Authority in the Archives

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Abstract

This article offers a critique of the sensory deprivation under which legal studies normally operate by exploring how material forms shape law’s substance. Archives and the objects in them used for storing precedents have a history that we must understand if we are to ascribe meaning and authority to the texts they contain. Thus the images here do not simply illustrate propositions; they raise and answer questions about how physical forms constrain what is knowable as law. We can see this by studying practices in the eighteenth-century English court of King’s Bench, and especially the manuscript precedent books made by that court’s clerks. Examining one case—of the liberal campaigner, John Wilkes—we can watch clerks shaping authority as they used indexing tools of their own making to find the crucial precedents. Those same clerks then turned the case into a precedent by storing the results in the archive over which they were masters.

I. Introduction

Precedents matter. A nineteenth-century clerk in the Crown Office of the Court of King’s Bench appreciated this as he jotted Shakespeare’s lines into the front of his manuscript precedent book (Figure 1). That book provided clerks in his office with a great collection of examples. But it was only one of many such custom-made books serving as guides to the contents of other books, and to thousands of rolls and files he and his companions held in their care. Those records remind us that precedents exist as things. We have to store them; if we want to use them, we must find them again.

What follows is an exploration of the stuff of law: the physical objects and procedures for storing, using, and finding precedents to generate legal authority. In the eighteenth century, that authority pronounced itself in the voices of people called justices. But their voices could not have spoken authoritatively without the work of court clerks in an archive those clerks created and controlled. It was they who found the authorities; it was they who, once new authorities were made, put them back into the archive where they might be found again.

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As Frederick Schauer has put it, “law is, at bottom, an authoritative practice,” one resting on citations.¹ When Shakespeare had Henry VIII ask for a precedent, and when a court clerk two centuries later noted that line in one of his precedent books, they were both saying, “give me a citation.” They demanded textual and thus physical evidence of the previous thinking of some thought or practicing of some practice to justify acting again according to the same thought or practice. Because citation is “intimately connected with the authoritative core of the idea of law,”² and because citations must remain to us in some physical form, law is not at bottom an authoritative practice; it is an archival one. And archival practice, like other legal practices and ideas, has a history. If we do not understand that history, we cannot hope to understand law and the authority claimed whenever anyone attempts to pronounce what is law.

![Figure 1: Shakespeare's History of the Life of King Henry the Eighth, Act I, Scene II, quoted by an anonymous clerk of the court of King's Bench.³](image)

Realizing this matters as much as the precedents themselves. How law as an archival practice was and is conducted shapes what law is and will be. Understanding the people who conducted this practice forces us to think again about where and how authority is made. It is easy enough for a modern justice to write the words, “Lord Mansfield wrote …” as he attempts to make his own authority out of Mansfield’s.⁴ But it is not en-

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² Id. at 1934-35.
³ “Things done without example, in their issue, are to be fear’d—Have you a precedent of this ________?” Found in The National Archives [hereinafter TNA], KB15/52, opening. This manuscript precedent book contains examples of oaths and patents of office as well as examples of process on various forms of attachment and distraint and on prerogative writs like certiorari. Someone appears to have begun work on this volume in 1813, judging from the list of assize circuits found on pages 1-2. But dated entries continue through the nineteenth century, suggesting how this volume of precedents, like others that survive, were working books constantly updated by a succession of users.
⁴ Boumediene v. Bush, 553 U.S. 723, 844-45 (2008) (Scalia J., dissenting) (quoting R. v. Cowle, (1759) 97 Eng. Rep. 587, 599-600 (K.B.)). Of course, Mansfield did not actually write the words Justice Scalia proceeds to quote, though these words were attributed to Mansfield as being spoken from the bench. That attribution was originally performed by Sir James Burrow, master of the Crown Office of Mansfield’s court and the author of reports published as James Burrow, Reports of Cases in the Court of King’s Bench, Since the Death of Lord Raymond (1766-80). Sadly, many of Mansfield’s written words are lost to us since rioters burned his London home during the Gordon riots of 1780. Thus we must rely on Burrow’s authority as clerk and reporter for the proposition Justice Scalia ascribes to Mansfield.
It is not entirely clear how his lordship came to write the ascribed words 250 years ago and thus what it might mean that he did so (or did not). Upon closer examination, we will find that authority, because it arises from an archive and citations to the archive, is made by a community of actors rather than by the exalted individual on whom both our legal histories and our legal arguments dwell.

Given this, how we write the history of legal ideas and the ways we employ them in legal problem-solving today must be reconceived from the archive up. The main approach to the history of legal ideas is fundamentally biographical: we line up ideas by lining up a series of utterances made by identifiable individuals—usually justices, sometimes the authors of treatises we accord canonical status. Rather than work in this monodimensional mode, I want us to do prosopography: to work from a collective biography and a set of practices of a community whose members created and mastered the archive out of which authority was, is, and must continue to be made. Borrowing an insight from Steven Shapin, we must appreciate “the epistemic role of support personnel” whose work has been “rendered invisible” in legal analysis and legal history “by positing a solitary knower as the sufficient maker” of authority. Peering behind that solitary figure, we discover that legal authority, like scientific knowledge, “is produced by and in a network of actors.” In the eighteenth century, justices rarely gave much sign of their place in that network, so wider contributions to authority have been overlooked. If we look hard, we can see the network in action: we can begin to consider the many ways that the role of clerks in the archive should force us to reexamine our own citation practices, whether we write law’s history or attempt to write its future.

To do this, I want to examine eighteenth-century practices in the archive of one English court, the court of King’s Bench. We will look to this period because two key developments intertwined then to transform the meaning and purposes of precedent and its role in generating authority. The first concerns judicial understandings of precedent. Over the course of the seventeenth century, English courts had come to place a greater reliance on the evidence of earlier cases—on examples—to determine cases coming before them. But only in the later eighteenth century did this practice begin to gel into habits and doctrines by which judges felt themselves directed or bound by such earlier cases. Second, this conceptual development was causally related to another development on a front we typically overlook: clerical practice, archival practice. It was the clerks who literally made the precedents by turning them into things: into words inked onto pages and rolls. It was they who made precedents by making it possible to find those same things again as needed. And it was they who made records into an archive.

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7 Likewise, as Shapin notes, the great scientists “almost never accorded [their assistants] an identity as relevant or authoritative presences in those scenes.” Id. at 376.
Our traditional focus in the history and philosophy of law and its practices is on words. Reasonable enough: the law is made of words. But our obsessive attention to words causes us to miss something of vital importance: the law is also made of things. We must examine things closely to see this, and to see how the material forms by which law persists in a world of embodied beings controls what is known and knowable—what has been and will be authority.

We will thus proceed from ideas to the objects by which we hold and transmit ideas. We will move from generality to specificity, from law to history, from claims about the nature of precedent and authority and archives as theorized phenomena to temporally situated practices. We will go into the archive to see what is there. The images we will examine below do not illustrate propositions; they generate them. Looking at them should remind us of the sensory deprivation within which most accounts of law’s work operates. In the end, we will resolve upon a single case. By circling inward to look with ever-greater granularity at the stuff of law, we will reach a position from which we might think anew about authority and where it comes from. For though a justice may speak, he does not act alone.

II. Precedent, History, Authority

Working by precedent, according to Neil Duxbury, involves “deciding on the basis of what was done when the same matter had to be resolved in the past.” Crucially—and this is what differentiates claims based on precedent from those based on custom—“part of the reason precedent is authoritative is that it is not an imagined event.” Rather, we “compare the present case with an identifiable earlier event.” Let’s begin with “event,” then consider the acts of imagining and comparing, before turning to how an event might be “identifiable.” Doing so will allow us to differentiate precedential thinking from historical analysis and to consider what this means for the authority premised on precedent.

To work from precedent is to operate according to an example that can be located in time: the making of a precedent is an event. The word “event” evokes specificity, and it evokes observable action. The action, as much or more than words said at the moment of action, is what matters. But to act is to speak, and thus we may overemphasize the distinction between actions and words. Problems arising from this overblown distinction are especially pronounced when we consider life in the early modern English courtroom, where reasons for actions, if given at all, were given orally and do not survive as a matter of record. Only the action itself—a court order, a judgment—left signs upon rolls and

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9 As Frederick Schauer notes, “[I]t remains difficult to isolate how much of the effect of a past decision is attributable to what a past court has done rather than to what it has said.” Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 573 (1987).

10 “Texts are acts,” observes Quentin Skinner. And “acts are in turn texts: they embody intersubjective meanings that we can hope to read off.” Quentin Skinner, 1 Visions of Politics 120 (2002).

