Reporting the Law in Perennial Time

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On this 20th anniversary of Cornell University's Legal Information Institute, I'd like to recount a story that LII Director Tom Bruce told me. It seems a young attorney from the U.S. Agency for International Development was on his first trip to an emerging nation. He arrived at the American Embassy there and was shown into the Ambassador's office. A passionate believer in the rule of law, the young lawyer was thrilled to discover that the office was lined, floor-to-ceiling, with bookshelves holding a complete set of the United States Reports. Those are the official law books containing all of the U.S. Supreme Court's decisions, from 1790 to the present. Gushing, the young man told the Ambassador how inspiring he thought it was that visitors to the Embassy could view this tangible proof that the United States is a nation of laws. Somewhat sheepishly, however, the Ambassador informed the young man that it had not been his idea to place the books on his shelves. Rather, he said, the decision had been made by the Embassy's detachment of U.S. Marines, who were responsible for security. The Marines felt that the U.S. Reports were the only books in the Embassy's library that were thick enough to stop bullets from coming through the building's outer walls.

Assuming the story's not apocryphal—Tom Bruce wouldn't lie to me, would he?—I think the episode entitles me to add another line to my résumé—that of defense contractor. That's because for over 23 years, I was the Reporter of Decisions for the United States Supreme Court. In that job, I was the editor and publisher of the U.S. Reports.

Tom asked me to speak today because of the ongoing and escalating interactions of our two professions. One of my purposes, therefore, is to describe for you the work of Reporters of Decisions. Hopefully, that description will help to explain why I have entitled this presentation "Reporting the Law in Perennial Time." Finally, if I'm lucky, that explanation will segue into a discussion of why people like me seem to be asking the impossible of the online community.

According to the Web site of the Association of Reporters of Judicial Decisions [http://arjd.washlaw.edu]—which I'll refer to as the "ARJD" throughout this speech—Reporters of Decisions are those public officials whose "primary responsibility … is to prepare their courts' opinions for publication. This may include editing opinions for accuracy, standardization of format and style; proofreading for grammatical, typographical and factual errors; drafting headnotes and syllabuses; preparing tables of cases, indexes

and digests; and publishing the courts' opinions and other materials officially in both electronic and print formats."

Except for the part about compiling digests, that pretty much describes my job at the U.S. Supreme Court. The Reporter of Decisions is one of the Court's five statutory officers. The others are the Clerk of the Court, the Marshal of the Court, the Librarian, and the Counselor to the Chief Justice. They're called "statutory" officers because federal law defines their positions and duties. For example, the Reporter's job is created and delineated by §673 of Title 28 of the United States Code. I was the 15th man to hold the Reporter's position since 1790, when Alexander Dallas published the first volume of the U.S. Reports in Philadelphia. To give you some perspective, there were 17 Chief Justices during the same period. Although there has never been a female Chief Justice, I'm happy to report that my successor—my former Deputy and friend, Christine Luchok Fallon—is now the first woman to hold the job of Reporter of Decisions at the Court.

The Reporter's primary responsibility is to prepare the Court's opinions for publication in the official U.S. Reports. That makes Chris Fallon an editor of sorts, but not the all-powerful type of editor sometimes found in commercial legal publishing or on law reviews. For example, she could never tell a Justice to "rewrite that Part III, it's a real turkey." Rather, the

Reporter has been described as a "double revolving peripatetic nitpicker" by Henry Putzel jr., the 13th person to hold the position. The Reporter's office carefully examines each draft of each opinion to assure the accuracy of its quotations and citations and, to the extent possible, its facts. We also check for any typographical errors, misspellings, grammatical mistakes, deviations from the Supreme Court's complicated style rules, and departures from traditional, technical rules of opinion drafting. For example, the Reporter tries to assure that a concurrence or dissent does not refer to its author and joiners as "we," the pronoun traditionally reserved to the members of the majority. And when an opinion refers to another opinion as "the plurality," the Reporter's staff checks to make sure that the other writing satisfies the technical definition of that term. The office performs all of its editorial functions before each case is released and then redoes them, fully and completely, in preparation for the case's republication in the preliminary print and, later, in the bound volume of the U.S. Reports.

