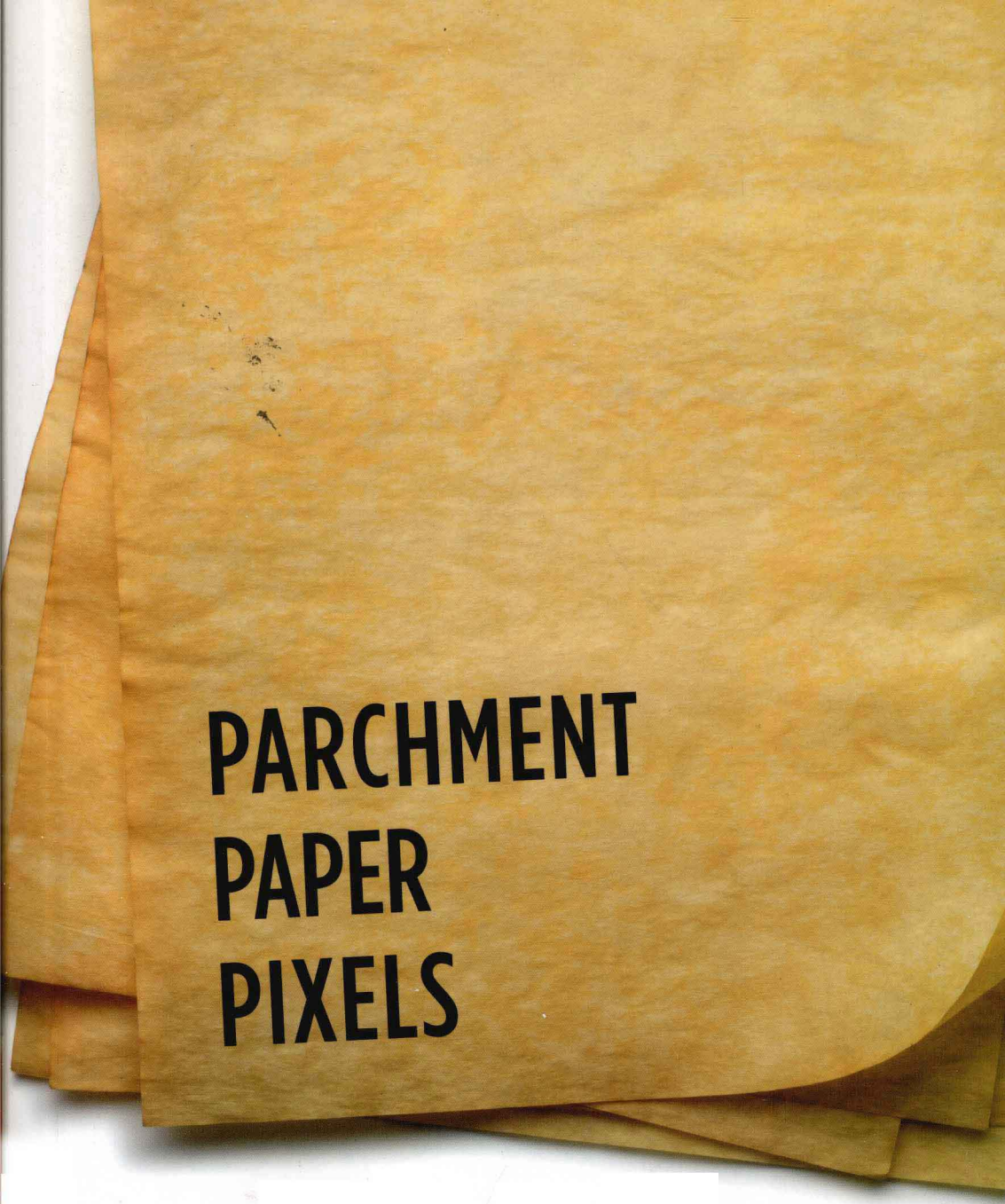

PARCHMENT PAPER PIXELS

Law and the Technologies of Communication

PETER M. TIERSMA

PARCHMENT PAPER PIXELS

Law and the Technologies of Communication

PETER M. TIERSMA

PETER M. TIERSMA is professor of law at Loyola Law School in California. He is the author of *Legal Language* and *Frisian Reference Grammar* and coauthor of *Speaking of Crime: The Language of Criminal Justice.*

