

“If Rules They Can Be Called”

An Essay on *The Law of Judicial Precedent*

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I. Introduction

When judges rely on a new source of legal authority created by non-governmental actors, we ought to pay attention. In 2016, Thompson Reuters published *The Law of Judicial Precedent*,¹ written by Bryan A. Garner and twelve appellate judges.² The judges, of course, were not acting in their official capacities when they produced the text, and Bryan Garner, the author of more than two dozen law-related books,³ holds no official government position. This is nothing new, you might be thinking—third parties have been creating treatises that collect and report the law since before the U.S. legal system even existed. In fact, this book is based on a 1912 treatise that set forth the very same set of doctrines.⁴ And yet, I argue here, the creation and ready acceptance of a text codifying this particular set of unwritten norms is well worth our notice.

In our current legal system, judges have the freedom to choose any source of authority to support their decision, their choices constrained only by social norms.⁵ The once limited universe of legal sources is now virtually unlimited,⁶ and there is no process for vetting the sources

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¹ BRYAN A. GARNER, ET AL., *THE LAW OF JUDICIAL PRECEDENT* (2016).

² Those co-authors are Carlos Bea, Rebecca White Berch, Neil M. Gorsuch, Harris L. Hartz, Nathan L. Hecht, Brett M. Kavanaugh, Alex Kozinski, Sandra L. Lynch, William H. Pryor Jr., Thomas M. Reavley, Jeffrey S. Sutton, and Diane P. Wood.

³ See *Books by Bryan Garner*, LAW PROSE, <https://lawprose.org/bryan-garner/books-by-bryan-garner/> (last visited May 18, 2022).

⁴ HENRY CAMPBELL BLACK, *HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS* (1912).

⁵ Amy J. Griffin, *Problems with Authority*, 97 ST. JOHN’S L. REV. __ (forthcoming 2023).

⁶ See, e.g., Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CALIF. L. REV. 1673 (2000); Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909 (2011); Frederick Schauer & Virginia Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 49 (2000).

judges choose to rely on. Any evaluation of sources cited comes either from judicial colleagues or from third parties, such as scholars and practitioners. In other words, there is no legal authority on legal authority. The lack of any systemic means of either tracking or evaluating all unofficial legal authority cited creates the risk that judicial norms about legal authority are adopted without sufficient reflection or evaluation—a problem bigger than any one text.⁷

Here, I consider just one new source of authority that judges have started to rely on: *The Law of Judicial Precedent*. This self-styled “hornbook” contains 93 “Blackletter Principles” related to the operation of precedent in the U.S. legal system. The principles address subjects like the nature and authority of precedent, the weight of decisions, the law of the case doctrine, treatment of state law in federal court, and the weight of foreign precedents. Each of the 93 principles is presented in boldface, followed by several pages of explanation. For example, the very first principle states, “**Like cases should be decided alike. Following established precedents helps keep the law settled, furthers the rule of law, and promotes both consistency and predictability.**”⁸ The authority cited in support of this particular principle includes scholarly books and articles, Supreme Court cases, a Ninth Circuit case, and *Black’s Law Dictionary*. In this manner, over the course of 783 pages, the text sets forth what it has labeled the “law” relating to the operation of judicial precedent. The law of judicial precedent, in turn, determines what substantive law principles courts must follow when they are articulated in cases. Reading this text made me wonder, who gets to decide what counts as law?

Rules about the operation of precedent—which cases and which parts of cases are binding—are almost entirely uncoded. Like other uncoded judge-made rules, operational rules are not always easy to pin down—they are sprinkled throughout cases in no particular order, they are not always expressed in identical language, they evolve, and there are often conflicting versions. To find common law rules, a researcher can look directly at written opinions themselves, finding them with the help of digests prepared by publishers (electronic or otherwise) or by using direct word searches in electronic databases. In some common law fields, the law has been codified by a Restatement or a Uniform Act. Otherwise, in fields without an organized effort to codify, treatises may be the easiest way to find common law rules, and the closest thing to a codified version.

And so, when *The Law of Judicial Precedent* was published in 2016, many judges and lawyers were surely pleased. Not since 1912 had anyone

⁷ Griffin, *supra* note 5.