In a nutshell, therefore, what the Reporter's office does is to pick the nits out of the opinions, over and over and over again until, we believe, they're perfect. We concentrate on the technical details of opinions, not on the big picture. To answer a frequently asked question, we do not, for the most part, "correct" substantive errors in opinions. In the relatively few instances in which substantive changes were made to opinions during my 23-plus years, the

impetus to do so almost always came from the Justices' chambers or from the public through chambers.

While we're in FAQ mode, here's a question I've always ducked. It often happens, usually at a cocktail party, that someone sidles up to me and asks conspiratorially, "Just between you and me, which Justice is the best writer?" I'll tell you now what I always told them: All of the Justices are exceptionally experienced and talented legal writers, and each of them is equally, astoundingly wonderful in his or her own unique and fabulous way! What else could I say?

In addition to doing the editorial work necessary to prepare opinions for publication, the Reporter and two other attorneys in the office write the syllabuses—that is, the summaries—that appear at the beginning of every case in the U.S. Reports. I say "write" advisedly here because, in this modern age, syllabus preparation largely involves taking a digital copy of the principal opinion in a case and boiling it down and down and down until all that remains is the case's essence, its bare bones. I also say "syllabuses," rather than "syllabi," because once a Latin word has made the transition to English, I believe it should take an English plural.

To answer another FAQ: Yes, each syllabus is carefully checked and approved by the chambers whose writings it reflects. The syllabus is the work of the Reporter, not the Court. The Court's input is, technically, just suggestions. I'm sure, however, that any Reporter unwilling to accept chambers "suggestions" would not be a Reporter very much longer. Actually, the syllabus-approval process creates a great deal of security and comfort for the Reporter's office. Three times during my tenure, I received letters from readers claiming that a syllabus had misinterpreted the case it summarized. In each instance, I was able to answer that I stood by my syllabus because chambers had approved it shortly before the case was released to the public. Nevertheless, each time I presented the correspondence to chambers just to be sure that I, and they, hadn't made a mistake. In each instance, the syllabus came back reapproved without change.

Accuracy, of course, is a must for syllabuses, but comprehensiveness is not. If a syllabus reflected every point made in the case it covered, it would be almost as long as the case itself. Perhaps the primary factor in determining the length and comprehensiveness of a particular syllabus is the preference of the Justice who wrote the majority opinion. During my time at the Court, most of the Justices preferred syllabuses to be as short as possible. In particular, Justices John Paul Stevens and Antonin Scalia were acutely attuned to the length of a syllabus and would often "suggest" shortening

measures. Justice Ruth Bader Ginsburg, on the other hand, often preferred fuller summaries of her cases and actually added facts and reasoning to the syllabuses I prepared. She believes that the syllabus is frequently the only information on a case that busy judges and lawyers might read. Not surprisingly, statistics on reader views of Supreme Court cases by Cornell LII users tend to support Justice Ginsburg's view.

Supreme Court opinions are published, first, on the Court's Web site, then as paper bench and slip opinion pamphlets and, later, in the preliminary prints and bound volumes of the U.S. Reports. After a bound volume is issued, it too is posted on the Web site. For each Term, the Court issues between three and five 1,200-page volumes, depending on the number of opinions released during the year. In my last few Terms, ending with my retirement in September 2010, the Court heard between 75 and 100 arguments and issued a comparable number of opinions. During my last Term, October Term 2009, the Court released 92 cases, which will result in four, rather than the more usual three, bound volumes. That's because of the extreme length of the landmark campaign finance case, *Citizens United* v. *Federal Election Commission* [550 U.S. 50]. Presently, at the beginning of October Term 2012, the Court is working on opinions that will appear in volume 568 of the U.S. Reports. Of those 568 volumes, 82 are mine, representing the largest number attributable to any of the first 15 Reporters.

Despite that record, I am only the second-longest-serving Reporter. I ran out of steam with two years to go to before I would have set the Reporter-longevity record.

Well, that completes the first part of my presentation. I have used my own career to describe for you what a typical Reporter of Decisions does. Next, I will tell you why I have given this speech the odd title, "Reporting the Law in Perennial Time." Partly, it's an homage to a wonderful address that Professor Bernard Hibbitts of the University of Pittsburgh School of Law gave to the Reporters' Association, *i.e.,* the "ARJD," in 2009. As you may know, Professor Hibbitts leads a mostly volunteer team of part-time law student reporters, editors, and Web developers to produce the "Jurist" [http://jurist.org], a Web-based legal news and real-time legal research service. Not surprisingly, Bernard entitled his presentation, "Reporting the Law in Real Time," to emphasize the up-to-the-minute nature of Jurist stories. I have exchanged "perennial" for "real" in my presentation today to focus on a dilemma Reporters of Decisions face in this Internet Age.