The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London

Printed in the United States of America

19 18 17 16 15 14 13 12 11 10 1 2 3 4 5

ISBN-13: 978-0-226-80306-7 (cloth)
ISBN-10: 0-226-80306-6 (cloth)

Library of Congress Cataloging-in-Publication Data

Tiersma, Peter Meijes.
Parchment, paper, pixels : law and the technologies of communication / Peter M. Tiersma.
p. cm.
Includes bibliographical references and index.
ISBN-13: 978-0-226-80306-7 (cloth: alk. paper)
ISBN-10: 0-226-80306-6 (cloth: alk. paper) 1. Technology and law. 2. Communication in law. 3. Communication—Technological innovations. 5. Law—Technological innovations. 6. Law—Information tehnology. 7. Legal documents. I. Title.
K487.T4T54 2010
343.09'9—dc22

2010002014

♾ The paper used in this publication meets the minimum requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992

Acknowledgments

Anyone who carefully peruses the endnotes of this book will be able to surmise that it has been in the making for over a decade. I owe a debt of gratitude to many people with whom I have discussed the issues raised in the book or who have read and commented on some or all of it. In particular, I wish to thank Peter Alldridge, Stephen Barnett, Bob Brain, Paul Callister, Richard Cappalli, Charles Collier, Sydney DeLong, Jan Engberg, Edward Finegan, Lidewij van Gils, Victor Gold, Robin Kar, Daniel Martin, Michael Sinclair, Larry Solan, Elizabeth Traugott, and participants at workshops or presentations at Chicago-Kent Law School, the City University of Hong Kong, Loyola Law School in Los Angeles, the Law and Society Association, the Deutsch-Amerikanische Juristenvereinigung, the International Association of Forensic Linguists, and the Linguistics Department at the University of California in Santa Barbara. Research assistance was provided by Loyola Law School graduates Dale Kim, Scott Bishop, Heidi Brooks, Irene Farinas, and Shiva Heydari (in chronological order). I also benefited from suggestions made by the reviewers and editors of the University of Chicago Press. Finally, the writing of this book was supported financially by the Joseph Scott Fellowship and later by the Honorable William Matthew Byrne Chair at Loyola Law School in Los Angeles.

A longer version of chapter 6 was published by the *Notre Dame Law Review* as "The Textualization of Precedent" (82 Notre Dame L. Rev. 1187 [2007]). Bits and pieces of this book may also be found in various articles that I have written over the years, but as with any authoritative legal text, this book is currently the definitive and complete expression of my thoughts on the matter and supersedes any positions I may have taken, whether orally or in writing, on any previous occasion.

As to my ruminations about what the future will bring, I will doubtless be proven right in some areas and wrong in others. If this book were published only in electronic format on a website, I could revise it as developments in the technology of communication occur. It would always be up-to-date, but never finished. Would that be better than fixing it in print, which provides stability and finality but also guarantees obsolescence? These are the sorts of issues I hope to address.

Contents

1
Introduction

Written texts are ubiquitous in our legal system. Lawyers and judges create such texts just about every day, and when they aren't drafting them, they are often struggling to interpret and apply them. Law is surely one of the most literate of all professions. Legal texts are also extremely important to the rest of society. Documents like statutes, judicial opinions, deeds, wills, and contracts literally govern much of our lives.

