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Victorian Precedents: Narrative Form, Law Reports and *Stare Decisis*

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Victorian-era law reports are often choppy or truncated, miserly in detail, and utterly lacking in character descriptions, creating what I have identified as an "anti-narrative" style. This article shows how the law reports use narrative conventions – often in counter-intuitive ways – to manifest the tension between a concrete case and the abstract rule which is its potential precedent. Incorporating a discussion of nineteenth-century theories of legal precedent and the history of common law reporting with a formal analysis, I contend that the insular "anti-narrative" form of the reports enables the communal nature and goal of precedential reasoning: the creation of a common law, dating from "time immemorial." It also reveals a legal doctrine – and a narrative genre – in crisis.

Is a paper evidencing the law of England to be buttoned up in the side pocket of a judge, or to serve for a mouse to sit on in the dusty corner of a private library? If the law of England is to be deduced from adjudged cases, let the reports of these cases be certain, known and authenticated.

–Charles Watkins, *Principles of Conveyancing* (1838)[1]

It is a maxim among those lawyers, that whatever hath been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made.

–Jonathan Swift, *Gulliver's Travels* (1726)[2]

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1. Charles D. Watkins, *Principles of Conveyancing: With an Introduction of the Study of That Branch of Law* (Philadelphia: J.S. Littel, 1838).
2. Jonathan Swift, "Gulliver's Travels," in *Gulliver's Travels and Other Writings*, ed. Louis A. Landa (Boston: Houghton Mifflin Company, 1960), 201

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I. Introduction

Reading nineteenth-century British law reports discursively, rather than for their judicial content, one is struck by the peculiarity of their narrative form. These narratives, though varied, are usually miserly in detail, with non-existent character descriptions and a style that can best be described as choppy or truncated. In other words, they are markedly different from the naturalized representation of reality which characterizes journalistic, historical, and literary genres of the period.[3] The two main effects of this style are (a) that the narratives are difficult and uncomfortable to read, and (b) that the story told is almost elided, effaced by its own narrative style (or lack thereof). In short, it seems that the law report narratives are resisting their own narrativity, thus promoting what I have identified as an *anti*-narrative style. I use the term "anti-narrative" precisely to signal their narrative resistance. The reports are not *not* a narrative, in the sense that they are not something else (for example, lyric poetry is something other than narrative, not an anti-narrative). They *are* narratives, but narratives that seem to be contesting their character as such.

The importance of the law reports *as a discourse* is extensive. Because they provide accounts of judgments made in a court of law that will serve as precedent, the reports are more than simply another type of legal document. Rather, these compilations are the repository of the common law. Together they make up a body of law and knowledge which marks the singularity and exceptionality of the common-law system. In this article, I show how the law reports use narrative conventions – often in counter-intuitive ways – to indicate that their truth claims are limited to potential precedent and not to a referential truth. My analysis thus reveals the reports' commitment to a specific *legal* narrative truth, one which is at once non-fictional *and* non-referential.

I argue that anti-narrativity constitutes a formal response to nineteenth-century challenges to the authority of the common law, and by extension to law reporting. The anti-narrative form is motivated both by the sweeping political, social, and legal changes of Britain nineteenth-century and more specifically, by the debates concerning the doctrine of legal precedent. Anti-narrativity is thus the critical narrative manifestation of legal precedent; it enables a mode of reasoning from the particulars of a common life, at the same time as it reveals a narrative genre – and a legal doctrine – in a crisis.

II. The Insular Form of the Law Reports

A typical Victorian report consists of three parts: (1) *Statement of the Facts*, which is a retelling, usually in narrative form, of the facts of the case leading to the

3. See, most famously, Hayden V. White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Baltimore: Johns Hopkins University Press, 1975).

suit or indictment, as well as those emerging in the course of the proceedings and leading to the ultimate decision; (2) *Arguments*, which are presented to the court by the legal representatives of the two sides; (3) *Judgment*, that is, the judge's decision, usually given in his own voice, which presents the legal reasoning leading to the verdict. Rather than offering a study of judgments (as is usually the case in legal scholarship), in what follows I turn to the hitherto under-analyzed Statement of Facts and their attendant narrative form(s).

Given the ostensible similarities between law and literature[4] and the predominance of realist narrative in the nineteenth century,[5] it would seem to make sense for the law report narratives to be similar to those of the realist novel. After all, both narratives are trying to represent a truthful reality in the clearest way possible. In addition, both discourses are anxious to prove that the extra-textual (or referential) reality represented by their texts is the only true one, indeed the only one that could be considered. Let us then begin by considering a fairly typical "Statement of facts" from an 1837 report, *Sieveking v. Behrens & Von Melle*, published in *The Jurist*:

> The bill in this case was filed by plaintiffs (who were also plaintiffs in a suit against the defendants in the Mayor's Court in the City of London) to restrain defendants from proceeding in a judgment obtained by them in the Lord Mayor's Court in respect of an attachment issued by them against certain goods belonging to a foreign merchant who had become bankrupt, and whose assignees the plaintiffs were, and that the goods might be declared to belong to plaintiffs as such assignees. Defendants pleaded a verdict and judgment obtained by defendants in a suit between the same parties in respect of the same subject-matter in the Mayor's Court; and the question was, whether the plea was good.[6]