11 I use the word “record” here in the strict sense, as the formal record of a common law court: the “[r]ecord is a writing in parchment, wherein are enrolled pleas of land, and common pleas, or criminal proceedings, in a court of record.” Giles Jacob, The Common Law Common-Plac’d 328 (1733).
files in the archive. It did so as an example for the future, the underlying rationale for which was all but absent from its status as an example and thus as a future precedent. A key aspect of precedent is that it can—and in the eighteenth century, it usually did—operate without reference to the intellectual work underlying the choice and use of an example. A precedent served as an example “simply because it was prior.”

An event, if it is to be identified later, must leave behind physical traces of its occurrence. Imagination is crucial here. Rather than distinguish an “imagined event” from an implicitly actual one, let us say that we can imagine an event of the kind that might be used as a precedent because we possess evidence of its having happened. The event is not “imagined” in the sense of “made up”: we adduce evidence to claim that a particular thought or action occurred at a certain moment and involved certain persons and legal problems. But imagination is critical to the work of finding and using evidence to identify a past event—a decision or some part of it—as a potential precedent by putting it into relation with another event, namely one before us in the present. We might thus borrow from R. G. Collingwood, the foundational figure in the modern philosophy of history, to say that the precedential imagination, like the historical imagination, builds a “web of imaginative construction” among points fixed by evidence. Imagining events is precisely what we do in both precedential and historical modes, though we do so only in relation to the physical evidence we possess of their occurrence and character.

Working by precedent begins to resemble historical analysis insofar as it involves the finding, selection, and imaginative reconstruction of evidence of events in the past. How far does this resemblance go? Not very, because operating by precedent involves making, then following, analogies to the present. Working by precedent, we search out seeming similarities between and among events. Doing historical analysis, we usually differentiate them. As Collingwood bluntly put it, “[N]o argument from analogy will hold,” insofar as such argument purports to be historical. Whereas reasoning from precedent involves the pursuit of cases that are “sufficiently similar” to a later one before a court, “the things about which the historian reasons are not abstract but concrete, not universal but individual, not indifferent to space and time but having a where and a when of their own.” Precedential decision-making, like history, involves working with matter from the past. But it “is not really history at all,” because the “method by which it proceeds is first

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12 Schauer, supra note 9, at 576. As Schauer notes, “[B]eing constrained by precedent often involves something different from being constrained by specifically formulated normative language.” Id. at 575. This was often the case in the eighteenth century.
14 As Duxbury notes, “To follow a precedent is to draw an analogy between one instance and another,” even if “not all instances of analogy-drawing … are instances of precedent-following.” Duxbury, supra note 8, at 2.
15 Collingwood, supra note 13, at 239.
16 Schauer, supra note 9, at 577.
17 Collingwood, supra note 13, at 234.
to decide what we want to know about, and then to go in search of statements about it.”

By invoking Collingwood in this way, I don’t want to suggest that there is greater value in one of these enterprises. Rather, I want to be sure to distinguish between two ways of using matter from the past that we might mistakenly believe are quite like one another. They are not.

Put more simply, precedential and historical thinking involve work with evidence of the past, but each stands in very different relation to the present and the future. Unlike historical analysis, operating by precedent involves looking forward as well as backward. This is not to preclude the possibility that once we have composed an historical analysis, we might use it as matter with which to think about the future: matter for making hypothetical propositions, many of which we might not have seen had we not started in a properly historical way. 

History can and should be useful as we think our way toward or away from any hypothetical future. But its utility exists only insofar as we operate on the basis of an historical account rather than an account of past events motivated by our desires for or expectations about that future.

Another way to distinguish precedential and historical thinking appears when we consider where authority comes from and how it works in history and law. By Collingwood’s account, there are two kinds of authority: external and internal to the historian. In the first instance, authority is simply “the person believed” by the historian owing to the former’s status. By taking a critical posture toward this figure, the historian becomes her own authority, her thought “autonomous, self-authorizing.” This transposition of authority from the words of some figure received uncritically from without to the historian’s own mind results from assuming a constructive relationship toward evidence: toward what it means for some marks surviving from the past to operate, upon critical examination, as “a source” about that past. An authority, in the external sense, “consists in the fact that we take its statements as true and incorporate them into the body of our own historical beliefs,” without such examination. But, “[i]f we cease to take [the authority’s] statements as true, and criticize them … then the written or spoken word ceases to be an authority and becomes a source.”

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18 He called this “scissors and paste” history. Id. at 257.

19 The difference between past and future, Collingwood contended, “is that the past can be, within the limits imposed by present circumstances, critically reconstructed,” whereas the future, “can only be guessed at in hypothetical propositions.” Id. at 412.

20 As Frederick Schauer puts it, “Today is not only yesterday’s tomorrow; it is also tomorrow’s yesterday.” Schauer, supra note 9, at 573.

21 Thus one of the consequences of historical explanation can serve is not through analogy, but by challenging us with the past’s examples of dissimilarity in its ways of being. Quentin Skinner has put the matter nicely: “[O]ne of the present values of the past is as a repository of values we no longer endorse, of questions we no longer ask.” Quentin Skinner, Liberty before Liberalism 112 (1998).

22 Collingwood, supra note 13, at 235-36.

23 Id. at 489.
Ultimately, “the criterion of historical truth cannot be the fact that a statement is made by an authority” in the external sense of that word.24 In the classic account of authority in law, this is precisely the point. An utterance is accepted owing to the status of its utterer: a recognized court or judge, or maybe a revered treatise writer. Our acceptance of a statement as authoritative is content-independent.25 Precedential thinking, unlike historical thinking, does not require that we expose an authority’s statements to any critical test. In Collingwood’s terms, such authority is external rather than internal to those accepting it.

While we might distinguish the historian’s and the jurist’s understandings of authority in this way, they share one feature that is critical for what follows here. Both rely on the existence of evidence to establish the fact of an utterance having been made. However distinctive, we discover that historical and precedential thinking are linked, at bottom, in the archive. It is there that we will have any hope of finding “an identifiable earlier event.”26 Theorists of precedent have wrestled with the fundamental conceptual problem: how to identify what one might accept as an event “sufficiently similar” to the one before a later court.27 Schauer takes up this problem of how we perform the work of analogy at the heart of the use of precedent, noting how it is an issue “of assimilation, how we will group the facts and events of our world.”28 But this problem is linked to a deeper empirical question to which I want to turn: how have others found, and how will we find, a “sufficiently similar” event?

Finding requires that events be stored and that means be devised for getting at them. We pronounce these means by the word “archive.” For all that judging by precedent and composing historical analyses are thus conceptually different enterprises, they are the same enterprise insofar as they rely on the archive. So let us theorize the archive, then historicize it.

### III. Theorizing the Archive

Archives are the vessels into which we intentionally put authority made in the present in order to inform authority-making in the future. Archive-making, like judging by precedent, involves “imagining what might be”; it makes us “visionary and expectant.”29 As we find precedents in the archive, as we make legal authority, we construct potential precedents; as we use the archive, we continue to make it.

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24 Id. at 237.

25 Schauer provides an account of H.L.A. Hart’s notion of authority before proceeding to consider its limitations, especially to demonstrate the viability of the idea of an “optional authority,” which would seem otherwise to be inconceivable by an account that sees “persuasion and authority [as] inherently opposed notions.” Schauer, supra note 1, at 1943.

26 Duxbury, supra note 8, at 9.

27 Schauer, supra note 9, at 577.

28 Id. at 579.

The traditional conception of the archive is as “a neutral, or even ethically benign, tool … an empty box, a place, a site or an institution, whose special role is the guardianship of the document.” By this view, in the words of Arjun Appadurai—himself building on the French Annales historian, Marc Bloch—documents form a “graphic trace,” their creation and gathering into the archive a result “of contingency, indeed of accident, and not of any sort of design.” Intentions are the act of an archive’s later users, not its present creators. The archive’s “moral authority stems from the purity of the accidents that produced its traces.”

It’s been a long time since historians have seen the archive in such innocent terms. Rather, we can now see the archive as “an aspiration … a deliberate site for the production of anticipated memories by intentional communities.” Archives don’t contribute passively to making histories; they have histories.

Twenty years ago, Jacques Derrida offered what persists as the most influential consideration of the archive. He began etymologically. The Greek word arkhion indicated “the residence of the superior magistrates, the archons,” whose function was to command. Command involved making law and keeping the signs of its making. Archons also possessed “the power to interpret the archives.” This competence arose from the fact that they made the means of classifying the documents they kept, operating “by virtue of a privileged topology” of their own creation. Making the archive and ruling through it entails making the means of access to its contents. This discussion formed a prologue to Derrida’s main concern: a consideration of our obsession with finding the beginnings of things—the mal d’archive. As one reader of Derrida puts it, “[T]he beginnings of law lie in the archive.”