Currently, the nature of such texts is undergoing tremendous changes. Many of these changes result from developments in the technologies of storing and communicating information. For thousands of years, the primary technology for storing and communicating legal information has been writing. During the past millennium or two, writing has generally consisted of using ink to place marks on paper or parchment. The process could be done by hand or by a mechanical device like a printing press.

Today many people do most of their writing by typing on a computer keyboard. The texts that they produce may reside only on a hard disk or other electronic storage medium. What appears on the screen is not really letters of the alphabet but rather tiny dots, called pixels, which create the impression of writing but which can also represent images. Not only are legal texts stored on computers,

but the Internet has made it increasingly possible to communicate those texts electronically.

Because law is such a textual enterprise, one would expect that the technologies of storing and communicating legal texts would have been the topic of much discussion by the profession. Lawyers do indeed concern themselves with these issues, but they almost always do so within the context of a specific area of the law, such as requirements that contracts or wills be in writing. Surprisingly, even legal academics have paid relatively little attention on a more general level to the nature of legal texts, the literary conventions that produced them, and the technologies used to store and disseminate them. This book aims to start remedying that deficiency.

Writing, Civilization, and Law

During the past few decades, scholars of literature, psychology, education, history, anthropology, linguistics, and related fields have begun to investigate the evolution of writing and its impact on our culture and its institutions. David Olson has suggested that the development of alphabetic writing systems gave Western civilization many of its defining features.[1] According to an influential article by Jack Goody and Ian Watt, writing made it possible to begin distinguishing myth from history.[2] It is therefore "not accidental that major steps in the development of what we now call 'science' followed the introduction of major changes in the channels of communication in Babylonia (writing), in Ancient Greece (the alphabet), and in Western Europe (printing)."[3]

Some scholars suggest that the development of writing, especially the phonetically based alphabet that arose in ancient Greece, has not merely influenced our civilization and culture in dramatic ways, but has fundamentally altered how people think. According to Eric Havelock, "Greek literacy changed not only the means of communication, but also the shape of the Greek consciousness." In a similar vein, Walter Ong argued that the development of literacy fostered abstract thinking, categorization, and logical deduction.[4]

Although no one doubts that the rise of literacy has had a profound influence on human civilization, the extent of its impact is controversial. Even more so is the issue of whether and how literacy influences cognition.[5] Nonetheless, a literate society is quite different from one that is purely oral. The debate is not about *whether* writing has had an impact on our civilization, but rather about *how* and *how much*.

The spread of literacy is also held to have had important ramifications for our legal systems. Goody has posited that writing effectively distinguishes custom from law.[6] And the ability of the population to read and write is claimed to have promoted important political and legal institutions, democracy in particular.[7]

One of the central aims of this book is to investigate these issues as they relate to the law. What impact does the adoption of writing have on the law? What is the role of writing in our legal system today? What is the nature of legal texts? And how are written wills, contracts, or statutes different from those that are retained solely in the minds and memories of those subject to them?

The Technologies of Writing and Communication

A closely related issue is the technologies of communication. Despite the undeniable effect that developing literacy had on ancient civilizations, the process of writing changed very little over the ensuing millennia. Essentially, it involved an individual placing meaning-bearing marks of some kind on a medium (parchment, paper, stone, wax, etc.) that was capable of displaying those marks. We still do this today when we write with pencil or ink.

Only in the fifteenth century did the next major revolution in communication technology occur. Before this time, scribes had to laboriously write and copy texts one at a time. As a result, written materials were expensive and scarce. The invention of the printing press made relatively cheap and identical copies of a text widely accessible. Like writing, printing has been associated with monumental societal movements, such the Renaissance, Protestantism, and the scientific revolution.[8]

As we will see, the printing press also had implications for several areas of the law. It now became possible to create and distribute very large numbers of copies of important legal documents, especially statutes and judicial opinions. For example, when the English parliament first started to enact statutes, lawyers and judges would have been unlikely to rely very much on the exact words of the law. At best, they would have had a handwritten copy of an original document contained in a government archive. But once they had a printed copy that was certified to be an exact reproduction of the text that Parliament had debated and adopted, the words in that text began to assume much greater significance.