⁸ GARNER ET AL., *supra* note 1, at 21.

attempted to synthesize a set of rules on the topic.⁹ The book, a self-described “conventional description of contemporary practice” in the U.S. system,¹⁰ collects and organizes a lot of very useful information. It has somewhat quietly entered the realm of authoritative sources. Since its publication in 2016, it has been directly cited as support in 149 judicial opinions¹¹ (77% federal, 23% state) by 78 different judges (including 7 of its authors, one of them Supreme Court Justice Neil Gorsuch.)¹² In the scheme of things, 149 opinions in five years may not seem like very many. But it is quite possible that number will continue to increase over time and, in my view, even the current level of citation is sufficient to establish that the book has acquired some authoritative status.

A book review in the *Harvard Law Review*, authored by a Ninth Circuit judge and two of his former clerks shortly after publication, was quite positive: “The main contribution of *The Law of Judicial Precedent* is identifying and assembling in one volume the various problems and questions of precedent that practicing lawyers and judges might encounter, as well as guiding principles for resolving them.”¹³ According to the review authors, it does what a treatise is expected to do—“organize and clarify an area of law for the sake of reference.”¹⁴ That review acknowledges possible “skepticism”¹⁵ about the project (noting that “[t]o begin with, principles of precedent often seem more like modes of reasoning than firm rules”)¹⁶ but puts the skepticism aside as likely unfounded and chooses to “take[] up the treatise on its own terms as a practice guide for working lawyers and judges.”¹⁷

I do not take up the treatise on its own terms here. Instead, I question its core unstated premise: that judicial practices related to precedent are appropriately presented as definitive blackletter law. Which is not to impugn the book’s quality—it is an impressive synthesis of material from a wide variety of sources. But the book bypasses critical questions about the origin and status of practices related to the operation of precedent,

9 BLACK, *supra* note 4.

10 GARNER ET AL., *supra* note 1, at 18.

11 As of the end of 2021, cited directly 114 times by federal judges and thirty-five times by state court judges. I excluded references that were not direct, such as a citation to another case that had referenced *The Law of Judicial Precedent*.

12 In addition to Justice Gorsuch, it has been cited by Judge William H. Pryor Jr. (22 times); Judge Harris L. Hartz (5 times); Judge Sandra L. Lynch (5 times); then-Judge Brett Kavanaugh (3 times); Judge Jeffrey S. Sutton (3 times); and Judge Carlos Bea (2 times).

13 Paul J. Watford, Richard C. Chen & Marco Basile, *Crafting Precedent*, 131 HARV. L. REV. 543, 549 (2017).

14 *Id.*

15 *Id.* at 548.

16 *Id.* at 547.

17 *Id.* at 544; see also John G. Browning, *Examining Precedent*, 80 TEX. B.J. 500, 500 (2017) (“The tome is an invaluable resource for all lawyers, judges, and law students, and appellate practitioners in particular will find it indispensable. . . . *The Law of Judicial Precedent* is a ‘must have’ for those in the legal profession and merits a place on any lawyer’s bookshelf.”).

labeling them “law” without discussion. The book tells us the doctrines related to precedent are “sorely in need of elucidation,”¹⁸ but its goal of organizing and textualizing judicial decisionmaking practices as specific, concrete rules may have unintended consequences. The codification of judicial norms is, at the very least, worthy of discussion.

II. The codification of informal judicial practices

If “the law of judicial precedent is a dizzying matrix of doctrines and subdoctrines”¹⁹ (and I don’t disagree with that description), why wouldn’t we want a treatise synthesizing them in an orderly fashion for easy reference? As is true of so many things, the fact that there is a market for such a treatise does not warrant its existence. There are valid reasons to pause and reflect on its publication. Is it a good idea to transform a complex, messy set of judicial practices into neat, numbered principles—to codify them? The rules related to the operation of precedent are distinct from other sorts of legal rules, and may not be well suited for codification. The “law of judicial precedent” is based on the social practices of the judiciary, with no textual source. Such practices are foundational rules governing the process of judicial decisionmaking, often intertwined with and even indistinguishable from what we label judicial reasoning. Presenting these practices as rigid rules minimizes their subtle, complicated, evolving nature. Moreover, the codification of these sorts of rules allows judges—the creators of the rules—to distance themselves from the rules, citing them as if judges themselves had no role in their creation: a sort of performative formalism.

