *Introduction to Basic Legal Citation* (2000-2001 ed.), at <http://www.law.cornell.edu/80/citation/citation.table.html>.
33. George Santayana, *The Life of Reason* v.1 Constable (1905-1906). Santayana (1863-1952) was one of the most acclaimed philosophers of the twentieth century.

graphs would be numbered. Although the U.S. courts did not adopt this proposal, the fact that it was seriously considered points out the enormous change that occurred in just a few short years.²⁹

As the importance of Internet research continued to grow, many courts posted opinions which had previously been unpublished. Unpublished cases had been accessible for a number of years through microfiche, newsletters, and looseleaf services. However, these cases were not very useful to attorneys because of court rules forbidding the use of unpublished cases.³⁰

In August of 2000, the 8th Circuit Court of Appeals declared that the rule forbidding the citation of unpublished cases was unconstitutional. The reasoning of the court was that "Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded."³¹ The 8th Circuit concluded that the Constitution did not allow courts to ignore previous decisions; to do so was an abuse of judicial power.

The ideas of vendor-neutral citation and use of unpublished cases are in many ways the last frontiers in legal research. Both of these concepts rely on access that has only been possible since the development of the Internet. The vendor-neutral citation format has been discussed or adopted in several states,³² and the use of unpublished opinions is on the rise. It remains to be seen what will happen with these two concepts.

Throughout the centuries, written law has give society rules to live by, and ideals to strive for. The printing press made reproduction of books feasible, and the Internet made publication easy. With the heritage of the printed law book keeping our liberty intact, we can start the new Millennium knowing that legal publishers and law libraries will play an important part in the world of tomorrow. As the future becomes the present, the written law ensures that we also look at our past. After all, those who cannot remember the past are condemned to repeat it.³³

duced at will in slide form for the library or by faculty on their Webpages? What about copying from more recently published books and periodicals or does the publisher or photographer now own the copyright?

ANSWER: Photographs of either two or three-dimensional works of art are also copyrighted. This is the case even though the underlying work is now in the public domain. The photograph of that work still may be protected since photographs are copyrightable regardless of subject. Many art history teachers, etc., have asked to have so-called "copy photography" exempted, but so far the Act has not been so amended.

Reproducing the photos is no different than copying any other copyrighted work for the library. For faculty Webpages, if access to the images are limited to one class, password protected, and available only one term without permission of the copyright holder, it may fall under the multiple copying guidelines since putting something on a restricted Website is the equivalent of multiple copying. However, teachers should closely follow those guidelines which includes restricting access to the class and removing access at the end of the term. Otherwise, it is infringement.

QUESTION: *An instructor wants to reproduce for her class reader a portion of an out-*

of-print book, published in 1970 by a small, independent publisher. The instructor has been unable to locate the publisher in order to seek permission, nor could she locate the printer. It appears that both are no longer in business. Further, the author cannot be found in the local phonebooks. Does the instructor have any other recourse for seeking permission to reproduce a portion of the book for the course reader? If a permission-granting source cannot be located, is it appropriate to apply the four factors delineated under the fair use section of the Copyright Act to evaluate whether or not to reproduce a portion of the work?

ANSWER: Not only is it appropriate to apply the four fair use factors, it is all that one can do. Then conduct a risk assessment. What is the chance someone will complain, and if they do so, what is the likely worst case scenario?

Since the publisher and printer appear no longer to be in business and the author is not in the phonebook, there are a couple of other things you might do. (1) Look for the author via the Internet and other phonebooks from surrounding towns. (2) Contact the U.S. Copyright Office to see if they can give you any clue from their records about the location of the copyright holder, since the defunct publisher may have transferred the copyright. Then, do the risk assessment. It may be that there is so little risk that the faculty member should just go ahead and reproduce the material for the course reader.

Papa Lyman Remembers (part of) The XX Century

by Lyman Newlin (Book Trade Counsellor, Broadwater Books) <broadwater@wnyip.net>

As usual, my story is being written just as the deadline approaches. But there's a coincidence with two notable dates. The first lines are being written on November 11, 2000. The November eleventh which stands out in my memory is that of nineteen hundred eighteen — the day ending World War I — Armistice Day as it was called until 1954 when its name was changed to Veterans Day and it became a national holiday commemorating the veterans of both world wars. On that day 82 years ago the town of Garrett, Indiana was wildly celebrating as were thousands of other municipalities large and small. But the Garrett celebration was atypical in that a large percentage of citizens were of German lineage. To have a German surname or accent or to be a pupil or in any way associated with a parochial school of Lutheran affiliation which used the German language (or had used it prior to America's entry in the War) was sure to be suspicious of being friendly to the "Enemy." Between our home and our school I had to pass a small Lutheran elemen-

tary school. If there were two or more fellow pupils going past that school and we could catch "one of them" we would chase him back into his school house. If we caught him he was due for a good pummeling. Kids were not alone in this physical display of "patriotism." During the first Armistice Day (11/11/18) celebration some "patriots" forced the Lutheran pastor to crawl on his hands and knees behind an American flag during a parade. I don't recall similar public behavior during or after WW II, although there was much "to do" about citizenry of Japanese lineage. Incidentally, just to show you how things come full-circle, I have been a Lutheran myself for more than three decades now, and both of my sons went to Lutheran catechism school.

The other recent and much more generally and cordially celebrated holiday was All Saints Day — Halloween. In fact this day is rapidly affronting Christmas as being generally more popular with kids. "Tricks or Treats" was not the way they did this holiday in my day—I can't

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