Interestingly, there are other major developments in the technologies of communication, such as radio, telephones, and television, that have had

a huge impact on our lives and culture. Yet they have had little influence on the law. True, it is almost impossible these days to imagine the practice of law without telephones. And television depicts one trial after the other, both real and fictional. Still, the nature of the law and our legal system (as opposed to the daily practice of the profession) have scarcely been affected by these technologies.

Why is it that the development of writing and printing have had much greater influence on the law than have radio, telephones, and television? All of them are important technologies of communication. The difference, I believe, is that law has traditionally been a predominantly textual enterprise. Radio, telephones, and television transmit sound and images. Law, on the other hand, relies very heavily on the written word.

More recently, the technology of writing and the nature of the texts that it produces are undergoing epochal changes caused by the development of computers, mass storage devices, and the Internet. Now that cases and statutes are easily and cheaply accessed online, the shelves of books that traditionally line the walls of law firms have largely disappeared or become decoration. Lawyers are increasingly filing documents such as motions and briefs electronically, rather than sending a courier to court with a bundle of papers. Almost all legal research is conducted via computers and the Internet. Electronic contracting has become routine.

Some scholars take the view that computers and the Internet will have as great an impact on our civilization as the development of writing and printing did. Jeff Gomez, in a printed book bearing the title *Print Is Dead*, points out that reading on a computer screen is a vastly different enterprise than reading out of a book: "What's going to be transformed [is] the ability to read a passage from practically any book that exists, at any time you want to, as well as the ability to click on hyperlinks, experience multimedia, and add notes and share passages with others. All this will add up to a paradigm shift not seen in hundreds of years."[9]

A more sanguine view is taken by Nicolas Carr, who has written extensively about technology. He recently published an article with the title "Is Google Making Us Stupid?"[10] The basic point is that people read less than they used to, or read differently. Carr quotes people who were once voracious readers but who have stopped buying books altogether, or who claim to have lost the ability "to read a longish article on the web or in print."[11] A survey published by the National Endowment for the Arts in 2004 found a "dramatic decline" in the percentage of the population that reads literature (defined as novels, short stories, plays, and poetry).[12]

Similarly, research from University College London, sponsored in part by the British Library,[13] reports that people seeking digital information on the Internet do not usually read the content of websites from start to finish. Instead, they engage in a type of "skimming activity": "they view just one or two pages from an academic site and then 'bounce' out, perhaps never to return. The figures are instructive: around 60 per cent of e-journal users view no more than three pages and a majority (up to 65 per cent) never return."[14] According to the authors, people searching for information online do not engage in "reading" in the traditional sense; rather, they are browsing through titles, abstracts, and content pages looking for "quick wins."[15] Carr, who cites this study, concludes that Internet users today not only read differently, but they also think differently.[16] These claims, of course, mirror those made regarding the impact of writing, and like those claims they should be taken with a grain of salt.

Nonetheless, there can be no doubt that many aspects of our lives and culture are being radically transformed by modern technologies of communication. This is true also of the legal world.

Technology and Law

A scholar who predicts that computers and the Internet will result in dramatic changes in legal culture is Ethan Katsh. He observes that, as opposed to conventional writing or printing (that is, traditional text), electronic media distribute information much more broadly and quickly, that users interact differently with it, that images become relatively more prominent, and that information can be organized more flexibly.[17] Electronic media are less stable, less fixed, and less tangible than writing and printing.[18] And the boundaries between different types of media (such as text, graphics, and sound) are beginning to blur.[19] Katsh predicts that these developments will have significant consequences for the system of precedent and how lawyers research and access the law.

The process is well underway. The best example is contracts, which today are routinely transacted online, sometimes without a scrap of paper being exchanged or printed. In a similar vein, lawyers are more likely to read a case or statute online these days than in a book.