A. Operational rules about precedent are informal norms

Rules about the operation of precedent comprise a unique category of foundational norms and practices distinct from traditional common law rules. Rules about what counts as binding law are secondary (or second-order) rules, not substantive laws that govern public conduct. Secondary rules are rules *about* the primary rules, determining how those primary rules can be created, recognized, interpreted, applied, and so on.²⁰ In particular, rules governing the operation of precedent guide judicial decisionmaking, dictating whether judges should defer to existing judicial opinions, and which parts of those opinions judges should defer to. They

¹⁸ GARNER ET AL., *supra* note 1, at 19.

¹⁹ *Id.* at 781.

²⁰ H.L.A. HART, *THE CONCEPT OF LAW* 94 (3d ed. 2012).

authorize the creation of substantive common law, and are thus in some sense prerequisites for substantive rules. Unlike other secondary rules, such as rules of procedure, rules about what counts as law are largely informal—unwritten.

One of the distinguishing features of rules about precedent is the way they are created: they are norms, arising from the ground up.²¹ They cannot be traced to any moment of deliberation or any formal process of rulemaking. The cornerstone doctrine of *stare decisis* itself cannot be traced to any single case or enacted law—there is no single origin point for it. Trace back citations to *stare decisis* in any Supreme Court decision—the earliest cases only recognize a pre-existing rule without purporting to invent it. As Henry Campbell Black wrote in his 1912 treatise on the laws of precedent, “the rules which govern the subject,—if rules they can be called, . . . rest only in judicial discretion and have no stronger sanction than judicial habit.”²² To the extent that they dictate what is binding on courts, they are, in H.L.A. Hart’s terms, rules of recognition,²³ or what others have called practices of recognition²⁴—the practices that determine what counts as law.

Because such practices are created by judges and often articulated in judicial opinions, they are easily conflated with substantive common law rules. But thinking about rules of precedent as common law poses a vexing circularity. Socially accepted practices that *give* authoritative status to statements in judicial opinions (such as *stare decisis*) cannot derive their authoritative status *from* statements in judicial opinions. In other words, it is circular to say that rules articulated in judicial decisions have the authority to establish which parts of judicial decisions are authoritative. These sorts of operational ground rules require judicial consensus; it is the consensus that makes them authoritative.

Evolving practices regarding judicial precedent are not specific rules derived from the resolution of a particular case or controversy.²⁵ Dicta

21 See, e.g., Griffin, *supra* note 5; Grant Lamond, *Legal Systems and the Rule of Recognition: Discussion of Marmor’s Philosophy of Law*, 10 JRSLM. REV. LEGAL STUD. 68, 76 (2014); Frederick Schauer, *The Jurisprudence of Custom*, 48 TEX. INT’L L.J. 523, 531–32 (2013).

22 BLACK, *supra* note 4, at v.

23 HART, *supra* note 20, at 100.

24 Schauer, *supra* note 21, at 532 n.65 (“[T]he ultimate rule of recognition is best understood as a collection of practices (in the Wittgensteinian sense), practices that may not be best understood in rule-like ways.”); A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 73 (A.W.B. Simpson ed., 1973).

25 KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 212 (2012) (“A later court is likely to take the view that in such large matters of judicial practice, a particular court cannot settle matters with the degree of finality that would attach to narrower solutions of substantive law. . . . Mel Eisenberg is persuasive that there are basic institutional principles of common law interpretation, though these have developed over time rather than being established by particular precedents.”).

does not suddenly become authoritative because one judge decided to defer to it in one opinion. Courts do not necessarily follow a rule because another court (even one with the power to bind the subsequent court) has articulated it.²⁶ Thus, ground rules for the resolution of individual cases and controversies are better understood as practices, whose authority is derived from their very existence. Formalizing the so-called “law” of precedent masks, at least to some extent, the significant and unique characteristics of this set of judicial practices.

The Law of Judicial Precedent seems to recognize the nature of the rules it presents: the text’s self-described “mission” is to provide a “description of contemporary practice.”²⁷ But its form of presentation belies this description. As noted above, the authors present a principle at the start of each section, followed by several pages of explanation for each principle. The principles themselves are not accompanied by any direct citations—they stand alone at the top of a page, set apart from the cited discussion that follows. This form of presentation places great emphasis on the text of the principle—the words chosen by the authors in the sentences that articulate the “blackletter principle.” The rhetorical effect is hard to miss: the fixed language used in the bold lines of text at the beginning of each section has great import.²⁸

Similarly, the numbering and ordering of a specific, limited set of textual rules (93 to be precise) also has rhetorical effect. A finite number is, in fact, a little odd. Do we know how many legal principles there are in any other field of law? *The Law of Judicial Precedent* does not purport to be an empirical study. How then did the authors determine the content of the 93 blackletter principles? According to the preface, Bryan Garner’s approach was to “discern the major propositions first, and then write in support of them.”²⁹ His methodology, however, is not explained. The numbered presentation of definite rules seems atypical for a treatise. Scholars have identified an increasing focus on the text of judicial opinions³⁰—the actual

26 Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1565 (2020) (“Indeed, it is common for a court to proclaim a principle for identifying the holding of one case only to violate that principle in the next case.”).