Many commentators have expanded Derrida’s account to see the archive as “all the ways and means of state power.” Perhaps. But as Carolyn Steedman has helpfully observed, “if we are historians … archives are nothing like this at all.” They are places filled with objects bodying forth the unexpected, creating intimacies across space and time that we cannot anticipate until we encounter them. As historians or as jurists operating in precedential mode, we might want to move on.

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31 Id. at 16-17. Understood this way, the archive, on which historians depend, seems to have been formed in defiance of Collingwood’s dictum against “anticipatory historical thought.” Collingwood, supra note 13, at 410.
33 Cornelia Visman, The Archive and the Beginning of Law, in Derrida and Legal Philosophy 41, 42 (Peter Goodrich et al. eds., 2008).
35 In keeping with an impulse common among historians, Steedman deflates theory by reference to the desultory reality of practice. For her treatment, which expands on the article cited above, see Carolyn Steedman, Dust: The Archive and Cultural History (2002). For a love letter by an historian to the archive and the intimacies it fosters, see Arlette Farge, The Allure of the Archives (Thomas Scott-Railton trans., 2013).
Michel Foucault helps us do so. The archive, as he put it, is “the system that governs the appearance of statements as unique events.” By embodying the “statement-event,” the archive “defines the mode of occurrence of the statement-thing.” The clerks who make the archive make a thing out of an event—that key quality of a precedent—and thereby project the event into the future.

In pondering the archive, Foucault, like Derrida, was concerned with more than “the institutions, which, in a given society, make it possible to record and preserve those discourses that one wishes to remember.” I am not. It is theoretically interesting to think of an archive in capacious terms as it conceivably consumes all ideas and practices we might associate with terms like information, desire, or power. But I will restrict my discussion to places, people, and their practices, to those institutions we denominate by vernacular uses of the word “archive.” For there were and are such institutions. Their operations and purposes require explanation in and of themselves.

Nonetheless, Derrida and Foucault help us identify three key features of archives as institutions. First, they help us see that archives are places, occupied by people doing work. This work is concerned simultaneously with conserving, classifying, and interpreting. Each of these activities constitutes or makes possible the others. As we shall see, classifying becomes interpreting, and vice versa. Second, the archive makes statements into events by making them into things. The thingness of statements makes them potential precedents. Finally, we are reminded of the archive’s future orientation. If conserving, classifying, and interpreting are the constitutive acts, the persons performing those acts in a given place constrain and direct the future.

IV. Historicizing Archives

The more we see the material dimension of decision-making by precedent—the more we are concerned with the problem of how we shall find an event that is “sufficiently similar”—the more we realize that this material dimension exists logically prior to the problem of what constitutes similarity. By devising the labels deployed in making the catalogues, tables, and indexes as well as the systems by which those labels were and can be deployed, the makers of the archive determined what we might find. Derrida suggested that any understanding of the archive must account for its institutionalization. The claims that authorize the creation of the archive, he suggested, impose “a bundle of limits” on it.

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36 In part by reflecting on Steedman’s critique of Derrida, Randolph Head has noted how “the sweeping claims and ultimately anti-historical approach taken by Derrida ensured that many historians might accept the stimulus, but would reach for their own new paths that took account of the theoretical archive without losing sight of the very real archives they encountered.” Randolph Head, Preface: Historical Research on Archives and Knowledge Cultures: An Interdisciplinary Wave, 10 Archival Science 191, 192 (2010).


38 Id.

39 Schauer, supra note 9, at 577.
These limits “have a history.” So the archive must become an object of historical inquiry as well as a site of the kinds of labor that produce histories or precedents.

Historically, the principal community that intentionally constructed archives was the modern European state as it formed in the sixteenth to eighteenth centuries. As a technology of knowledge, the archive was one of the chief means—along with new military and financial structures and courts—by which states generated the political and social order they aspired to achieve. The ambitions that generated new state practices were inconceivable without the archives that sustained them. It is no accident that the consistent survival of official documents produced in the course of managing England’s monarchical state began with the reign of Henry VIII. These State Papers grew in volume and complexity over the following two centuries, organized around distinct administrative targets—domestic, foreign, colonial—divided by reign, and increasingly broken into subclasses as the work of government became characterized by neater divisions of labor.

New methods of organization increasingly relied on registering documents in distinct series and on new forms of indexing to aid movement within the archive. Nowhere was this work more apparent than in the making and managing of empires, a process that unfolded in tandem with the formation of European states and their archives.

Three things stand out in this brief history of state archives. First, archives grew and underwent careful organization by design, not accident. Archive design, like decision making by precedent, arose in response to expectations about the future; design determined what might be archived and thus knowable—it determined that future. Second, archives don’t just contain texts. They contain objects, the material nature of which was crucial to the meanings of the words and other signs in documents, both as they were

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40 Derrida, supra note 32, at 4.


43 The State Paper Office, which kept the documents generated by or associated with successive monarchs’ secretaries of state—the nodal point in royal administration—received its first “keeper” in 1606. Nicholas Pocock, From Abbey to Archive: Managing Texts and Records in Early Modern England, 10 Archival Sci. 249, 250-51 (2010). On the cataloguing work of Arthur Agarde and Thomas Wilson, see id. at 259-62.

44 For discussion of the registration and indexing system developed at Innsbruck beginning in the 1560s, see Randolph C. Head, Spaces in the Archive, Spaces of the Archive: Material, Metaphorical, and Abstract Articulations of Space in Early Modern Chancery Record Management (Aug. 2009) (http://www.academia.edu/2460564).

45 Colonial archives are “products of state machines … technologies that bolstered the production of those states themselves.” Ann Laura Stoler, Colonial Archives and the Arts of Governance, 2 Archival Sci. 87, 98 (2002).

46 “Only what has been pre-judged as relevant is likely to be recovered.” Harriet Bradley, The Seductions of the Archive: Voices Lost and Found, 12 Hist. Hum. Sci. 107, 113 (1999).
conveyed and received at the time of their creation and as they were intended to survive for those whom the archive’s makers imagined might resort to them later.\textsuperscript{47} Third, we might think of the archive not only as a thing or as a container of things, but as an ongoing process. Archives, in the words of Ann Laura Stoler, act as “epistemological experiments,” giving intentional structure to knowledge in pursuit of particular ends.\textsuperscript{48} As Derrida pointed out, “archivization produces as much as it records the event.”\textsuperscript{49}

The evidence of identifiable events that we consult today was constructed for us by others to be evidence of certain preferences and aspirations. Only by understanding the preferences and aspirations of their makers and the practices they used can we hope to understand what we may and may not do with the archive. Only by understanding archives as physical spaces filled with objects of certain kinds, designed and made by embodied persons who worked in those spaces, can we hope to apprehend the texts on which we normally dote. Only then can we assess just what it means to say an event has served and might serve again as a precedent, as an authority.

V. Historicizing Precedent and Authority

“Precedents are examples or authorities to follow in judgments.”\textsuperscript{50} Thus declared Giles Jacob in the 1729 first edition of his influential law dictionary. The construction of his definition makes synonyms of precedents, examples, and authorities. Precedents and authorities—rulings, judgments, cases—are examples. As such, they give evidence of what law on any given question might be; they illustrate the possibilities. They do not, in and of themselves, dispose of any given problem because precedent does not, by its nature, impose any absolute requirement of obedience. It certainly didn’t in the eighteenth century. Like archives, precedent and authority involve concepts and practices with a history, one that pivots on the eighteenth century.

By the seventeenth century, justices had begun to give greater credence to the results of previous cases. But they did not feel bound by those cases.\textsuperscript{51} In the eighteenth century, precedents continued to suggest rather than direct outcomes, though it was then

\textsuperscript{47} In the documents the early modern state created, “meaning depended not only on the words inscribed on them—their texts—but also on their material form, on visual cues, on seals, signatures and other special marks.” Head, Mirroring Governance, supra note 41, at 320.

\textsuperscript{48} Stoler, supra note 45, at 87.

\textsuperscript{49} “[T]he technical structure of the archiving archive also determines the structure of the archivable content even in its very coming into existence and in its relationship to the future.” Derrida, supra note 32, at 17.

\textsuperscript{50} Giles Jacob, A New Law-Dictionary (1729), s.v. “precedents.”