Yet while the media are changing, writing and text remain tremendously important to the law. A will or testament still invariably consists of ink on paper, without multimedia content or other modern embellishments. Statutes remain almost entirely written text, even though they are widely distributed by electronic means and could easily include sound, pictures,

or video. Likewise, judicial opinions remain mostly text, although they occasionally contain graphics (usually in an appendix) and in one instance contained a reference to a video available on the court's website.[20] These exceptions prove the rule, however.

Past experience suggests that it is easy to overstate the potential impact of new technologies on the law. In 1992, two legal scholars, Ronald Collins and David Skover, published an article entitled "Paratext" in the *Stanford Law Review*.[21] They suggested that, although our legal consciousness is mediated by print, nontextual forms of storing and transmitting information, which they call "paratexts," will ultimately challenge the dominant role of traditional text and writing in the legal system. Collins and Skover predicted that paratexts, which can include any form of electronic communication, will come to supplement and eventually replace written evidence and documentation. The official record of trials, as well as wills and contracts, will become paratext. This will rapidly change the "Gutenberg mindset of the printed word."[22]

Collins and Skover were mainly concerned with audio and video recording, since they were writing before computers were common in courtrooms and law offices. It is true that some courts have replaced the stenographer with mechanical audio or video recording machines. Yet, for the most part, a videotaped record must be transcribed into written text and be printed on paper for purposes of appeal.[23] Moreover, video has not replaced written text in most other areas of law. Video can be a useful evidentiary tool, but when the law requires wills and contracts to be in writing, paratext has so far not proven to be an acceptable alternative.

We should also be cautious in drawing causal connections between technological changes and our culture in general or our legal system in particular, as Richard Ross has emphasized. The effect of social, economic, and political factors should not be ignored.[24] The invention of alphabetic writing in ancient Greece did not cause the rise of democracy in Athens, although it may have enabled or promoted its development. Nor can we predict with complete confidence the changes that modern technology will cause.

Overall, however, the trend is clear. The traditional supremacy of written text, in the sense of ink on paper, is being challenged. Whether it will be entirely supplanted is open to serious doubt, but it will almost certainly be demoted—or enriched—by modern technology.

Another aim of this book is therefore to assess the impact that changes in the technologies of communication have had or may in the future have on the law. It goes without saying that the daily practice of lawyers is being

profoundly affected by computers and the Internet. In addition, the nature of the law and of legal transactions is also changing. Just as a written statute is different from an oral decree, a statute printed on paper and bound into a book is not the same as a statute that is typed into a computer and accessed on the Internet.

Speech, Writing, and Conventions of Literacy

To set the stage, we will begin in chapter 2 by examining the phenomenon of writing more closely, concentrating on how it differs from speech. In many respects, writing is nothing more than a means of representing speech in a more enduring form. Yet this simple observation has tremendous implications. For example, the relative permanence of written language makes it possible for a text to be transmitted over great distances and long stretches of time. Writing may not be essential to governing a large state or empire, but it certainly facilitates the process.

Moreover, as societies become more literate, a strong belief tends to arise that it is good for laws, as well as for many private legal transactions, to be reduced to written text. When that happens, there is a tendency for the text of those writings to become increasingly authoritative, a process to which I refer as *textualization*.

Historically speaking, the earliest legal texts were almost always records of spoken transactions. As such, they functioned merely as evidence of an underlying oral event. Over time, however, the written text often became regarded not just as evidence of a legal event, but as constituting the event itself. The text was no longer just a record of the law. Rather, it had become the law. Statutes therefore had become textualized.

Legal professionals textualize a contract or statute not just by writing down the essence of what they agreed to or decided. They carefully choose and edit the exact words that will function as a definitive statement of the terms of the will, contract, or statute. The essential transaction is no longer the act of reaching agreement or making a decision; it is the text that the authors created. It is therefore not surprising that those who need to interpret a contract or statute—often judges—tend to take the words in the text very seriously.