27 GARNER ET AL., *supra* note 1, at 18.

28 Scholars like Ruth Anne Robbins and Matthew Butterick have shown us that typographic choices truly matter. See Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108, 113 (2004) (on the visual effectiveness of text itself, “visual presentation matters”); MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS* (2d ed. 2018); see also Derek H. Kiernan Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 J. ALWD 87 (2010) (reviewing existing literature on document design).

29 GARNER ET AL., *supra* note 1, at xiii.

30 See Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 222 (2010) (arguing that “overemphasis on words, phrases, and quotations to the exclusion of legal principles” is one of the reasons why dicta becomes holding); Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1188 (2006) (“[T]he common law is embarking on a path towards becoming increasingly textual.”).

words rather than underlying ideas—and the presentation of this book is consistent with that trend.

The authors did amass quite a bit of evidence in support of each textualized principle. The sources cited to support each articulated principle are varied, including mostly cases and a variety of scholarly books and articles. That method seems like a reasonable way to determine contemporary practices if empirical data isn't available. Take, for example, Principle # 25, **"Approval, Acceptance, and Recognition: Another court's approval of a decision can bolster its credibility and increase its value as precedent. The absence of approval or affirmation through citation or reference can leave an opinion vulnerable to attack."**³¹ This section's 28 citations include references to eighteen decisions from nine different state courts (dates ranging from 1811 to 2006); nine Supreme Court decisions (dates ranging from 1803 to 2014); three federal circuit court decisions (1991, 1993, 2013); five scholarly articles (from 1985 to 2011), and *Black's Law Dictionary*. This sort of citation has a kind of anecdotal feel—the book does not explicitly address the nature of the rules or whether they conform to particular jurisdictions. Some sections are devoted to specific federal or state practices, but not specific federal circuits or specific states.³² And these sections, for the most part, address rules that are only relevant in one system or the other (for example, how federal courts should treat state court precedent) rather than different versions of the same rules for federal and state courts.

My point is not that these citations are somehow "wrong"—the nature of judicial practices as social norms means that they do not necessarily align with traditional jurisdictional limits. One way of establishing the existence of such norms and practices is through empirical data, but that is not the only way. Many judicial practices related to precedent may be general law, which "emerges from patterns followed in many different jurisdictions."³³ Norms, given their nature as social practices, are perhaps appropriately identified with this sort of wide-ranging cross-jurisdictional evidence used in the text.

However, two key characteristics of the text conflict: the presentation of distinct rules contradicts the descriptions of much looser practices. Can the two be reconciled, or are many of these norms and practices simply not suitable for codification?

31 GARNER ET AL., *supra* note 1, at 233.

32 The first four and the last two sections (A–D and H–I) are not jurisdiction specific. The middle three are aligned with federal and state jurisdictions. Section E is labeled "Federal Doctrine and Practice," section F is "State Law in Federal Court," and section G is "State-Law Doctrine and Practice."

33 Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006) (defining general law as "rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions").

B. Should judicial norms of precedent be codified?

The format of the book entrenches the idea that the law of precedent is comprised of a uniform set of rules. The book flap boasts that “[n]ever before have so many eminent coauthors produced a single law book without signed sections but instead writing with a single voice.” Presumably, the quotation refers to stylistic voice. But the book aims to do the same thing with respect to its substance, prioritizing the clarity of uniformity. It is not at all clear that rules about the operation of precedent actually are, or even should be, uniform national rules. Courts are institutions with varying responsibilities and expertise, serving different functions at different levels of the judicial hierarchy.³⁴ There are many other distinctions between judicial institutions, including, most notably, subject matter. Thus, rules related to the operation of precedent not only do vary from court to court, but arguably *should* vary.³⁵

The book, however, presents its 93 principles as if they comprise a single body of law, without geographical boundaries. Some of these rules surely are the sort of general rules that judges in all U.S. courts follow, rather than rules specific to any jurisdiction. But an anecdotal rather than empirical approach has the effect of glossing over any jurisdictional differences that do exist. In the explanatory pages following each principle, the authors sometimes articulate differences among jurisdictions,³⁶ but they do so without purporting to provide a comprehensive accounting of rule variations. The book’s dominant form of presentation—a uniform set of principles—has the effect of deemphasizing any differences and underscoring uniformity.