\textsuperscript{51} David J. Ibbetson, Case Law and Judicial Precedents in Medieval and Early-Modern England, in Auctoritates: Law Making and Its Authors 55 (Serge Dauchy et al. eds., 1997). Ibbetson thus differentiates between a medieval emphasis on the fact of the decision and a later interest in the argument by which the decision might be made and explained. Given this, “there was no real place for even a weak doctrine of judicial precedent of the form which had developed by 1600.” Id. at 66. For the early modern reluctance to see in previous cases much more than evidence of law, rather than binding directives, see John Baker, The Law’s Two Bodies: Some Evidential Problems in English Legal History 16-17 (2001); and J.W. Tubbs, The Common Law Mind: Medieval and Early Modern Conceptions 179-83 (2000).
that a notion of *stare decisis* began to appear. Accounts of this development stress changes in judicial process and in case reporting. But lawyers and judges of the eighteenth century continued to rely more on manuscript case reports, just as their predecessors had done. After all, manuscript reports were often of higher quality than their printed counterparts. As John Baker has demonstrated in his extensive work on the manuscript evidence of English law’s history, we must therefore be wary of “the tyranny of the press over our intellectual horizons.”

Nonetheless, as manuscript practices persisted, the volume and the quality of printed reports did improve, especially in the later eighteenth century. It was an age in which print and manuscript mingled in a single system for knowledge work. We might go further, connecting a changing conception about the use of precedents to reading, note taking, and writing practices that the legal community shared with everyone else in the eighteenth century. This is especially apparent in the making of legal commonplace books. These were manuscript collections of precedents made by students and practitioners, who put in one place references to cases or quotations they found as they read court rolls, case reports, treatises, and abridgments. Readers gathered citations under alphabetically arranged headings of their own choosing—abatement, bailment, and so on. Some made chronological guides and subject or name indexes. By these means, the makers of commonplace books built custom guides to matter that might serve as precedents, mixing chronological, conceptual, and other modes of access. And increasingly, this longstanding practice of making personal books in manuscript was imitated in print, as abridgments and commonplaces competed with one another in a growing market for printed law books.

As lawyers, courts, and judges changed their practices regarding the use of precedents in legal decision-making, those changes were accompanied by—even propelled

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52 For changing judicial and reporting practices and *stare decisis*, see Duxbury, supra note 8, at 31-57; Peter M. Tiersma, Parchment, Paper, Pixels: Law and the Technologies of Communication 177-220 (2010).


54 One of the key figures in this development was Sir James Burrow, who was not simply a reporter, but also master of the Crown Office, the person in charge of the King’s Bench’s Crown Side archive. On the improvement of printed reports, and on the persistence of manuscript notes and reports, see James C. Oldham, Introduction, in Case Notes of Sir Soulden Lawrence, 1787-1800 (Selden Soc’y Annual Vol. 128 (2011)) (James C. Oldham ed., 2014).


56 On literary and other non-legal commonplace practices, see David Allan, Commonplace Books and Reading in Georgian England (2010).

57 For an excellent account of the relationship of print to manuscript in the early modern era and a thoughtful treatment of the distinctiveness of developments in these practices in the eighteenth century, see Julia Rudolph, Common Law and Enlightenment in England, 1689-1750, at 40-54 (2013); see also Wilfrid Prest, Law Books, in 5 The Cambridge History of the Book in Britain 791 (Michael F. Suarez & Michael L. Turner eds., 2009).
by—changing material practices in the control of knowledge, and nowhere more signifi-
cantly than in the archive. So into the archive we must go.

VI. The Crown Office of the Court of King’s Bench

Practices used in judicial archives changed as the interest in precedents changed during the
clear modern period. New classes of records came into being in court record offices.
More important, clerks made more and better finding aids for the records in their care.
They did so by creating precedent books that employed similar usages found in common-
place books.

Consider the archive of the Crown Side of King’s Bench. The Crown Side con-
ducted major criminal proceedings and supervised lesser courts and magistrates as they
dealt with everything from alehouses and bastard-bearing to poverty, sewers, and vagran-
cy. The main body of Crown Side records, especially those from before 1688, resided next
to the court itself, in the Upper and Lower Treasury of Westminster Hall. Here they were
joined with the voluminous records of the Plea Side of the same court: that part of the
court’s business concerned with disputes between private parties. Repeated reports
throughout the eighteenth century warned that the records in the King’s Bench Treasury
in Westminster were in “ruinous” condition and in danger from fire.

More important for our purposes, there were only two ways to find cases in the
records held in the Treasury: by chronology or by the names of parties. Neither date nor
surname are principles by which the sufficient similarity that underlies precedential think-
ing might be established, so neither finding method could serve as the means for making
an archive into an instrument for the generation of authority. What one needed was an
index organized by forms of action and subdivided by varieties of factual circumstance,
jurisdiction, and more.

In fact, there were such indexes. These were kept in the Crown Office of King’s
Bench, in King’s Bench Walk, in the Inner Temple. It made sense that the Crown Office
was nearly two kilometers away from the court. The justices sat during term in Westminster
Hall. But they and the bulk of the legal profession kept their chambers in and around the
Inns of Court. This is where they did most of their work. Clerical offices of each of the
royal courts—Common Pleas, Exchequer, Chancery, and King’s Bench—were scattered

58 The coram rege rolls and other records were kept on “open stages” in the Treasury. These merged the
main records of the Crown Side with those of the court’s Plea Side into massive rolls. Today, these are
TNA, KB27. In 1702, the coram rege rolls were divided into separate series for the court’s two sides. The
Plea Rolls persist as KB27, while the Crown Rolls are KB28.

59 TNA, WORK6/16, f. 103: report of the commissioners of the royal works, 3 December 1739. Another
report to the same effect followed a decade later: WORK6/17, f. 61: 20 February 1749/50. By the mid
1750s, complaints were still made and plans for improvements remained stalled: WORK1/3: Works Office
to Samuel Seddon, 11 January 1755. On the contents of the Upper Treasury, see W. Nicolson, The English,
Scotch and Irish Historical Libraries 163 (1776). In 1709, the House of Lords heard complaints that these
record rooms at Westminster were “so noisome and unwholesome, that they are not able to fit in it; and
that it rots the Records.” 18 J. House Lords 717 (Apr. 20, 1709).
around the Inns.60 This put them near their regular users: the attorneys and barristers who needed information about previous proceedings that they might put in their briefs, and the justices who made decisions in response to the precedents put before them.

Consider this plan of the record room (Figure 2), drawn in the 1790s in the back of a precedent book by an unknown clerk. This simple diagram reminds us powerfully that an archive is not a theoretical conceit. It is a place filled with things.62 By examining an office layout, we are reminded that work with ideas happens in and through an embodied relationship with physical objects in a physical space.63

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60 For a listing of these offices, see Browne's General Law-List 6-8 (1777). The office of the clerks on the Plea Side of King's Bench was a few doors from the Crown Office, in an “ancient building … at the bottom of the King's Bench Walks.” Great Britain, House of Commons, Reports from the Select Committee, Appointed to Inquire into the State of the Public Records of the Kingdom 117 (1800) [hereinafter Commons Report].

61 TNA, KB15/53, 534-35. The latest note of dates marked on the plan at the time it was made is 29 George III (1788-89), though later notes amend some of the entries for later in the same reign (as late as 45 George III). Given how the information provided here accords perfectly with the description of the Crown Office's holdings in the Commons Report of 1800, this plan may have been created in aid of the work from which that report was generated. This suggests a date between 1789 and 1800.


It appears that one entered by a door in the lower right corner. The room was well lit by three windows. The ceilings were probably high, with presses that ran most or all of the height of the wall. We thus see a large, open, and probably quite full storage room. We might think of the room functioning as a single system, as a machine for finding precedents. Clerks would find what they needed and take it back to their desks, in rooms outside.

Though carefully controlled, records appear to have moved around a lot, within the office and beyond. During term, a book- or bag-bearer and other clerks carried on a regular traffic between the Temple and Westminster, carting records back and forth. Records could only leave the office upon “command of some of the judges.” After use, clerks were instructed to “put them in order on the files and bind them up and put them in such place in the office as is used for them that they may be the better preserved and more readily found.” The clerks understood that physical location in known places made possible the effective organization of things and thus of ideas. The most recent records were kept in the master’s room. And all but two categories of records date from the reign of Charles II, and especially after 1689. If the Crown Office was a machine for finding precedents, then we learn something important from this locational information about what was thought most likely to contribute to making a precedent: recentness.