Textualization is just one of the literary practices of the legal profession. Of course, most of the textual conventions of lawyers and judges (such as rules relating to spelling) are the same as those in other realms of human endeavor. Yet some of the law's distinctive literary practices, in particular textualization, are unknown to the lay public. These conventions have the

potential to create problems for those who engage in a legal transaction but are not familiar with the literary practices that govern the drafting and interpretation of the resulting text.

Having explored in general the nature of writing and the textual practices of the law, we will be in a better position to examine and understand specific categories of legal texts. Although we will spend a fair amount of time discussing the evolutionary development of wills, contracts, statutes, and judicial opinions, our concern is not in the first instance with what happened hundreds of years ago. The history is often interesting for its own sake, but the reason for exploring it here is primarily to illuminate our current situation. Thus, by comparing oral lawmaking in medieval England with the highly literate process that is used today, we can better understand the nature of modern statutory texts.

Wills

Testaments or wills were typically declared orally in the presence of witnesses in Anglo-Saxon England. After literate clerics came to England around AD 600, members of religious orders would sometimes write down the terms of a will. Such documents were merely evidentiary, and for a long time they were not considered very good evidence when compared with the memories of the witnesses who were present.

As the society became more literate, however, writing gained greater respect, so that the written will came to be viewed as the best evidence of what happened. Eventually, the concept of a will (a word that originally referred to a mental state) became coextensive with the document that bore this title. More recently, the text of a will has come to be regarded as the final and only expression of the testator's intentions. Wills have, in other words, become highly textualized.

The literary conventions of will making have often created difficulties for the testators on whose behalf the will is deemed to "speak." For instance, suppose that a testator makes informal changes to a will after it is executed, such as crossing out one amount of money and substituting a larger amount. Such changes are usually invalid and in some jurisdictions can have the perverse effect of invalidating the gift entirely, even if the testator meant to increase it. Also surprising to most people is that in many American states a will that is handwritten and signed by the testator is more likely to be carried out than one that is typed, signed by the testator, and notarized.

The legal system needs to become more aware of ordinary conventions and beliefs relating to texts, especially when they conflict with legal conventions regarding writing. These problems are likely to become even worse as people begin to type and store their testamentary desires on computers, which the law of wills does not currently recognize as being "writings" (and which are therefore invalid).

Contracts

Contracts are interesting from our perspective because they can still be entirely oral, as in early England, or they can be made orally with a written memorandum as evidence, or they can fully textualized. This is reflected in the fact that the word *contract* is ambiguous: it can refer either to an agreement (which is a mental state) or to the document containing the agreement.

Whereas writing and textualization are mandatory in wills law, parties to a contract can generally choose whether or not to textualize their agreement. The customary way of textualizing a contract is to add what is called an integration or merger clause, which usually says something to the effect that this writing is the final agreement between the parties and that it supersedes any prior oral or written terms. From a legal point of view, the agreement is no longer something contained in the parties' minds; instead, it consists of the text that they have created.

On the positive side, textualization adds a great deal of certainty to commercial transactions. Yet it can, once again, become problematic when ordinary consumers are involved. Most people are not familiar with the textual conventions associated with merger or integration clauses, which can bind them to the text of an agreement that is at variance with what may have been said or negotiated. And the clauses are often buried in small print or lurk behind an easily overlooked link on a web page.

Furthermore, rapidly evolving communication technology has dramatically transformed the nature of the contractual text. Unlike wills law, which continues to demand writing on paper and very strict execution requirements (typically, a signature by the testator in the presence of two witnesses), it has become extremely easy to enter into a contract on the Internet. The very loose requirements of electronic contract formation (best illustrated by "one-click shopping") promote quick and easy commercial transactions, a boon for both businesses and consumers. Yet modern contracts are often imposed with so little formality (by merely opening

a box of software, for instance, or by clicking on a link of a website) that consumers may find themselves unwittingly bound by a text that contains highly one-sided terms, often reinforced by an integration clause whose effect they do not understand. Whereas the textual practices of wills law are sometimes too strict, those relating to contracts may be too lax.