It is actually quite difficult to determine exactly how some of these rules operate in any given jurisdiction, due to their nature as complex principles of reasoning. Take for example, the process of determining an opinion’s holding. There is no consistent definition of a holding, even within specific jurisdictions.³⁷ A 2020 study identified a particular definition of a holding used by four state courts and the Ninth Circuit. Using empirical evidence, the author showed that this definition of holding, broader than many traditional definitions, had a discernible effect on decisionmaking in those jurisdictions.³⁸ The task of identifying all of the

³⁴ For example, trial courts review evidence; appellate courts correct errors; the highest court in a jurisdiction creates law. Rules of procedure are different at each level of the judicial hierarchy, and each court sets its own local rules.

³⁵ Tyler, *supra* note 26, at 1598 (“[A] particular court’s rules of precedent should be sensitive to the court’s capabilities, obligation, and institutional context.”).

³⁶ See, e.g., GARNER ET AL., *supra* note 1, at 428 (citing a 1923 Mississippi case and a 1927 Wisconsin case for the proposition that “[j]urisdictions adhering to this principle [about reliance upon “an old rule of property”] further split between those that permit the presumption to be overcome and those that don’t”).

³⁷ Tyler, *supra* note 26, at 1553 (“[M]any courts are wildly inconsistent in how they go about determining the holding of a case.”).

³⁸ *Id.* at 1566 (naming “Arizona, Illinois, Maryland, and Minnesota”).

variations on precedent practices in different jurisdictions in the careful way this study did would be a herculean one, so it is certainly understandable why the book did not attempt it. Again, I do not aim to criticize the quality of what the authors were able to accomplish but to point out the inherent limits of such a project.

The overall message the treatise sends is one of definiteness. Even if the description following a principle captures the variety of views on a topic, the particular words chosen for the blackletter principle may not. The book absolutely acknowledges the existence of uncertainty with respect to some of its principles in the supporting text.³⁹ But the "blackletter principle" presentation gives no hint of uncertainty or unsettledness.⁴⁰

Some of the practices presented as settled principles may not be all that settled. Take for example Blackletter Principle # 90, **Value of Foreign Precedents**.⁴¹ The blackletter rule here states that "[t]he value of a foreign precedent is increased by its relevance to the issue at hand, but is diminished to the extent that it is based on conditions—geographic, climatic, social, economic, or political—peculiar to the foreign state or country."⁴² In the text that follows, the authors note that "in some contexts, foreign decisions are persuasive to an American tribunal," citing to a Ninth Circuit case and *Roper v. Simmons*,⁴³ a Supreme Court case well known for its debate over the propriety of referencing juvenile death penalty practices in other countries.⁴⁴ Like many of the other blackletter principles in the book, this one strikes me as simply not well suited to rule format. Whether it is appropriate to put any weight at all on foreign precedent is not settled, and the debate is not captured by the book's blackletter principle. Scholars and judges have debated this at length and continue to do so.⁴⁵

Can the common law decisionmaking process really be reduced to 93 principles? The text, like just about any treatise, is a formalist work.

³⁹ See, e.g., GARNER ET AL., *supra* note 1, at 195–213 (Blackletter Principle #20, Plurality Opinions, which provides the rule that "the only opinion to be accorded precedential value is that which decides the case on the narrowest grounds," but acknowledges in the following description that there is still debate about what counts as the holding, and that many complicating factors make this task a difficult one).

⁴⁰ NILS JANSEN, *THE MAKING OF LEGAL AUTHORITY* 118 (2010) ("[I]t is general knowledge today that typography may visually create different values of, and relations between, different bodies of text . . .").

⁴¹ GARNER ET AL., *supra* note 1, at 751–61.

⁴² *Id.* at 751.

⁴³ 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) ("The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.")

⁴⁴ GARNER ET AL., *supra* note 1, at 759.