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4. We are all by now extremely aware that *stories* are what are told in court. See most recently, Peter Brooks, "Narrative Transactions–Does the Law Need a Narratology? (Draft Version)," *Yale Journal of Law and the Humanities* 18, no. 1 (2006). It seems that this phenomenon is especially prominent in the Victorian period. Guilt and innocence; good versus evil; the dramatic potential of the trial scene; the psychological and narrative richness of testimony; the plot lines inherent in the unraveling of a legal mystery, and of discovering the truth, have all been fully realized in the Victorian novel and expertly explored in recent scholarly literature. After history, law seems the next best genre in which to pursue our quest for narrative exploration. Ian Watt's comparison of realistic form to forensic epistemology is an oft-quoted starting point. Ian Watt, *The Rise of the Novel: Studies in Defoe, Richardson, and Fielding* (Berkeley: University of California Press, 1957). The list of contemporary work on Victorian law and literature is long and shows promise of growing longer, as indicated by the number of dissertations filed in recent years in the field of Victorian law and literature. Of particular relevance to my own work have been Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (Baltimore: Johns Hopkins University Press, 1992) and some of the more recent scholarship that has been written in its wake: Kieran Dolin, *Fiction and the Law: Legal Discourse in Victorian and Modernist Literature* (Cambridge: Cambridge University Press, 1999), Jan-Melissa Schramm, *Testimony and Advocacy in Victorian Law, Literature, and Theology* (Cambridge: Cambridge University Press, 2000), Irene Tucker, *A Probable State: The Novel, the Contract, and the Jews* (Chicago: University of Chicago Press, 2000), Jonathan H Grossman, *The Art of Alibi: English Law Courts and the Novel* (Baltimore: Johns Hopkins University Press, 2002).
5. A claim made famous by the work of Hayden White, mentioned above.
6. *Sieveking v. Behrens & Von Melle*, 19 *The Jurist* 329 (1837).

Before beginning with a close analysis of this quotation, we first note that contrary to expectations, the law report narratives are in fact as unlike the narrative style of the realist novel as they could possibly be. To signal this radical difference, I named this impossible-to-read style "anti-narrativity," precisely because of its narrative resistance.

The very nature of narrative is that it tells a story *about something* and thus usually refers to an external reality. Remarkably, the narratives of the law reports are self-referential to the point of being insular. The most striking feature of this insularity is that the reports are decontextualized to an extreme. Great care seems to be taken to eradicate all connection between the case in court and its "real-life" context.[7] In fact, the narratives seem always to refer back to themselves in a way that frustrates any attempt to understand what they are actually about. Another salient illustration of the insularity of the law reports has become so commonplace, so *naturalized*, that few who are in any way involved in the legal world even notice it: the principal actors in the case are rarely referred to by their names or any other distinctions which refer to the world outside the report or the case. They are always referred to as "the plaintiff" or "the defendant." The lack of proper names (or any other identifying sign) creates a strange displacement by which the events recounted seem not to be anchored in an extra-textual or concrete reality. That is, the characters in the narrative are always relativized because they are contingent upon the legal reality *which creates them* and to which they refer.

Looking more closely at the narrative quoted above, which constitutes the entire "factual" portion of the report, we note that the paragraph consists of only two sentences, where the subject of the first sentence is the bill and the subject of the second sentence is the defendants. In other words, the story told is the story of the filing of the suit in court, not of the events leading up to that suit. Similarly, the only two proper nouns in the narrative are the "Lord Mayor's Court" and the "City of London," which do not refer to the locus of the pre-legal events but rather to the locations of the legal proceedings. Thus, the referential reality of this narrative is a legal reality, that which is created by the trial itself or by other trials. In other words, the narrative does not tell the tale of a series of events which occurred in the "real" world and which then led up to and necessitated a trial, which in turn created legal persona out of the protagonists and legal occurrences from the events. Rather, the personae and events are always already legal; the narrative is not concerned with their extra-legal existence.

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7. This is especially evident in cases that involve some celebrity. For example in an 1863 case involving a breach of copyright of Mary Elizabeth Braddon's novels, no mention is made of the highly successful novelist's renown, her literary milieu, or its relevance to public life. This becomes even more striking when compared to the news report, which is all about context. Compare *Tinsley v. Lacy*, I *Hemming & Miller* 747 (1863), with "Tinsley v. Lacy. – "Aurora Floyd," "Lady Audley's Secret"," *The Times of London,* July 2, 1863.

The narrative indexes the legal proceedings and not the referential reality on which they are based. This point is even further supported when we consider the use of "as such" in the paragraph: "the goods might be declared to belong to plaintiffs *as such* assignees." This figure of speech creates a conditionality in the facts. In other words, even the facts stated are not anchored in any fixed reality but are doubly conditional: they might *be declared* to belong – not "might belong" – and only "as such." The triple conditionality of this phrasing thus removes the statement of the facts from any fixed reality and completely subsumes it to the legal event decided in the court. The narrative does not describe a reality of any kind, but only the possibility of one. It creates a skeletal structure, one that can be compared to other cases with relative ease.