Scanning the room’s holdings, we see that bails and indictments feature prominently. These were held in two distinct chronological files, for greater London and beyond, that were made up as documents came into the office. Affidavits, which only came into common use in the late seventeenth century, were likewise kept in a chronolog-

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64 The plan is not drawn using standard architectural conventions of the period, so this is speculative. That said, the drawing suggests an entrance by showing a slight gap in the perimeter and by starting to enumerate the presses immediately to the left of this gap. The probability of windows is indicated both by the marks used and by their symmetrical placement by press 5. My thanks to Louis Nelson for his help interpreting this image.

65 Dimensions present a puzzle. For instance, a rough estimate suggests that the controlment rolls—each of which is about 10 x 35 inches—indicated as being held in press 10 would occupy a total height of approximately fifteen feet. It is hard to imagine that the ceilings were so high. One possibility is that these presses were sufficiently deep that they could hold two stacks of the rolls. The oblong shapes of the presses in the image do not suggest this.

66 Thus an archive is “a centre of interpretation ... the place in the network through which all the other points must pass.” Thomas Osborne, The Ordinariness of the Archive, 12 Hist. Hum. Sci. 51, 52 (1999).

67 This plan refers to the master’s room as distinct from this record room; a similar, slightly later plan in TNA, KB15/52 (unpaginated, at rear), refers to a separate room for the secondary—the master’s chief deputy—as well. The absence of any indication of furniture besides presses suggests desks elsewhere.

68 This traffic can be traced using the tables of fees commonly published in attorneys’ practice manuals: e.g., Anonymous, The Practick Part of the Law (new pagination, at rear) (1695). See also TNA, KB15/64, ff. 5-17.

69 TNA, KB15/64, f. 21.

70 The indictments are listed as items one and two in Commons Report, supra note 60, at 112. This description helps us confirm that criminal process by information was joined with the indictments in the same files.
ical series.\textsuperscript{71} So, too, were “records of orders” (Figure 3).\textsuperscript{72} These annual files contained writs and returns of certiorari—by which the court brought matters from other courts and officers for review in King’s Bench—as well as writs of mandamus, habeas corpus, and more, including informations in the nature of quo warranto, by which holders of royal franchises, especially officers of urban corporations, challenged the legality of one another’s hold on office.\textsuperscript{74} The cords running through these recorda files kept their contents in chronological order but made them cumbersome. Finding a proceeding of a certain kind—finding an event—in files like these was physically difficult and time-consuming work.

Two other series of documents suggest a better way to find precedents. Controlment rolls beginning in the reign of Edward III take up six of the room’s twenty-two

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{recorda_file.jpg}
\caption{The inside of a recorda file for 1759-60, stored in one of three presses in the Crown Office. A return to habeas corpus lies on top, attached to the writ that prompted it (folded back, on the left). Immediately underneath is the top corner of a writ of mandamus to the Company of Surgeons to swear Melmoth Guy as an apprentice.\textsuperscript{73}}
\end{figure}

\textsuperscript{71} Now kept as TNA, KB1 and KB2.
\textsuperscript{72} TNA, KB16 (recorda files).
\textsuperscript{73} TNA, KB16/15/4 (open to Michaelmas, 1759). The mandamus is for swearing Melmoth Guy as an apprentice of the Surgeons Company, as reported in R. v. Master and Wardens of the Company of Surgeons in London, (1759) 97 Eng. Rep. 621 (K.B.).
presses (Figure 4). The fact that this is the only large body of materials predating 1688 indicates their utility. These were annual rolls made up by the secondary, the deputy to the master of the Crown Office. They contain “minutes of all the material proceedings in Crown causes, with references to the [coram rege] rolls in the Kings’ Bench Treasury. These therefore serve as Indexes to those rolls.” Entries were made on the controlments of writs of certiorari, habeas corpus, mandamus and other process and of the returns made to them. When they came into the office, the originals were placed in the recorda file and numbered, to provide ready reference from the roll to the file and vice versa. The controlment rolls thus provided a copy of items in a more accessible form: it is physically simpler to flip through a roll than to rummage through a file of parchments of different size and condition.

At least that was how it was supposed to work. In fact, entries were frequently omitted, the numbering often broke down, and for certain types of process, controlment entries diminished or disappeared altogether after 1688. Ease of access was thus vitiated by lower quality of enrolment. More important, the controlment rolls—though more easily searched than the gigantic coram rege rolls or the awkward recorda files—were also arranged by chronology. They did not and could not serve as means for finding precedents across many years by providing reference to cases according to type of proceeding or other factual characteristics. Lower quality of enrolment and the limitations of chronological organization probably explain why care in making these rolls declined beginning in the late seventeenth century. Their use as finding aids declined as well.

One other series of records ran back to well before 1688. The rulebooks commenced in 1589 (Figure 5). These contain entries of all the rules and orders that moved

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75 These are now TNA, KB29.
76 Commons Report, supra note 60, at 113. For discussion of the secondary’s functions, see TNA, KB15/64, f. 3. Robert Richardson, The Attorney’s Practice in the Court of King’s Bench 5 (1739).
77 TNA, KB29/297.
78 Commons Report, supra note 60, at 113.
79 TNA, KB21. Though the date range of the volumes held in the Crown Office does not appear on the plan, the Commons Report, supra note 60, at 113, indicates that the entire series, originating in 1589, was stored there in 1800.
cases along. In an office filled with records organized almost entirely by chronology, these books provided a better way to find things. If one had a rough idea of the date of a possible precedent, one could move quickly through their pages to find it: not only a judgment, but also other stages in proceedings. As books, they were the easiest physical objects to search. Flipping through pages in a volume with a soft vellum cover is faster than going through a file or roll. But if you didn’t know dates for possible precedents, 10,000 folios in forty-six volumes occupying about 100 shelf-inches presented a lot of ground to cover.

At this point, we can observe only one important principle of organization at work across all these records: chronology. Records in the Crown Office, and those in the Treasury in Westminster, would have served the purpose of finding precedents very poorly. In a precedential regime, dates have little independent analytic import.

If you wanted to find examples of writs of mandamus, it would have been easy enough to run through a few recorda files or rulebooks and find examples. But this is not how precedential decision-making—premised on likeness of circumstances—operates. When searching for precedents, the searcher typically wants not just any example of a mandamus, but one that evinces certain factual matter by which to liken the result in that case to a case in the present. We need “sufficiently similar” cases. One might need cases concerning swearing someone into public office rather than those about the transfer of records from one officer to his successor; one might need instances of oaths given to apprentices of companies rather than to fellows of colleges or mayors of towns. The eager searcher

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80 TNA, KB21/7. The label marked “Floor A” is modern.
81 Beginning in the mid-eighteenth century, these were bound in covers with stiff boards.
82 Schauer, supra note 9, at 577.
might suspect the haystacks he could investigate, but he would have had no idea where the needle might be, or even if there was one.

Another way to find records of useful precedents would be to consult reports. But only a small fraction of cases were reported, even later in the eighteenth century. And the point of searching for precedents in the court's records was to find more or different cases than those in the reports. Happily, there was a better way to find precedents than to flounder in masses of chronologically ordered parchment or to rely on the fraction of cases in the reports. The clerks made the way, their intentions directing access to the past and thus contributing to determining law's future. It was they who made authority by turning a record office into an archive. They did this by making manuscript books.

VII. Precedent Books

The earliest surviving precedent books were made in the Crown Office in the late sixteenth century. It had long been "the duty, and always ha[d] been the usage for the clerk of the Crown to make and keep indexes of his own records." Though a practice of long standing, the precedent book came into full flower in the eighteenth century.

Consider one example. Henry Walrond appears to have begun work on his volume of precedents from the rulebooks in the late 1710s, early in his career as a clerk in the Crown Office. Looking carefully at the hand, paper, and ink, we might conclude that he made it over a relatively short period. Though chronologically ordered like everything else in the office, the volume would have served as a better aid to finding precedents, for three reasons.

First, and most important, it is a compression of a larger chronologically ordered body of material. Walrond walked through the twenty-nine volumes available then, copying only the rules of greatest interest to him, reducing approximately 4000 written folios to about 100. Second, Walrond, or probably a later clerk, annotated the contents by underlining, making occasional notes in English, and using manicules: hand-shaped pointers.