⁴⁵ See, e.g., Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335 (2007); Mark Tushnet, *When is Knowing Less Better than Knowing More—Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006).

Formalism can be described as “decisionmaking according to *rule*,”⁴⁶ and that is exactly the assumption that underlies this book. Putting these judicial practices into a concrete, textual form suggests that decisionmaking happens in accordance with rules—it suggests that judicial autonomy is limited. One reason to be skeptical about this is that “we are all realists now”—few still believe that a judge’s identity and values have no impact on their decisions; that a judge is no more than an umpire calling balls and strikes.⁴⁷ An unofficial project purporting to define and concretize evolving judicial decisionmaking practices contradicts prevailing perspectives on how decisions are made.⁴⁸ Few would argue today that judges use precedent in the mechanical way that these rules arguably suggest.

Many of the blackletter principles in *The Law of Judicial Precedent* look like methods of judicial reasoning. For example, principles 6–9 in part A are “**The Context for Extracting a Rule or Standard**,”⁴⁹ “**Substantially Similar Facts**,”⁵⁰ “**Distinguishing Cases**,”⁵¹ and “**Analogous Cases**.”⁵² The authors of the 2017 book review noted that “the very effort to codify blackletter rules of precedent might imply an unrealistic view of judging in which answers about how to interpret and apply precedent can be looked up and rotely applied to the case at hand.”⁵³ The book review authors concluded that any initial skepticism along these lines would “prove largely unfounded”⁵⁴ because the book does not try to settle any debates about the extent to which precedent constrains judging, and it is “transparent about the principles that cannot be readily reduced to firm rules and for which it can offer only general guidance and illustrations.”⁵⁵

As it turns out, the principles courts have cited most frequently look a lot like a code of judicial reasoning. The single-most-cited principle (26 times) is #4: **Dicta v. Holdings**,⁵⁶ the second-most-cited (16 times) is

46 Frederick Schauer, *Formalism*, 97 YALE L. REV. 509, 510 (1988).

47 See, e.g., David Klein, *Law in Judicial Decision-Making* in THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 236–37 (Lee Epstein & Stefanie Lindquist eds., 2017) (“Virtually all knowledgeable observers today would agree that judging is not simply a matter of applying readily ascertained legal rules to individual cases.”).

48 An official project (a national set of rules, for example) would pose many of the same problems, but see *infra*, text accompanying notes 64–66 for discussion about problems with this particular set of authors.

49 GARNER ET AL., *supra* note 1, at 80.

50 *Id.* at 92.

51 *Id.* at 97.

52 *Id.* at 105.

53 Watford, Chen & Basile, *supra* note 13, at 548.

54 *Id.*

55 *Id.* at 549.

56 GARNER ET AL., *supra* note 1, at 44 (“The *holding* of an appellate court constitutes the precedent, as a point necessarily decided. *Dicta* do not: they are merely remarks made in the course of a decision but not essential to the reasoning behind

#36: **Choosing Between Discordant Decisions**,⁵⁷ and Principle #6, **The Context for Extracting a Rule or Standard**,⁵⁸ is the third-most-cited (13 times).⁵⁹ These judicial decisionmaking practices are, in many respects, not objective. Is the definition of dicta evolving at this very moment? It is hard to say, without specific and rigorous empirical evidence. Even if we had such evidence, it wouldn't be dispositive, as the interpretation of precedent is just not a mechanical task. In the context of complex decisionmaking, where most would acknowledge there is no one right way to read cases,⁶⁰ it seems almost meaningless to cite to a book like *The Law of Judicial Precedent* as if it were dictating some of these analytical choices.

A judge might very well be able to find the right principle to support any conclusion, bringing to mind Karl Llewellyn's infamous "thrust" and "parry" chart, in which he presented opposing canons on almost every point of statutory interpretation.⁶¹ Blackletter Principle #4 states that "**the holding of an appellate court constitutes the precedent, as a point necessarily decided.**"⁶² Blackletter Principle #6 states in part that "**a general rule or standard may be extracted that is broader than that in the holding itself and broad enough to apply to a novel case.**"⁶³ Later in the treatise, the authors provide rules on when to overrule a decision (Blackletter Principle #46, **Overruling a Decision**). Many of the principles in the text can be described, in Llewellyn's words, as "conflicting correct ways" of reading a case.⁶⁴ To that end, consider a recent Eleventh Circuit case, in which the majority opinion and dissenting opinion disagree over the scope of the majority's holding. The two cite to different principles from *The Law of Judicial Precedent*—the majority quotes the book for the principle that it is "improper for a later court to infer an alternative holding or rationale where none is sufficiently expressed in

that decision.").