Specifically, we Reporters are tasked not simply with reporting the news of the day, but with publishing and preserving the writings of appellate courts in ways that will assure their currency for the ages. For example, in editing U.S. Supreme Court opinions, I frequently suggested that the first

use of any name represented by a common acronym—for example, "FBI"—be spelled out. That's because though the acronym may be well known today, that may not be true in a couple hundred years. Just think how the meaning of "NRA" has changed in only 80 years. At first, the acronym referred to the National Recovery Administration, but now, of course, it means the National Rifle Association!

As this example suggests, the primary concern posed by the Internet for Reporters of Decisions is the transient nature of much of the information published online. While the Supreme Court's opinions will be relied on as authority for centuries, many of the materials posted on Web sites are deleted within days, weeks, or months after their inclusion. Entire sites come and go with alarming frequency, and even ongoing sites adopt new URLs quite often, making them difficult to track into the future. Because court opinions frequently cite and rely on materials posted on the Internet, the authenticity and preservation of such online materials are of paramount importance to the ARJD's members.

Our need for permanence seems doomed to frustration in many instances. For example, the Supreme Court has already experienced the loss of online materials that were cited in a bench opinion but removed from the Web during the brief period before the opinion's publication as a paper slip

opinion. The 2003 case of *Missouri* v. *Seibert* [542 U.S. 600] involved a police protocol for custodial interrogation that called for withholding *Miranda* warnings until after the questioning of a suspect produced a confession. The original confession was, of course, inadmissible, but the protocol recommended that the interrogating officer then give the *Miranda* warnings and lead the suspect back over the same ground until he admitted his guilt a second time. The theory was that the second confession could be used against the defendant in criminal proceedings. This procedure was recommended on the Web site of a national police organization. However, the organization deleted the protocol from its site just nanoseconds after the Supreme Court issued its decision, which held the second confession inadmissible at trial. After that online vanishing act, my office received frantic calls from Court staff and the public asking whether we had saved a hard copy of the protocol.

Fortunately, we had. We had learned that lesson the hard way in a case decided in 2000, *Garner* v. *Jones* [529 U.S. 244]. In that decision, Justice David Souter's dissent cited decisional and statistical materials posted on the Web site of the Georgia State Board of Pardons and Paroles. [See *id.,* at 262, n. 2, and 264, n. 5.] The cited materials were still online when the U.S. Reports preliminary print was published, but they had been removed from the Web before publication of our bound volume. I was able to prevail on the State to restore the missing materials to its Web site so we

could recheck them for the bound volume version of *Garner*, but, alas, the materials were stricken again after the bound volume was published. Thus, it is no longer possible for a reader or researcher to view the items upon which Justice Souter relied by going to their source.

Following *Garner*, a light bulb clicked on in my head. Ever since then, the Reporter's office has saved hard copies of Internet materials cited in Supreme Court opinions, placing the following statement after the initial citation to the materials: "All Internet materials as visited on _____ [the particular month, day, and year], and available in Clerk of Court's case file." Other courts, *e.g.,* the New York Court of Appeals, have followed suit in using such a statement. Of course, such attempts to, in effect, "freeze" ephemeral Internet materials in time are hardly an adequate solution to the transience problem. Placing a copy of the materials in the Clerk of Court's case file is clumsy at best, given that viewing the materials will require an e-mail or telephone request to the Clerk's office, which must then locate the materials and mail or fax copies to the requester. And the response time may actually be much longer, since the Clerk regularly sends old case files to the National Archives for safekeeping. Accordingly, the Supreme Court is considering whether and how to make the copied materials available on its own Web site.

Lately, the transience problem has become a personal dilemma in a very real sense for Reporters of Decisions. More and more governmental units of all sorts, strapped for cash by the economy, have begun to publish their "official" materials exclusively online, eschewing the print medium to save money. In our own bailiwick, the Supreme Courts of Arkansas, Colorado, Illinois, and New Mexico have already decided to discontinue their printed law reports in favor of online versions, and the Supreme Court of Washington is considering whether to adopt the same course.