The relative and contingent – as opposed to referential – aspect of the narrative is reinforced by the frequent use of "said" (or its corollaries "aforementioned," etc.), not in describing the action of talking but as an adjective referring back to a previous mention of the modified noun: "on the said date," "of the said party," etc. The narrative insularity thus serves to abstract the concrete extra-textual referents (i.e., real times, people, places, etc.), making them legal and textual creations, whose existence is in relation to their legal standing.

For example, in the 1837 case of *Sunbolf v. Alford*,[8] this awkward form is used to make at least three different types of references:

- Time references – "before and at the said time when &c.," "during all the time aforesaid." Most remarkably, the time is never actually said, making these phrases acts of reference with no referent. The result is a constant linguistic deferral, whereby the persistent repetition of this act of reference is not only superfluous in its repetitiveness but empty, in fact, of all meaning.
- References to the sum of money owed – "the said sum of 11s. 3d.," "the said sum." In this case the opposite is true. The act of reference "said" is rendered superfluous not because it lacks a referent, but because the referent (in four different cases within this sentence) is named immediately after the reference.
- References to the other persons accompanying the defendant (the other guests at the inn) – "the said other persons."

In all of these instances, the repeated use of "said" as a reference is, in itself, redundant. Even stranger is that none of these points – the time of the events, the sum owed, or the persons involved – are in contention in the case itself, and thus their incorporation in the narrative of the legal proceeding is not only very awkward but completely superfluous. What then, is insisted upon by its inclusion? What is the referent of the repeated

8. *Sunbolf v. Alford*, 3 *Meeson & Welsby* 248 (1836).

acts of reference? I argue that the use of conditional and insular language, while originally sanctioned by the conditionality of the legal case,[9] now becomes a stylistic marker, denoting this narrative as a law report and, furthermore, reminding the readers that it is *not* a realist narrative – that it reports and recounts a legal event happening in a court of law and not one in the real world. Awkwardness serves a purpose in denaturalizing the narrative, its audience recognizing that truth claims are limited to the proceedings of a case and not to a referential truth.

Moreover, in many cases the extra-textual reality is in fact also and already legal. One thing which is striking in the actual reading of the reports is how many cases are in fact cases within cases within cases. In a phenomenon evocatively portrayed by Dickens in *Bleak House*, a legal case seems sometimes to produce nothing but more legal cases – motions, pleas, etc. Reading through the law reports, *Jarndyce v. Jarndyce* seems far from an exaggeration and indeed many, if not most, of the cases reported originate in another legal proceeding. The result is that even the referential reality – the "pre-legal" one – is in fact a legal one. The original story that prompted the primary case is completely forgotten; in fact, it ceases even to matter for the settling of the specific question set before the court.

Often, a law report narrative lacks any explanatory value. Most of the report seems to consist of the sides slinging case names – precedents – at each other. These cases are mentioned in name only, codes for the holding or rule they represent. No attempt is made to explain their substance, i.e., what rule is being invoked, and for what purpose. For example, in *Tinsley v. Lacy*, the reporter quotes the Plaintiff's barrister: "The cases before the Dramatic Copyright Act have no application, nor have cases like *Reade v. Conquest.*"[10] The lack of explanation or elucidation makes the law report unintelligible to those outside the legal profession. In other words, this account of *Tinsley v. Lacy* is coherent only to legal cognoscenti, who can decipher the shorthand of case citations.[11]

Most crucially, the artificiality of this insular discourse is foregrounded, rather than obscured. These legal narratives seem to go out of their way to *insist* on their non-referential qualities, as if to stress their relevance only to the discourse of the common law. They can only be meaningful within their own specialized discourse and not within a wider context; by implication,

9. As well as being the remnant of the medieval and early-modern French law, "dit," which itself was a form of the earlier Latin "dictus, or predictus" (said, aforesaid) common in English Plea Rolls. The original rationale for this form was a matter of scribal efficiency: it alleviated the difficulties of repeatedly spelling out personal names, dates and places in the scribal forms of medieval Latin and thus also helped avoid declension problems that were sometimes acute for Norman scribes in Anglo-Saxon and Danish-influenced regions of the realm. I am grateful to Karl Shoemaker for bringing this history to my attention.
10. *Tinsley v. Lacy.*
11. This might explain the fact that anti-narrativity is so rarely noticed. Since practically all readers of law reports are members of the legal profession, who are trained and familiar with this discourse, it takes an outsider's eye to defamiliarize it.

the truth they convey is only truthful within the legal universe of the doctrine of *stare decisis.*

III. The Historical Origins of the Anti-Narrative Form

Writing in the 1940's, C.G. Moran traces the problematic of law reporting to the historical transition from an educational goal to that of the citation of precedent:

> The object […] is the production of an adequate record of a judicial decision on a point of law, in a case heard in open court, for subsequent citation as a precedent. A law report is *a report of law, and not of fact.* Only the issues and the facts relevant to the point of law decided should be recorded, since every judgment is founded on a situation of fact. […] The result is a tool of the lawyer for his use in court as a judicial precedent, ten, a hundred, a thousand years hence. It will be used in turn, to forge such other tools and, as such, it must be forged with precision. There must be no prolixity, irrelevance of detail or incoherence. To adopt the adverbs in King James I's writ of Privy Seal appointing two official law reporters, a reporter should report "though compendiousle yet truly and narratively."[12] (my italics)

Moran enumerates the most important tensions in the work of the reporter: between person and institution, interpretation and "presentation of facts" and the target audience of the report. Finally, his repetition of the exhortation to report "[c]ompendiousle yet truly and narratively," effectively frames our discussion. These three adverbs form the triangle of contention: "Compendiousle" asks for brevity, relevance, and comprehensiveness; "truly" expresses the need for authoritativeness; and "narratively" requires it all to read like a story.

This triangulation accounts for the unusual forms of the law reports, simultaneously manifesting both narrative and anti-narrative elements. Let it be reiterated that the law reports are far from uniform. They vary widely from reporter to reporter, in their length, their syntactical and lexical characteristics and in their readability. The one common feature is their struggle with narrative. The reports to which I refer in this article thus serve as illustrations or support for the observations and arguments I make about narrative and anti-narrative forces at work in the law reports. They are examples, but not necessarily exemplary, in that they are not paradigms or typical cases.[13]

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12. C.G. Moran, *The Heralds of the Law* (London: Stevens, 1948), pp. 13–4.
13. In fact, it is often the exception that can give us most insight into the rule, and offer a unique glimpse of the tension between the conflicting forces in law reporting.

Finally, the large historical arc of Moran's quotation emphasizes the obvious fact that the narrative form of the law reports itself has a history. Anti-narrativity and its role in negotiating these challenges to authority did not simply manifest itself in the nineteenth century; neither did the challenges themselves. Rather, what I here call anti-narrativity has its roots in the changing and evolving functions and forms of the law reports throughout the history of English common law. I argue that as these challenges to the authority of the common law came to a head in the nineteenth century, their narrative manifestation in the anti-narrativity of the law reports came to take on new meaning. The anti-narrative form, while not unique to the nineteenth century, serves a specific juridical end in the Victorian period by enabling the reports to deal with and engage in the anxieties and challenges faced by the common law courts of the day, and by extension, to law reporting. Through a brief gloss on the history of law reporting, I show how the insularity of the reports manifests the anxieties over these challenges as well as presents possible solutions.

The history of law reporting in England can be described as a series of overlapping responses to changes in the law and the legal profession. Originally records of the outcome of a case, the medieval Plea Rolls were kept for the purpose of establishing the rights of parties in each particular case, or justifying whatever acts may have to be done in execution of the judgment. The Plea Rolls were neither intended for public use nor for the legal profession, but for the court itself and the parties involved. They were referred to in case of a disagreement as to the outcome of a certain case and had little to no importance to those who had no direct connection to the case. These records were usually not written in narrative form because they rarely told a story – neither that of the events leading to the suit, nor that of the legal proceeding itself.

As medieval law grew and diversified, the legal profession required guidance in the ways and machinations of the evolving legal system. The Year Books, introduced in the thirteenth century, addressed – and in so doing, created – a public beyond those directly concerned with the case. This audience was comprised of the community of medieval legal students, who were interested not in the final outcome of a case, but in the way the legal system functions. They read the Year Book reports as learning manuals, and through them learned how to plead, about court procedures, and about the ways judges decided cases. As the intended audience for the reports grew, so too did the role played by narrative in the construction of the text. The move from the Plea Rolls to the Year Books was defined and differentiated by the form in which they were written (narrative), which in

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For example, the discrepancy between the narrativity of the account in the case of *Sunbolf v. Alford* (1837) and the anti-narrativity generated by the mannerisms adopted by the reporter/narrator ultimately read as parody. Narrative and anti-narrative forces seem to clash in this report, each pulling its own way. The discomfort that this clash generates can work as a locus for exposing the opposing narrative forces at work in its construction, in other words, of its work of narration.

turn signaled the audience or public for which they were intended (the evolving legal profession, rather than the parties involved).

Law reporting, performed by observers extrinsic to the actual proceeding, thus came to take on an increasingly important role within the legal system. The distinction between the history of the law and what the law itself was became less and less clear-cut as the law's story became the law itself. Legal historian John Hamilton Baker describes the early development of law reporting as a movement from record to report.[14] Narrative, which had previously served as the formal distinction between history and law, became a characteristic of both.

The sixteenth century heralded another important transformation in law reporting, reflecting and responding to the evolution of what was to become one of the most important legal doctrines of the common law, that of legal precedent (*stare decisis*). As a result, and over time, the appellate courts' rulings came more and more to determine the law of the land. The need for reports was extended from novices who needed instruction in *how the law works*, to all members of the legal profession who needed to know *what the law was*. Consequently, the narrative reports, hitherto largely extrinsic to the legal system, became one of its vital components. From a specific judgment one could (and should) abstract a "holding," the legal principle to be drawn from the decision of the court.[15] This doctrine of *stare decisis* became increasingly central to the function and form of the law reports.[16]

Moreover, the reporters, many of them prominent legal scholars, began challenging the authority of the judges whose decisions they were reporting. In the sixteenth and seventeenth centuries it was not uncommon for the reporter to vet the reports according to their merit and importance in his eyes, and to add commentary and even "improvements" to the arguments.