⁵⁷ *Id.* at 300 ("If two decisions of equal authority are irreconcilable, the choice of which one to follow depends on the circumstances.").

⁵⁸ *Id.* at 80 ("The language of a judicial decision must be interpreted with reference to the circumstances of the particular case and the question under consideration. Yet a general rule or standard may be extracted that is broader than that in the holding itself and broad enough to apply to a novel case.").

⁵⁹ The Law of the Case Principles are also frequently cited—there are eight principles in this section collectively cited 23 times.

⁶⁰ Karl Llewellyn, *Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 395 (1950) ("One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases.").

⁶¹ *Id.* at 401.

⁶² GARNER ET AL., *supra* note 1, at 44.

⁶³ *Id.* at 80.

⁶⁴ Llewellyn, *supra* note 60, at 395 ("These divergent and indeed conflicting correct ways of handling or reading a single prior case as one 'determines' what it authoritatively holds, have their counterparts in regard to the authority of a series or body of cases.").

the precedent,”⁶⁵ while the dissent counters with the principle that “the rationale that carries the force of precedent is that without which the judgment in the case could not have been given, and not the reasoning articulated by the court.”⁶⁶

Interestingly, this text has attracted only a fraction of the attention attracted (garnered?) by its sister treatise, *Reading Law: The Interpretation of Legal Texts*.⁶⁷ That book, written by Bryan Garner and Justice Antonin Scalia, contains 56 “Sound Principles of Interpretation” and “Thirteen Falsities Exposed”—bold principles exactly like those in *The Law of Judicial Precedent*. Both books are efforts to codify judicial practices related to decisionmaking. Yet, while the status of interpretive methodology is the subject of countless books and articles, the status of rules related to precedent has remained largely unaddressed—somewhat invisible. I suspect that the lack of attention is at least partly rooted in our history, as there was once no question at all about which sources counted as law.⁶⁸ But now we do recognize that there is such a question.⁶⁹ Determining what counts as law—and the operation of precedent is a big part of that—is at the very core of judicial power.

The nature of the book’s project—setting down the “law of judicial precedent”—inherently prioritizes order, concreteness, and uniformity. Assume that every single principle in the book is an accurate reflection of judicial practices on the date it was published. Textualization has power—those principles are now more established than they were before. Is that a good thing? On the positive side, the textualization of these principles might enhance the transparency and predictability of the judicial decisionmaking process. Easily accessible principles might be more equitable for parties who are subject to the court’s power. In other words, the text might advance a rule-of-law ideal by making the rules easier for everyone to find.

On the other hand, there are reasons to think that we might not want to cement this particular set of practices, which differ from substantive

65 *United States v. Johnson*, 921 F.3d 991, 1003 (11th Cir. 2019) (quoting Blackletter Principle # 10, “The language of a judicial decision must be interpreted with reference to the circumstances of the particular case and the question under consideration.”).

66 *Id.* at 1019 (Rosenbaum, J., dissenting) (Blackletter Principle # 6) (remarking that the majority “invokes everyone from Chief Justice John Marshall to Bryan Garner for the truism that judicial decisions are limited to the facts of the case before the court. *See* Majority Op. at 1002–03. But that does not respond to the problem here.”).

67 ANTONIN SCALIA & BRIAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2011) By any metric, *Reading Law* has attracted far more attention. Since its publication in 2012, over 2,000 judicial opinions have cited it. A search of “secondary sources” on Westlaw, scalia /s “Reading Law” = 1,810 results. Garner /s “law of judicial precedent” turns up only 105 results. Book Review Digest Plus finds 12 book reviews for *Reading Law*; 2 for *The Law of Judicial Precedent*.

68 Berring, *supra* note 6, at 1691 (in 1899, authority issues were simple because the world of authority was much more restricted). However, the distinction between holding and dicta has always been a concern.