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83 Oldham, supra note 54.
84 For example, TNA, KB15/42 was made or owned by Mile Sandys, master of the Crown Office in Elizabeth's reign. Another precedent book appears to date from roughly the same period: KB15/41.
85 Commons Report, supra note 60, at 117.
86 TNA, KB21/124. A note on the flyleaf says, “Special rules collected by Mr. Henry Walrond” (see Figure 11, below). The last entries in the volume date from the end of the reign of Queen Anne, in 1714. According to The National Archives Catalogue, the book's date was ca. 1716, though no evidence is provided in support of this dating (http://discovery.nationalarchives.gov.uk/SearchUI/Details?uri=C214571). Walrond was one of the lesser clerks, working under Sir Henry Masterman, from at least 1731. Great Britain, House of Commons, Lists of the Officers and Their Deputies, Belonging to the Several Courts in Westminster-Hall … Pursuant to Their Order of the 4th Day of March 1730, at 32 (1731). Walrond's name disappears from lists of clerks of the Crown in Richardson, supra note 76, between the editions of 1739 and 1743. We might thus guess that he made this volume sometime between the 1710s and 1740 or so.
commonly drawn in the margins of books by early modern readers (Figure 6).\textsuperscript{87} Finally, another clerk made a subject index.\textsuperscript{88}

As befits an annotated selection of court rules, Walrond’s book is heavy on procedural fare—attachments for contempt, special orders directing court personnel, fines, process in the return of writs—of just the kind about which the court’s justices expected the clerks to be experts. These were precedents of a critical kind in a world in which most proceedings did not go to judgment, and in which procedural choices loomed large in determining outcomes whether reached in court or outside of it. These were important precedents in circumstances in which how process worked was often determinative though not extensively reported.

But the clerks’ precedent-finding aids lent themselves to more substantive ends, too. Perhaps the most important change in King’s Bench business was its growing supervision and correction of other courts, justices of the peace, corporations and companies, and public functionaries of all kinds by using the prerogative writs: mandamus, certiorari, habeas corpus, and quo warranto.\textsuperscript{90} An entire precedent book might be given over to lengthy examples of cases of just one of these kinds: for instance, a volume devoted to mandamus (Figures 7 and 8). Others might serve as finding aids to multiple procedural forms by providing short references to cases by type, with types further divided into sub-categories.

Seeing how clerks made and filled their categories, we can get a sense of what they thought was important: what they thought were the effective distinctions to be made among otherwise similar kinds of things. Thus another volume contains entries of many kinds of process, but once again, focuses on mandamus. These entries were broken into


\textsuperscript{88} The index is in the middle of the volume. The indexer does not appear to have worked past page 17.

\textsuperscript{89} TNA, KB21/124, p. 145.

\textsuperscript{90} Paul D. Halliday, Habeas Corpus: From England to Empire 74-84 (2010).
subcategories: writs to hold elections, to swear a duly chosen officer, and to deliver records or ensigns of office from one officer to another, among many others. A general

Figures 7 and 8: A precedent book devoted to one purpose: cataloguing important uses of the writ of mandamus, one of the most politically consequential and often-used writs in King’s Bench in the eighteenth century. The text of this volume, with its neat hand, beautiful rubrication, and headings distinguishing writs for different purposes—for colleges, for towns, etc.—and its extra notes, in English, would have made it an effective reference to precedents.91

index of all of these by locale was also provided, as was a separate list of those sent to parliamentary boroughs, a sign of the clerks’ awareness that the choice of corporation officers in such towns might have serious political consequences. The clerks’ categorizing

91 TNA, KB15/46.
and indexing shows us the subdivisions by which potential precedents were organized and thus by which they might be found again. They show us how the clerks anticipated and thus attempted to shape the future.

By making such a way to find cases, the clerks converted records into an archive. They determined importance and controlled access, their lists defining relevance. We can thus readily imagine that if you wanted to find an example for a case as obscure as a mandamus to swear an apprentice of a London company, all you needed to do was turn to the pages in this volume, and in a few minutes of skimming, you would find reference to one (Figure 9). A brief entry there of the proper term and year would send you to the right place in a chronologically ordered file, roll, or rulebook where you might learn more.

In addition to their utility, these books show two other crucial qualities. First, we can associate this and many other precedent books with their makers and with later owners and users. These were private objects, not public records. They were created and used by identifiable people responsible for creating and mastering the archive. The Commons committee reporting on record keeping in 1800 remarked that the secondary and the clerk of the rules—who kept the rulebooks—“have as their private property several indexes connected with the records of that office.”92 The committee noted especially the existence of “catalogues of the special writs, beginning at the Revolution [of 1688]”—probably the precedent books described above. But these had “been made merely for their own use, and are their private property.”93 As such, these books circulated more readily outside the office than did the court’s official records, as we may see from the plea on the pastedown of one volume—“pls return to Crown Office.”94 Private ownership and a tendency to lend the books out indicates that those that survive today must be just a portion of the precedent books in daily use by the clerks two or three centuries ago.

We can readily imagine the motive for clerks to make and lend these books: money. They received most of their compensation in fees for various kinds of work, especially finding and copying records in their care.95 The better access they gave to lawyers and their clients for finding useful precedents, the more copying work they would have.

Many of these books, like Waldron’s, show signs of multiple hands. Others show evidence of simultaneous composition by more than one person. In this way, we might think of the making and using of precedent books as a collective project. As in earlier

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92 They went on to note that “it would be desirable to appropriate [these indexes] to the use of the officers for the time being.” Commons Report, supra note 60, at 21.
93 Id. at 114.
94 TNA, KB15/57, front flyleaf.
95 Fees were a regular object of official interest. See, for instance, the report on King’s Bench fees by a 1736 royal commission: TNA, KB15/64, ff. 5-17. Clerical guide books commonly gave lists of fees chargeable by clerks of various courts for searching records, copying them, and other aspects of their work. For an example of such fees in the Crown Office, see Practick Part of the Law, table of fees (second pagination) 55-66 (1702).
Figure 9: At the bottom of a list of writs of mandamus for “special causes” is a reference to that for making Melmuth Guy an apprentice. The writ itself is pictured above (Figure 3). 96

96 TNA, KB15/64, f. 127. The entry here says the writ is for Richard Guy. Richard was Melmuth Guy’s father. Richard wanted the company to accept his son as his own apprentice. The entry here also says Trinity term, which is when the writ issued. The return and hearing on the writ was the following
book making practices, some precedent books were probably written out on carefully prepared sheets and only bound later. Working this way was important as it allowed the creation of new headings as a book's makers worked. As anyone who composes an index knows, it is the headings you discover you need to create as you work that make the most useful finding aid. Clerks also left ample blank space under each heading, anticipating the desirability of adding further precedents in the years ahead, even after the pages were bound together.

A pair of volumes containing selected examples out of the rulebooks bears elegant witness to these practices (Figure 10). Two clerks made these, probably in the late 1720s. They began by rubricating the pages or scoring them to make clean margins. A neat court hand runs throughout, while a distinct italic hand added further examples under many of the headings. In physical features like these, we see signs of the intentionality Michaelmas term (see Figure 3). This case was ultimately reported: R. v. Surgeons' Co., (1759) 2 Burr. 892, 97 Eng. Rep. 621 (K.B).

97 TNA, KB15/59 and 60. Confusingly, KB15/60 is the first in this pair of volumes. That they were created as a pair is indicated by many physical signs: the identical bindings; the foliation, which is continuous across the two volumes; and the alphabetical “index” at the beginning of KB15/60, which refers to both volumes. The Commons report says there was no index to the rule books in 1800. Commons Report, supra note 60, at 113. There may have been no comprehensive index to all entries in the 46 rulebooks created to that point, but KB15/59-60 were certainly indexes to selected cases. As privately owned volumes, they may not have come to the committee's attention.

98 TNA, KB15/60, f. 184.
informing the clerks’ work. They were concerned to provide for the future by cataloguing what had passed and by allowing for the continuation of that work into the future. The volumes’ 155 headings, running from “adjournment” to “Wales,” provide fine-grained divisions of business in a highly searchable form. Attachments for contempt figure prominently, perhaps because the master of the Crown Office was often charged with examining alleged contempts of court. General clerical procedures of all kinds fill many pages.

Precedent books—focused as much or more on process than on results, and where noting results, doing so without reasons—remind us that much of what courts do to resolve disputes is not to reach a judgment, but to move people along to resolutions they reach on their own. The single most important procedural category, as in other precedent books of the period, was mandamus. The variable volume of business under each of the headings signals what the clerks cared about. These headings indicate people making an archive, creating the categories and other means by which what was knowable might be known in the future.

Figure 11: Front flyleaf of a precedent book made by Henry Walrond, one of the clerks of the Crown Office.