These developments make me fearful that society may be headed for a new dark age in which crucial governmental mandates and policies will no longer be readily available to the public because their online medium has been destroyed or corrupted by data degradation or illegal tampering, by technological obsolescence, or by natural disaster. Such concerns led the ARJD to issue a position paper urging its public sector colleagues to designate online documents as "official" only if the materials are authenticated by encryption, digital signature, or the like, and the agencies somehow commit to perpetuating the materials by translating them into each successive electronic medium as the online publishing paradigm shifts. [See http://arjd.washlaw.edu (Position Papers).]

To the ARJD's surprise and bemusement, the position paper has met with hostility from some sectors of the online community. Please don't misunderstand me here. The ARJD is not urging governmental units to forsake online publication. We all do that now, and have been doing it for years. We are not even saying not to designate online documents as "official." What we are asking is that such designations not be made, particularly if the online medium will be the only source for the documents, unless the agencies have taken steps to assure the documents' authenticity and permanence. This is the impossible request I mentioned at the beginning of this speech. Again, what Reporters are asking of its public sector colleagues is, if you're going make your online documents the exclusive "official" version of your materials, please take steps to assure that they are protected from hackers and other forms of online predation and that they will be available to the public online for as long as they remain relevant.

Thus far, the authenticity requirement seems to be taking care of itself. A variety of commercially developed and homegrown software products help online-only publishers assure that their "official" materials are as secure and incorruptible as is reasonably possible. These include Adobe documents with special banners, digital signatures and watermarks, and hash algorithms. Although none of the software seems to be 100 percent safe at this time, it appears likely it will only continue to improve as time goes by.

The Reporters' need for permanence of online materials seems to be a different matter, however. I am deeply concerned about what will happen when, inevitably, the paradigm shifts; when, for example, liquid molecules replace silicon chips as the physical medium or digital computers are scrapped entirely in favor of quantum machines. What will become of the mountains of data digitized in the meantime? Will the digitized documents be easily and cheaply translatable into the new medium, or will they all have to be scrapped and rekeyed or rescanned or whatever at great cost to impoverished governmental agencies? Of course, no one knows. At the ARJD's 2012 annual meeting in August, a roundtable of state officials who are currently building official online databases of appellate court opinions that are meant to totally supplant law books revealed that all of the participants were enthusiastic about what they were doing and confident about the success of their products in the short run. However, none really seemed to be considering what would happen if and when all of the data they've collected online was lost to technical obsolescence. Several spoke about possibly keeping paper copies of opinions to assure permanence, with no apparent consideration of how that paper might be turned into new online reports if necessitated by evolving technology.

Hard personal experience has demonstrated for me that the permanence question may be too difficult or costly to solve. In October Term 1981, the U.S. Supreme Court entered the computer age when it began to digitize its opinions using a system developed by Kodak. That system was not a computer network *per se*, but a series of dumb typesetting terminals that were used by chambers personnel to funnel their opinion text to the Court's internal Publications Unit. Pubs then processed the text and returned to chambers paper copies of what looked like official bench opinions. After the opinions were issued and in the fullness of time, Pubs would combine all of the opinion text to create the pages of the preliminary prints and bound volumes of the U.S. Reports, which were printed and released to the public by the Government Printing Office.

That system lasted about nine years, until October Term 1990, when the Court elected to switch to a Disk Operating System using WordPerfect to input opinions. All told, the original system was used to create 47 volumes of the U.S. Reports. That's almost as many as the 51 volumes the Court has subsequently crafted with WordPerfect and Microsoft Word and posted on its Web site.

Naturally, once the Court began using an internal local area network, the question arose how the previous 47 volumes could be used to facilitate the

research, writing, and publication of future volumes. Astoundingly, it soon became painfully apparent that the materials couldn't be used at all. They were so moribund with computer coding that it would be all but impossible to extract the original text from the gobbledygook. Indeed, the answer seemed to be that it would be easier and much cheaper simply to rekey or scan all of the data. In other words, we would have to replace the actual words crafted by the Justices and their clerks with data retyped by federal prisoners or overseas contractors or replicated by machines that were less than 100 percent perfect. Unhappy with that prospect, I asked two of this conference's prestigious speakers, Tom Bruce of the Cornell LII and Professor Lee Hollaar of the University of Utah's School of Computing, to serve as *amici curiae* by crafting a program that would mine the Court's gold from the code-laden dross. Unfortunately, the answer from each of these trusted advisers was that it couldn't reasonably be done.