69 For example, the question of whether presidential tweets should be considered authority.

laws in so many ways. Transparency may be at least a little less significant with respect to operational rules because they are addressed to judges, not the public. They do indirectly affect the public, but it is not clear the reliance interest is quite as significant as it is with respect to substantive rules. More significantly, putting them into textual form makes them more rigid. A system based on judicial practices established by consensus over time is flexible, allowing for a more responsive judicial system. A system which establishes rules as judges converge on a practice allows for experimentation, and codifying the rules may shortcut that valuable process. The stakes are high for foundational rules that apply in every case, so we should be concerned if the text has the effect of stunting their evolution.

Even if we do think that these rules should be codified, there is reason to think that such codification should not be at the hands of a small group of unofficial actors. This set of authors—its twelve distinguished judges—is certainly well qualified to opine on these rules. The laws of judicial precedent are the very tools of their profession. But in an ideal world, should a group of twelve judges (distinguished, elite, and homogenous), in isolation, decide what these rules are? To be fair, these judicial authors are perhaps no different than the elite set of lawyers who work on crafting Federal Rules, or those chosen to serve on the American Law Institute, creating Restatements and Model Codes.⁷⁰ In that respect, this text may simply be one example of a much bigger problem. However, Restatements, Rules, and Model Codes all have the benefit of some transparent and deliberative processes—that is not true of this text.

Collecting and recording existing rules is, of course, not lawmaking. But maybe it is, effectively. When a principle elucidated in the text is cited by a judge in an opinion, that citation could be window dressing.⁷¹ However, it could also be influencing the judge's decision, in which case whether we label it "law" or not makes little practical difference.⁷²

Finally, I wonder, why now? The publication date of the 1912 treatise *Handbook on the Law of Judicial Precedents* falls squarely within what many have deemed the Formalist Age.⁷³ What does it say that the next version of the treatise was produced 100 years later in 2016? In the preface, Bryan Garner suggests that it has not been done before because the task of compiling this body of law was "staggering."⁷⁴ I think it instead

⁷⁰ See, e.g., Brooke D. Coleman, #SoWhiteMale: Federal Civil Rulemaking, 113 NW. U. L. REV. ONLINE 52 (2018).

⁷¹ Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1353 (2018) ("The question of how much work the canons are really doing and how much is mere 'show' (or cover for the common law tools they wish to deploy) is difficult to resolve").

⁷² GREENAWALT, *supra* note 25, at 183.

⁷³ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 11 (2d ed. 2014) (Civil War to World War I as a formalist era).

⁷⁴ GARNER ET AL., *supra* note 1, at xiii.

might reflect a kind of performative formalism.⁷⁵ By that, I mean visible reliance on rules suggesting that the rules dictate the outcome, even when those in the legal system don't believe they do. Somewhat ironically, in a legal system in which strict formalism has been largely debunked,⁷⁶ citation to formal doctrine might be valuable as a proxy for judicial neutrality, pushing back against the notion that results are driven by a judge's personal values. If a judge cites to this book as authority on how to extract a rule from a case, that citation deemphasizes the role of choice in the judge's decision. The textualization of these practices allows judges to artificially separate themselves from the rules, even though they themselves are the creators.

The next edition of this book, if there is one, could be different. The "typographical presentation of a text" contributes to its legal authority;⁷⁷ form matters. Eliminating the 93-blackletter-principle boldface presentation would avoid the appearance of formal fixed laws, instead depicting the rules as the evolving social practices they are. The authors could also provide more research (including some empirical data) on the practices that vary across and within jurisdictions. In my view, the text needs more diverse authors, with different life experiences, to provide an array of perspectives on the critical question of what should count as law. And finally—though this would require a title change—the authors should acknowledge that there is no written law of precedent. That's the beauty, in many respects, of the common law.

III. Conclusion

At the very least, we ought to recognize the nature of the practices presented as textual rules in *The Law of Judicial Precedent* and consider the consequences of their unofficial codification. Formalizing unwritten rules prioritizes uniformity, order, and certainty—values we might be willing to sacrifice in exchange for the benefits of ever-evolving practices. Creating a written law of precedent may elevate the weight of precedent at the expense of other less-tangible sources, such as policy, principles, and values, particularly if our legal system continues on its current path of prioritizing text. To the extent that this text reflects the allure of formalism in today's realist world, serving a performative purpose, we should be wary. Citation to authority (of whatever sort) remains a mainstay of judicial opinion writing and deserves our constant attention.

75 See Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1625 (2020) (discussing the "performative use of citations").

76 Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 779 (2004).

77 JANSEN, *supra* note 40, at 141.