Statutes

We will next discuss statutes. The earliest laws written in English were various Anglo-Saxon codes. These codes were almost entirely evidentiary or descriptive of current customs. But in the twelfth and thirteenth centuries, formal efforts at lawmaking become evident. These early statutes were written down by a clerk after a legislative proposal had been adopted. They were generally quite loosely interpreted by judges, who might not even have had a copy of the statute in their possession. It's hard to be a textualist if you don't have a text!

Eventually, a formalized procedure for enacting statutes developed, whereby Parliament, with royal assent, enacted written proposals into law. The words of a statute were no longer merely evidence of what Parliament and the king decided; rather, those words came to be viewed as constituting the statute. In other words, statutes had become highly textualized. Judges in consequence began to pay more attention to the text.

Printing was the next major development. Early printed versions of statutes were not always reliable. But by the eighteenth century, accurate printed copies that contained the exact words that Parliament had enacted became widely available. Courts began to scrutinize the text of statutes ever more closely. Although the practice has been moderated recently, a fairly literal method of interpreting statutes is still common in England.

In the United States, legislatures also routinely enact written text, and accurate copies of legislation have been widely accessible since the founding of the republic. Nonetheless, American courts have never adopted as literal an approach as those in England. This difference illustrates that while textualization may enable a more literal style of interpretation, it does not require it or inexorably lead to it. Yet once the elements are in place, the attractions of a textual mode of interpretation are strong, as the recent rise of textualism in the United States has illustrated.

Statutes will almost certainly remain written text for the foreseeable future. Their dissemination in an electronic format makes it possible to add multimedia content and to change them almost instantaneously when the need arises. But do we really want to be ruled by a paperless statutory re-

gime that is maintained on a legislative website subject to continual updating? I may be hopelessly old-fashioned, but I greatly prefer to be governed by statutes that cannot be frequently changed in the way that an Internet site updates stock prices and its weather report.

Judicial Opinions and Precedent

The other major source of law in a common law system consists of judicial opinions (usually called *judgments* in Britain). In contrast to statutes, which have long been regarded as quintessentially *lex scripta* ('written law'), English lawyers and judges traditionally considered the common law, as revealed in their judgments, to be *lex non scripta* ('unwritten law'). These lawyers were aware, of course, that many judgments were written down and published in books of reports. But the writing was done by reporters sitting in the courtroom, not by the judges themselves. The reports were summaries of what the lawyers and judges said in court, followed by a brief description of the result. There were sometimes multiple and somewhat different reports of a single case, and some of them were not considered very accurate.

More recently, the reports of cases in England have become quite reliable. Nonetheless, English judgments have resisted the textualization that is so evident in other areas of the law. Consequently, the law that is contained in those judgments remains surprisingly oral in style. The main reason is that English judicial opinions were traditionally delivered by word of mouth, as they often still are today. Judges pronouncing an oral (extempore) judgment choose their words carefully, but because of the limitations of the medium, they simply cannot plan and fine-tune the wording of their decisions to the extent that a writer can.

It goes without saying that English lawyers pay close attention to what judges say in their judgments, but they do not dissect the language in the way that they would analyze the text of a statute. They are concerned with recovering the gist or essence of the judge's words, especially in how it reveals the reasoning that the judge used to determine the outcome. For these and similar reasons, it is fair to say that the common law of England, and in particular the notion of precedent, is relatively more conceptual and less textual than its American counterpart.

The orality and conceptual nature of English common law adjudication has largely disappeared in the United States. Early in the history of the republic, most jurisdictions began requiring appellate judges to issue opinions in writing. Courts also adopted the practice of having one judge draft