Signs of ownership, even chains of possession, cover the pastedowns and fly-leaves of the court’s precedent books. Walrond’s book came later into the hands of Francis Barlow (Figure 11), the secondary in the Crown Office—deputy to the master—during the middle of the century. Like many in that office, Francis was later succeeded by his son, Henry Barlow, whose signatures and bookplate adorn a number of surviving

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99 We can guess about dating from two details in particular. First, the latest orders noted in each hand are for the twelfth year of George I: 1725-26. Second, the orders entered in these volumes are virtually all in Latin, the language of the rulebooks and other records until a statute directed record-keeping in English from March 1733: 4 George II, c. 26. Indeed, the second clerk seems to have taken over completion of the work from the first, though their work also overlaps throughout. This is suggested by the change in the way the headings were written beginning a few folios into the second volume. In the first volume and at the beginning of the second, the margins are rubricated—traced in red ink. The headings are also rubricated and in court hand. Early in the second volume, both practices change simultaneously: the margins were now made by scoring the paper rather than lining it in red, and the headings were in a black italic.

100 “[I]mportant as case-law is, we have made an error if we have treated the history of the common law solely as a history of decided cases.” Baker, supra note 53, at 78.

101 TNA, KB21/124, front flyleaf. On Walrond’s book, see supra text accompanying notes 86-89.
precedent books (Figures 12-15).\textsuperscript{102} The rear flyleaf of another volume suggests an even longer provenance, from the sixteenth century to the nineteenth.\textsuperscript{103}

These books thus occupy an interesting space, as objects identified with individuals, but made and shared in an ongoing group project for creating, controlling, and moving about within the archive. By recognizing them as private objects made to improve the clerks’ work and income, we can begin to understand the care in passing these volumes down through generations of clerks, many of whom were connected to one another by marriage and lineage. We can also understand better the control they exercised over record access, and the place this gave them in generating authority along with the justices. Reports are full of signs of the clerks being consulted about how to proceed.\textsuperscript{105}

\begin{flushleft}
102 Francis Barlow was a clerk of the Crown from at least 1755 and was secondary from at least 1776. He shared this latter office with his son, Henry, from at least 1796. Henry Barlow was sole secondary by 1803. Crown Office staff can be cobbled together from multiple works: Anonymous, The Clerk's Instructor in the Practice of the Courts of King's Bench and Common Pleas 16 (1741); multiple editions of Richardson, supra note 76 (1739 and 1743), at 4-8 in each edition; multiple editions of Anonymous, The Attorney's Practice (1743, 1759, 1769, and 1776), at 5-10 in each edition; John Impey, The New Instructor Clericalis (6th ed. 1796); and William Hands, The Solicitor's Practice on the Crown Side of the Court of King's Bench (1803), unpaginated (in the list of Crown Office staff).

103 TNA, KB15/42, rear pastedown, indicates that the book belonged to Miles Sandys in the late sixteenth century. It was initialed by Henry Barlow around 1800.

104 These images show the front pastedown or flyleaf of TNA, KB15/40, 41, 46, and 64.

105 The secondary was especially important in this capacity. The recommendations of Henry Masterman the elder, secondary in the 1720s and 30s, were often accepted “accordingly” after he gave them in court: Anonymous, (1729) 1 Barn. K.B. 252, 94 Eng. Rep. 172; R. v. Gohaire, (1729) 1 Barn. K.B. 275, 94 Eng.
And the court routinely consulted the clerks’ manuscript books, even long after their makers had died. But we can see this reliance on the clerks’ archival expertise even more clearly by watching them work in a single instance: finding precedents in the archive, helping the judges to make precedents, and then returning them to the archive again.

VIII. Finding Precedents, Making Precedents

“There is no precedent for this,” Serjeant John Glynn cries in this 1769 caricature (Figure 16). But Glynn was wrong: there were plenty of precedents. It had been a great case, widely watched. The lawyers on both sides had been superb. The justices praised them for quoting “many precedents and cases which had at various times altered their opinions.” Precedents had been found in the archive to decide the case of John Wilkes. His case was then put back into the archive so that it might become a precedent.

Wilkes’s closest friends knew him as an irrepressibly witty libertine, a man who could give as good as he got in a duel. London crowds celebrated him throughout the 1760s for his defense of liberty. Though he was imprisoned by the judgment of King’s Bench in May of 1768, toasts in “polite company” were “Liberty to Mr. Wilkes, and confinement to his enemies.” Four years earlier, juries had found Wilkes guilty, in absentia, on two charges: for seditious libel in publishing The North Briton, no. 45, an attack on the ministry, and for libeling a bishop in his “Essay on Woman,” a poetical bonbon he had prepared for a circle of friends whose tastes, like his own, ran to the place where ribaldry intersects pornography. By the start of Easter term 1768, Wilkes had decided to return from his French exile and to appear before King’s Bench to see what judgment he might receive.


107 2 Oxford Magazine, between 90 and 91 (January 1769).


111 For a recounting of the trials, see Cash, supra note 109, at 170-72. For a fuller analysis of the evidence and Mansfield’s notes, see 2 James Oldham, The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century 814-29 (1992).
In 1764, Wilkes had been found guilty not on an indictment, but on a criminal information, by which a defendant may be tried without the need for a previous finding by a grand jury. Now, in 1768, a few issues had to be clarified before the justices could proceed to judgment based on this conviction. Two potential problems arose: that the information against Wilkes had been amended on Chief Justice Mansfield’s order prior to his trial; and that the process of outlawry used in an effort to bring him into court had been improper. These problems would be addressed by searching out and discussing precedents during a series of hearings over the next two months.

The amendment of the information in 1764 had involved changing the word “purport” to “tenor.” Mansfield explained that this change had not been objected to in 1764 by Wilkes’s counsel, one of whom was William Hughes, a clerk of the Crown Office who acted on that occasion as Wilkes’s attorney. But by changing “purport” to “tenor,” the prosecution had been able to remove the problem of establishing intention from the wrong that it needed to convince a jury Wilkes had committed. Mansfield explained that, “upon hearing the clerks in court on both sides,” he had ordered the change made.112

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112 R. v. Wilkes, (1770) 4 Burr. 2527, 2528, 98 Eng. Rep. 327, 328 (K.B.) (quoting order of Feb. 20, 1764). Because it was then between terms, this controversial hearing occurred at Mansfield’s house, a common practice of justices as they conducted business during the court’s vacations.
Mansfield, with his fellow justices, was now in the position of reviewing his own actions on that occasion and the court's later use of outlawry. To consider these issues, "great searches" were made in the records, including by "some of us." Mansfield continued: "I say 'some of us'; because I cannot, with truth, assume the merit to myself. . . . But from the able assistance of those who have taken the trouble to make searches and to collect materials, I think I am now thoroughly master of a subject, which I am not at all ashamed to say I knew very little of before."113 "I feel myself extremely obliged," he explained, to those who "searched the subject to the bottom."114 At the bottom was the archive. The clerks produced from the archive "many authorities to support" their process by outlawry; these "are not, after so great a length of unquestioned usage, to be now impeached."115 Given his reliance on the archive, Mansfield rejected the dicta of spurious authorities: "The extension of [information] process [to misdemeanors] is supposed by Lord Coke. . . . and what he says is repeated, without examination, by a variety of authors. . . . [But] there is no authority for the supposition."116 He answered supposition with the authority of cases: reported cases and unreported ones that were available only in the court's archive.117

We are not told how the clerks worked.118 But we can make a good guess after having examined their precedent books. It would have been easy enough for them to find examples of amended informations in Henry Walrond's precedent book.119 Or they might have used the books of the late secondary, Henry Masterman. He had advised the court in 1730 that informations might be amended, and we know that his notes survived to be consulted in the generations after his death.120 Using tools like these, the clerks were able to find the "the records cited on both sides."121 And it was the records in and of themselves—recited at length, with little discussion of the rationale underlying them, since that

116 4 Burr. at 2558, 98 Eng. Rep. at 344. This is not the only time Mansfield took a shot at Coke. See, for instance, Cowle's Case (1759), where Mansfield criticized Coke's habit of citing "cases which were not applicable to the particular question under his judicial consideration." 2 Burr. 858, 97 Eng. Rep. 601. In other words, Mansfield thought Coke attempted to make precedents of things that were not sufficiently similar.
117 The unreported cases are indicated here by term and regnal year, sometimes with a roll number. For instance, see the notes at 4 Burr. 2564, 98 Eng. Rep. 348.
118 We might guess that counsel for one or both sides may also have joined in the search. If so, they could not have acted without the clerks' help and the access only they could give.
120 R. v. Charlesworth, (1730) 1 Barn. K.B. 342, 94 Eng. Rep. 230. On the use of Masterman's notes many years later, see supra note 105. One of the surviving precedent books indicates it was "the records cited on both sides."121 And it was the records in and of themselves—recited at length, with little discussion of the rationale underlying them, since that
rationale was not available in those records—that determined the matter. We might conclude that the court’s work with its precedents was content-independent. The justices and clerks acted as they did in response to the precedents, “simply because [they were] prior.”122 That was reason enough.