Ever since that experience, the specter of impermanence has haunted my ruminations on just what advantages automation offers the Reporter of Decisions. Remember, court opinions are meant to survive the ages. Indeed, current-day opinions frequently cite cases contained in the earliest volumes of the U.S. Reports as authority. They are able to do so because of the law books' reassuring permanence on the shelves. But what will happen when

the paradigm shifts and future Reporters may lack the tools or funds to recreate the "official" precedent on which the common-law system is built?

For a while, the Uniform Electronic Legal Material Act (or, "UELMA") seemed to offer a possible solution. The National Conference of Commissioners on Uniform State Laws adopted that Act in August 2011. So far, it has been introduced in five state legislatures and enacted in Colorado and Calfornia.

Ralph Preston, who was then the Reporter of Decisions for Ohio and the Chair of the ARJD's Electronic Publishing Committee, served as an observer to the group that drafted UELMA under the aegis of the National Conference. Ralph pushed hard for provisions requiring any state governmental entity wishing to publish "official" information exclusively online to observe rigid authentication and permanence standards and to suffer severe penalties for failure to do so. What finally emerged, however, is a toothless shadow of what the ARJD had hoped to achieve.

As to permanence, section 7(a) of UELMA provides: "(a) An official publisher of legal materials in an electronic record … designated as official … shall provide for the preservation and security of the record in an electronic form or a form that is not electronic." To translate, in order to meet the

UELMA permanence requirements, an online-only "official" publisher need do nothing more than save paper copies of the materials in question.

This conclusion was confirmed by Michelle Timmons, chair of the UELMA drafting committee, in her speech at the ARJD's August 2012 annual meeting. Ms. Timmons began her discussion by noting that her committee was tasked with drafting an Act that would assure the same level of trustworthiness in online law as that traditionally placed in print law. However, she then noted that uncertainty about the ongoing ability to read archival online documents as technology evolves is the primary hurdle to preserving those documents. Finally, she concluded that print is still a "very good" method of preservation and will likely remain essential to satisfying UELMA's permanence requirements into the foreseeable future.

Thus, governmental entities that have abandoned print in favor of online publication of their "official" documents in order to save a few dollars will be held harmless when the online paradigm shifts, so long as they have kept paper copies of all of the documents they have uploaded onto the Web! This begs the questions whether, how, and on whose nickel the online documents will be restored to the public once they are no longer available online.

I am not reassured by the assertion of a management consultant friend that the marketplace will provide the solution when the time comes. Commercial legal publishing officials have suggested that they could assist by allowing the Supreme Court to duplicate their unofficial versions of the opinions if it ever becomes necessary to recreate the U.S. Reports online. However, a file I kept during my tenure at the Court demonstrates the myriad ways in which commercial publishers' versions of Supreme Court opinions differ from the "official" versions. Indeed, studies by impartial third parties have verified that conclusion. Even in the occasional instances in which the commercial versions' differences might be attributed to errors by the Reporter's office, those versions are still wrong, since Congress has designated the printed U.S. Reports the "official" versions of the Court's opinions [28 U.S.C. §411]. Thus, even when we're wrong, we're right. And right is the pertinent question here. Commercial versions may be 99.9999 percent accurate, but still it is only the original, "official" version that must prevail under federal law.

Well, that's my story and I'm sticking to it. If anyone out there is still listening, I assume I'll emerge from this conference with a reputation as a crazy old coot nattering on about how the sky is falling. However, I would like to assert at this late hour that I am not really a Luddite. I was the official who first proposed, then oversaw, the creation and completion of the

Supreme Court's first Web site. Moreover, during my tenure, automation of the opinion process proceeded from an antiquated typesetting system to a truly powerful, all-inclusive digital environment, making my job as Reporter infinitely easier. For example, I no longer had to remember whether a particular Justice did or did not previously hyphenate a specific unit modifier, *e.g.,* "compelling-state-interest test." That is, "compelling" hyphen "state" hyphen "interest" space "test." I could know the answer instantly by performing a simple computer search.

In conclusion, I am bothered by the confluence of personal experience and emerging factors that seem not to bode well for the Reporter's traditional duty to memorialize for the ages what his or her court has said. Can anyone here tell me, "There, there, Grandfather, everything will work out just fine." I'm afraid not. We'll just have to hold our collective breaths and wait and see how it all comes out.