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14. See John Hamilton Baker, "Records, Reports and the Origins of Case-Law in England," in *Judicial Records, Law Reports, and the Growth of Case Law*, ed. John Hamilton Baker (Berlin: Duncker & Humblot, 1989).
15. Henry Campbell Black, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1979).
16. The most famous of these new reporters was Edmund Plowden, whose 1578 reports have received much critical and rhetorical acclaim. Baker identifies the emergence of Plowden's reports with the rise of judicial case law:

    > Plowden's book is the first clear indication that the common law was no longer based simply on the "common learning" of the profession. It had come to depend on judicial decisions, interpreted in the context of the facts which gave rise to them. […] They were authorities in a new sense. The common law was now what the courts said it was, and the courts had embarked on a new mission to develop the common law from case to case.
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    > Baker, "Records, Reports and the Origins of Case-Law in England," 42.

    A central word in this account is "authorities." Since judicial decisions became authoritative as precedent, their reporting played a crucial role in this system. If the cases were not reported, how could lawyers argue precedents, or, to put it more pointedly, how could one be expected to know what the law was? Not only had the judicial decisions become more authoritative, but the reports had to establish their own authority as well. These Early Modern reports already grapple with what I identify as a major feature of nineteenth-century law reporting: the struggle with narrative form as a response to a crisis of authority.

As the legal profession and law reporting continued to develop and expand, these questions of authority became more pressing. The eighteenth century marked the shift from the reporters of the old school who wrote their reports primarily for their own use and for whom publication was a side venture, to the reporters of the new school who wrote their reports primarily for publication. This change reflected a movement from private interest to public professionalism which was necessary due to the rapidly growing British legal system and the accompanying expansion of the Bar. The sheer size of this ever-growing legal system created complex problems concerning the command of the law. If the common law was once limited in scope, more or less known by its practitioners, it now reached dimensions far too large to be comprehended or known by a single individual. Reliance on the law reports for dissemination of the law became vital: without them one could not know what the law was.

IV. Victorian Reports: A Formal Response to Social, Political and Doctrinal Challenges

From record to report, from private notes to commercial enterprise, from educational manuals to professional texts, from an unfettered judiciary to one bound by the doctrine of legal precedent: all of these changes in the function and purpose of law reporting were also reflected by a transformation in the narrative form of the reports themselves. Responding to the major changes sweeping over the British polity, law reporting, already a complicated palimpsest of diverse legal practices and histories as well as judicial idiosyncrasies, was faced with new challenges in the later eighteenth and nineteenth century. The exigencies of Empire, of a rapidly expanding legal system, and of an ever-growing number of participants in the legal process presented a major challenge to the common law. Indeed, the growing numbers and kinds of participants in the legal system challenged the very *commonality* of the common law, expanding its membership and purview. Lord Wright formulated the problematic succinctly in saying, "I have often wondered how this perpetual process of change [in the common law] can be reconciled with the principle of authority and the rule of *stare decisis*."[17]

This anxiety is reflected in the anti-narrative form of the reports, which serves a particular juridical end by denaturalizing the facts and story of the case. Adding to the above-mentioned self-referentiality and insularity of the reports is the remarkable scarcity of proper nouns.[18] Interestingly, at times when a proper noun is mentioned, it is done in a way that is doubly and triply qualified. Consider the 1864 case, *Grell and Another v. Levy*, reported in *The Weekly Reporter*.[19] The statement is presented as a series of pleas, each

17. Quoted in Laurence Goldstein, "Introduction," in *Precedent in Law*, ed. Laurence Goldstein (Oxford: Oxford University Press, 1987), 5–6.
18. See below a more detailed discussion of the role of Proper nouns (or lack thereof) in law reporting.
19. *Grell and Another v. Levy*, XII *The Weekly Reporter* 378 (1864).

one sentence long, therefore in an always already legal form. In the cases quoted above, the statements never contain proper nouns. However, this time there is an exception; one name is mentioned again and again – that of Krozniski Wilhelms who was indebted to one of the plaintiffs and whose debt (and the attempts at its recovery) was at the center of much of the convoluted legal proceedings in this case. However, the references to Wilhelms are heavily qualified. He is initially presented as "a certain person, to wit, one Krozniski Wilhelms" and thereafter referred to as "the said Krozniski Wilhelms" or "the said K. Wilhelms." Thus, even the use of a proper noun is heavily circumscribed and subsumed under the auspices of this specific text. Wilhelms can easily be abstracted back to the generic "a certain person" by which he is introduced. Moreover, it seems that the repetition of Krozniski Wilhelms' name emphasizes its foreignness, its un-Englishness. In this case, the referent of "Krozniski Wilhelms" is not a specific individual, but again, a general category of "foreigners."