From what they saw in the precedents, Mansfield and his fellows on the bench agreed that informations could indeed be amended. They also agreed that the outlawry against Wilkes should be reversed. “Authorities,” stretching back nearly 150 years, “though begun without law, reason, or common sense, ought to avail the defendant.”123 Nonetheless, reversing the outlawry did not prevent Wilkes from receiving a stiff fine and twenty-two months in prison.124 But it is the search process rather than the result that interests us as we consider the material practices for bringing precedents out of the archive and turning them into authority. As Mansfield explained, in many cases, “judges must inquire of their officers. This is done in court, every day, when the practice is disputed or doubted. . . . The officers are better acquainted with it than the judges.”125 True enough. Their acquaintance grew out of their command of the archive that they made and maintained. The clerks mastered the precedents of procedure that determined the matter, and on them the justices relied.

Just as interesting as how the precedents came out of the archive is how Wilkes’s case returned there to become a potential precedent in the future. From the beginning, Mansfield had foreseen this result: “What is determined upon solemn argument establishes the law, and makes a precedent for future cases. . . . This will be a precedent.”126 The clerks made it so, turning the event into a thing.127 They did this in three ways. First, they did what they were always charged to do: they filed the documents the case generated and recorded the orders and judgment in the rulebook. Second, various aspects of the case were made into loose notes and added to bundles of other such notes in cases with similar features, for instance, with other cases involving amendments to informations.128 Finally, the clerks jotted notes of the case in their precedent books, where they might easily be found by a future clerk in search of interesting examples of outlawries gone awry.129 In their archive, the clerks continued to make authority.

122 Schauer, supra note 9, at 576.
123 4 Burr. at 2565, 98 Eng. Rep. at 349.
124 The judgment is entered in the rulebook: TNA, KB21/40, unpaginated, at Saturday fifteen days after Trinity. Unusually, it is also entered in full in Burrow’s report: 4 Burr. at 2575-76, 98 Eng. Rep. at 354-55.
126 4 Burr. at 2545, 98 Eng. Rep. at 337.
127 Or, in Foucault’s words, turning the “statement-event” into the “statement-thing.” Foucault, supra note 37, at 129.
128 TNA, KB33/5/7 (four records of Wilkes’s case); KB33/5/10 (miscellaneous judgments); KB33/14/1 (miscellaneous offences); and KB33/15/4 (amendments).
129 TNA, KB15/51, pp. 186, 267: Here, a simple reference under the index heading “outlawry” referred one elsewhere in the same volume to the Wilkes case, noted as showing “outlawry, an entry of after conviction.”
IX. Authority in the Archives

Wilkes encountered the power of the archive as its guardians generated authority. When finished, the result was put back into the archive, where it might generate authority again. That authority was produced not only through justices sitting on the bench and pronouncing the law. It was produced by a community employing particular technologies by which they made and managed what was authorized as law. At the heart of those technologies stood the guides by which the clerks made records into an archive. By devising the finding aids and the organizing categories within their precedent books, and by arranging the shelving and other furniture for preserving them, the clerks determined “the rules of a practice that enables statements both to survive and to undergo regular modification.”

This is how authority is made in a precedential system. At bottom, authority is an archival practice.

Rendering visible the archival community that generated authority in the eighteenth century reveals some of our own presuppositions that we may not otherwise see. Among these is our proclivity for print. If our trip into the archive suggests that authority was made in ways different from our own, then our reliance on printed sources and the voice of the Olympian justice as we try to write law’s history and as we try to make judicial authority today is not simply a problem; it is the problem. To solve it, we must follow the court’s clerks back into the archive. This is not the place to consider the many varieties of ostensibly historicizing approaches to law’s past commonly used in courts today—some call these approaches “originalism.” But whatever our interpretive premises, if we do not understand the material forms in which the texts we enlist in our arguments first appeared and by which they survive to us now, then our most elegant methods of textual interpretation can yield little of value.

More problematic than the texts we consult are those we may never see, obscured by all those that we do see. Appreciating this is especially important now. The social history writing of the 1960s and 70s and the revisionist historiographies of the 1980s and 90s inspired a turn to the archive in force. Now, the internet directs a new generation of historians, and the jurists who hope to build claims for their own authority out of their work, back to print. Word-searchable databases of printed texts make such work too easy, encouraging us to avoid tougher but more valuable work. And we don’t stop often enough to consider how the structures for searching designed by software engineers may not help us see, much less answer, the significant questions we might put to the past. Like court

This entry then referred the reader to a fuller treatment in a different precedent book, called “the Great Book.” Here, one may find a full entry of proceedings on Wilkes’s outlawry, notice of its reversal, and the judgment on his conviction which then followed; TNA, KB15/50, pp. 469-74. Neither of these books lists the Wilkes case under headings for “informations.”

Foucault, supra note 37, at 130.

One of the consequences of this is that we increasingly work on texts in ways their makers could never have done or imagined. While such databases open some new vistas, they block others: most important, those by which we might see what their makers thought they were doing by making texts and books in the forms they did.
clerks two or three centuries ago, those who create the categories and the other means of conducting our “great searches” today shape what we ultimately claim for our own authority.\textsuperscript{132}

All is not lost. Certainly, some databases contain not only print material, but also manuscripts or catalogues of archives. These can promote our access to the written word.\textsuperscript{133} And it may be possible for some manuscript materials to become useable, if not searchable, through online image banks. But serious, perhaps insurmountable, problems remain.\textsuperscript{134} We may want to join digital evangelists in celebrating the idea that everything is online. “True but trite,” responds Robert Darnton. There is, he reminds us, a long history of change in technologies of knowledge that overlap rather than erase each other. “To imagine a future in which the digital destroys the analog is to misunderstand current trajectories and the history of communication in general. New media do not extinguish old ones, at least not in the short run.”\textsuperscript{135} People understood this in the eighteenth century, as clerks continued to use manuscript practices to control the archive, even as the volume and utility of print grew apace. Though the new does not simply supplant the old, new media do cloud our view of what remains of the old. As they do, and as we forget that they do, the archive will be hidden rather than revealed by electronic means. So, too, will all it has to show us about the practices and ideas of others, and about our own.

I do not mean to romanticize the archive. Doing so holds its own risks. It’s not pretty work.\textsuperscript{136} But it was and is necessary work. The seeming banality of life in the archive—for those who made the archive long ago, and for those of us who use it now—prevents us from taking seriously the business of looking closely at things. But if we do look closely, we will see that the archive provides us with the stuff by which we might get at what matters: the ideas.

We must think historically before we can think precedentially. In precedential mode, we ask the eighteenth century to do our bidding, to answer our questions. Fine. But

\textsuperscript{132} For discussion of one interesting effect of searchable databases on legal argument, see Frederick Schauer & Virginia J. Wise, Nonlegal Information and the Delegalization of the Law, 29 J. Legal Stud. 495 (2000).

\textsuperscript{133} The British project called A2A (Access to Archives), part of the Archives Network and hosted by the National Archives, is astonishing (http://www.nationalarchives.gov.uk/a2a). But it remains only as good as the cataloguing, much of it decades old, preformed by archivists in the repositories whose lists form the foundation of the database.

\textsuperscript{134} It is difficult if not impossible to imagine scanning the millions of parchment membranes that make up the surviving archive of a single pre-modern English court. One attempt to do this is represented by the Anglo-American Legal Tradition (http://aalt.law.uh.edu). This is an astonishing enterprise. Use of such a site—which still contains a small portion of selected classes of documents—underscores the heroic scale of the undertaking. Even digitized, it is hard to imagine how it could be made searchable by a machine taught to read thousands of hands writing in highly idiosyncratic ways in such documents. We must still do the work of the archive, looking closely with our own eyes.


\textsuperscript{136} Thus see Carolyn Steedman’s invocation of an archive fever more literal than Derrida’s. Steedman, supra note 35, at 17-31.
we generally put those questions to the past and seek answers to them by using technologies we are comfortable with rather than those used by the people we say we want to understand. If so, we cannot find what we seek. As long as we fail to appreciate the ways in which the technologies early modern people used conditioned the making of what they took to be legal authority, we will never learn what they may teach us. By appreciating this, we might be able to do for the history of law what Quentin Skinner has done for the history of political thought: to help us “acquire a perspective from which to view our own form of life in a more self-critical way, enlarging our horizons instead of fortifying local prejudices.”137 Doing this for the history of law should transform our practice of law—we might develop a more critical precedential jurisprudence. After all, precedents are things, in archives.

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137 Skinner, supra note 10, at 125.