The anxiety over the place of the foreigner within the common law comes up a remarkable number of times in the law reports. In another example, the only adjective in *Sieveking v. Behrens & Von Melle*, the law report quoted above, is the word "foreign" which modifies the merchant. However, the adjective does not make the merchant more specific, or point the reader to an individual referent. Rather, it narrows down the class of merchants to one of "foreign merchants" – smaller, but still a class of people and not an individual. Moreover, this special class of the "foreign merchant" is also a legal matter, signaling the complicated law of international commerce, rapidly expanding and evolving in the eighteenth and nineteenth centuries. During this period, English commercial law dealt less and less with commerce among Englishmen. As the economies of Empire grew increasingly complex, more and more foreigners came under the purview of the common law. Indeed, the single adjective "foreigner" in the report reveals the challenge presented by the foreigner to the very *commonality* of the common law. The anomalous treatment of foreigners in the law reports reveals both the social and legal anxiety they generate and the formal ways in which the reports engage with this anxiety.

Moreover, the judge-made qualities of the common law were also increasingly challenged by another series of legal reformers: the proponents of statute law and codification, most prominent among them Jeremy Bentham. The two sources of law were seen as not only separate but also competing: legislative success could undermine the authority of the common law.[20] This perceived threat was felt even more strongly in the wake of the extensive nineteenth-century legal reforms that were carried out by parliamentary legislation, and not by the courts. Judge-made common law was increasingly required to defend and fortify its position and authority as the primary source of British law.

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20. See David Lieberman, "Legislation in a Common Law Context," *Center for the Study of Law and Society Jurisprudence and Social Policy Program. JSP/Center for the Study of Law and Society Working Papers* Paper 23 (2004). Lieberman not only problematizes the common law/codification binary itself but shows how the reforms of the nineteenth century (many of them regarded as failures) can be viewed in terms of their continuities with earlier orthodoxies.

And in fact, one of the strongest reactions to this perceived threat was a tightening of the hold of legal precedent. Writing about *stare decisis* in the nineteenth century, Jim Evans identifies an increasing rigidity and conservativeness in this doctrine as a result of a growing unease about uncertainty in the law which in turn provoked a demand for greater authority of decisions.[21] From a more flexible *principle* of adhering to decisions, the authority of cases had come to be determined largely by a system of rigid *rules* of precedent: each court was strictly bound by decisions at a higher level, and the higher courts were bound by their own decisions. The law reports and the doctrine of *stare decisis* were intimately connected, sharing an anxiety over the authority of the common law.

The anxiety over what the law was extended to an anxiety over the way it was to be reported. Throughout the nineteenth century, and especially in the debates surrounding the calls for reform in the law reports, more and more judges and other legal professionals publicly and privately expressed their growing concerns over the accuracy, authenticity, and ultimately the authority of these texts. The law reports had become too bulky, unprofessional, and inefficient at their task of providing a trustworthy, authentic, and authoritative account of the law as made by the courts.[22]

The absurdity of an untrustworthy system for the recording and dissemination of precedent and of the common law itself, was clearly delineated in an 1849 "Report of a Special Committee on the Law Reporting System of the Society for Promoting the Amendment of the Law":

> [The Law Reports are …] the formal constituents of the common law, and yet, by a singular inconsistency, whilst every act of Parliament requires the sanction of the three estates of the realm, and its contents are communicated to the public in the most authentic form, the law laid down by our

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21. Jim Evans, "Change in the Doctrine of Precedent During the Nineteenth Century," in *Precedent in Law*, ed. Laurence Goldstein (Oxford: Oxford University Press, 1987).
22. An interesting example is quoted in a report itself. In the case of *Sunbolf v. Alford*, brought before the Court of the Exchequer in 1837, Lord Abinger, C.B., remarks, in dismissing a certain precedent brought by the defendant's counsel:

    > As to the authority cited from the case of *Newton v. Trigg*, it is the dictum of a single judge, unnecessary for the decision of the case, and resting perhaps on the authority of a doubtful reporter, who might not have heard accurately what was said; and I cannot conceive that to be any authority at all on such a subject. And as to the supposed authority of Wentworth, it is really no authority whatever. Mr. Wentworth was not a reporter; his is a vast collection of pleadings, obtained from Mr. Lawes and one or two other gentlemen, which he threw together, and which I have found, in a very long career of professional life to be in a great measure extremely incorrect; and it cannot be assumed that there is the least authority to be derived from this statement.

    These remarks, voiced by the highest judge in the Court of Chancery, pointedly reflect the anxiety of authority – mentioned six times in this short paragraph – which concerned the legal practitioners of the time. The crisis of authority was not only reported by the law reports, but also, in a sort of vicious cycle, augmented by their unstable reporting practices. For further examples of judges' exasperation with the accuracy and lack of authority of law reports see also Jonathan Yovel, "Invisible Precedents: On the Many Lives of Legal Stories through Law and Popular Culture," *Emory Law Journal* 50 (2001).

> tribunals is in no respect officially promulgated. A statute creating the most trifling alteration in legal procedure is ushered into public notice in the most formal manner possible; a judicial exposition of one of the leading principles of our common law, materially affecting the future administration of justice, the rights of property or the liberty of the subject, may take place without notice and without anticipation, amidst an inattentive crowd, whilst the voice of the judge who delivers it may not reach anyone beyond the parties immediately interested in the case which gives rise to it.[23]

The special anxiety expressed at the comparison with the promulgation of statute law further supports the claim that the anxiety over the *reporting* of law was intimately connected with the anxiety over the role of common law jurisprudence as the traditional, central component of British law.

Throughout the history of law reporting, from its origins as pleading manuals for medieval legal novices to its centrality in the dissemination of the common law, narrative form reflected and negotiated the doctrinal, historical and professional constraints within which it functioned. Elements of anti-narrativity, central to my analysis of nineteenth-century reports, had existed and developed throughout this history. Anti-narrativity was thus not a new formal phenomenon of the British nineteenth-century. Rather, within the specific legal culture of the Victorian period, the anti-narrative form of the law reports came to take on new meaning and function, in negotiating and defending the doctrine of legal precedent, the centrality of judge-made law to the British legal system, and the commonality within which it functioned.

V. General and Specific: The Narrative Tension of Legal Precedent

In order to promulgate a judge's decision, a report has to mediate between the specific case and the general rule which is its holding. An interesting example is the scarcity of proper nouns in the reports. The plaintiffs and defendants are not even referred to by the definite article – i.e., "the" plaintiffs – but rather simply as "plaintiffs," making them (and others mentioned in the narrative) unspecific or generic. In the above example of *Sieveking v. Behrens & Von Melle*, not only are the plaintiffs or other persons in the narrative referred to by the indefinite pronoun, but inanimate objects and even legal procedures ("a judgment") are generic. The lack of specificity is compounded by the striking dearth of adjectives, adverbs, or modifiers in general.[24] The story is generic to the point of abstraction. It no longer

23. As quoted in W.T.S. Daniel, *The History and Origin of the Law Reports: Together with a Compilation of Various Documents Showing the Progress and Result of Proceedings Taken for Their Establishment and the Condition of the Reports on the 31st December, 1883* (London: W. Clowes, 1884), 5.
24. Most reports are hardly descriptive, containing only the adjectives deemed absolutely necessary. Comparisons with news reports of identical cases strongly indicates not only does the reporter not *add* any of his own descriptions, he actually *edits out* those originally uttered in court.

presents the specific facts of a case, but rather offers a shell or skeleton to which other sets of specific facts can be compared.

Another way of negotiating the tension between specific and general is evident in the case of *Sunbolf v. Alford*, as reported in *Meeson & Welsby's Reports*.[25] The report opens with a sentence recounting the plaintiff's "declaration," his statement of claim in a legal action:

> Trespass for assaulting and beating the plaintiff, shaking and pulling him about, stripping and pulling of his coat, carrying it away, and converting it to his defendant's own use, &c.

The sentence is not a narrative, being a fragment (no predicate) containing the nature of the case, which is the action of trespass. While the fragment has no main verb, the clause "trespass for . . ." is made up almost solely of verb-based nouns (gerunds): "assaulting and beating the plaintiff, shaking and pulling him about, stripping and pulling of his coat, carrying it away, and converting it . . ." The gerund form alludes to action – the text positively reverberates with it – but presents an abstraction of this action. The action is not located in a specific time and place but is continuous, always taking place. Thus, the actions described in the narrative are not what someone did, but generalizations of action – things that can be done – and not an allusion to a specific event. The text also does not mention a subject of these actions, only an object (the plaintiff). This peculiar characteristic of the gerund – that it does not require a subject – makes it even better than the passive voice in eliding a subject and avoiding the question of agency. Like the passive voice, it imparts a retrospective and non-dynamic presentation of the facts. In other words, it implies an already existing situation *at a given point in time*: this is the way things were when we encountered them. More weight is given to a situation than to agency. The elision of agency, especially in a legal case when such responsibility is in contention, is a crucial factor of law reporting.

Indeed, many reports are written in the present tense, establishing a timeless quality. Since a report is not concerned with representing an event but rather a legal principle, the continuous present tense of the report is most appropriate. After all, the legal rule established by precedent in this report does not exist in the past: as a component of the common law, it always *is*, not *was*.

Anti-narrativity thus abstracts the facts from their specificity and makes them generally applicable. Upon reading the report, lawyers can more easily decide whether a precedent is relevant or not to their specific case. In addition, it also creates serious questions of interpretation: while a lack of modifiers and definitive parts of speech might seem like a more neutral presentation of events, it in fact requires greater interpretive intervention on the part of the reporter, as he is engaged in the practice of abstraction – a

25. *Sunbolf v. Alford*.

mediation between that which was presented to him and that which he presents to his reading public.

When writing up a case, a reporter knows that its judgment could later be distilled into a rule-like "holding" and serve as precedent for future cases. However, neither the reporter nor the judge have a way of knowing what that later case will involve, what aspect of the judgment will be taken for the case's "holding," and what analogies will be drawn from it. How will this case be applied to a new set of facts, to new, unforeseen, and unforeseeable narratives? Anti-narrativity, I argue, is the formal manifestation of this conundrum. In the final part of this article, and in light of the above readings, I will show how the unique features of the law reports become meaningful in the context of the doctrines and practices of legal precedent. Their narrative form is thus a legal construct that is of value only within the legal system, which is its referential universe, and within the doctrine of legal precedent, which is its framework for the creation of meaning. Having shown above how the reports' form was motivated by their larger cultural history, we now approach their second major motivation in the controversy surrounding the doctrine of *stare decisis*.

VI. Theories of Precedent

Anti-narrativity, we have seen, is the narrative manifestation of precedential reasoning. To fully understand its complexity, and the way anti-narrativity performs a meaningful discourse, we must now inquire into the theories of legal precedent at work in nineteenth-century jurisprudence. One of the thorniest jurisprudential debates of the common law system arises from the question of how, given the rules of legal precedent and the doctrine of *stare decisis*, legal change evolves. The first and most obvious answer is the direct overruling of a precedent (i.e., of an existing legal rule). However, this method is problematic because, by acknowledging a deviation and change in "the law of the land," it introduces elements of inconsistency, arbitrariness, and uncertainty into the law. And indeed, cases where a precedent is overtly overruled are rare; more often legal change evolves through the distinguishing of prior cases and the determination of the *ratio decidendi* of a prior case.[26]

The *ratio* is the basis of the notion that any case may be simplified into a holding. In this model, like cases are to be decided alike, and courts are bound to follow precedents under the principle of *stare decisis*. "Following" the precedent means rendering the precedent into a "holding" – which is to say, a rule – and then applying this new rule deductively to the facts of the undecided case. However, the idea of a "holding" creates a temporal

26. See Theodore M. Benditt, "The Rule of Precedent," in *Precedent in Law*, ed. Laurence Goldstein (Oxford: Oxford University Press, 1987).

problem: where is the "holding" located? Is it inherent in the original case, or is it created later when it is so interpreted by another judge?[27] After all, a precedent is not a precedent until it has been followed.

The idea of a smooth and uninterrupted temporal flow, where change is invisible if not non-existent, is central to the common law's vision of itself. Quoting Matthew Hale's 1713 *History of the Common Law of England*, David Lieberman demonstrates that the common law garnered its strength and authority from its

> … long experience and use which produced not only a law "very just and excellent … in it self," but also an administration of common justice "singularly accommodated" to the "disposition of the English nation." Common law had become "incorporated" into the "very temperament" of the people, and "in a manner [which became] the complection and constitution of the English commonwealth."[28]

This quotation accentuates the common law's investment in the incrementality and cumulativeness of legal development. The temporal challenge in applying legal precedent is thus linked to the temporal anxiety of authority in the superiority of the common law as the primary source of British law, as well as with the essence ("the very temperament") of Englishness.

Nineteenth-century legal reforms and their accompanying crisis of certainty intensified the long-standing jurisprudential debate on the theoretical roots of precedential reasoning in the common law. From a more technical debate over specific modes of legal reasoning, the doctrine of *stare decisis* came to define the common law and, as a result, Englishness itself. Contending with change and innovation which had come to characterize Victorian culture, and, more specifically, its legal system, precedent and its doctrinal origins were rediscovered as the *raison d'être* of the common law. As a result and as I have already mentioned, the controversy over legal precedent became the major point of contention between the jurists in the long-established tradition of Coke and Blackstone and the more recent positivists, led by Bentham and Austin.

In his informative essay, "Some Roots of Our Notion of Precedent," Gerald Postema outlines these two competing conceptions of precedent, the first legitimated by tradition and the second by that of the authority of the sovereign.[29] The first, "traditionary" conception was rooted in the

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27. One way of solving this conundrum, suggests Laurence Goldstein, is as follows: the holding of a case is something that is determined by *subsequent* courts from their interpretation of what facts were before the precedent court and material to its decision. Goldstein, "Introduction," 5–6.
28. Lieberman, "Legislation in a Common Law Context," 7–8. Quoting Matthew Hale, *History of the Common Law*, ed. Charles M. Gray (Chicago: Chicago University Press, 1971), 30. (The date of the composition of Hale's *History* is not known; it was first published posthumously in 1713.)
29. Gerald J. Postema, "Some Roots of Our Notion of Precedent," in *Precedent in Law*, ed. Laurence Goldstein (New York: Clarendon Press, 1987).

"commonality" of the law. Its proponents, most notably Sir Edward Coke in the seventeenth century and Sir William Blackstone in the eighteenth, placed judicial precedent at the heart of the common law system. Their conception views the common law as the "common custom" of the people of England, handed down by tradition and experience and not as written directives or rules.[30] Despite obvious substantive changes, English law is seen as the same body of law of Saxon times; the key is not identity of components but a recognizable *continuity* with the past.

According to this approach, common law is the product of a disciplined process of reasoning and reflection on common experience; it is the repository of this accumulated collective experience, the dictionary of this language of human intercourse.[31] Through long immersion in it – not (or not only) grasping its general principles, but acquiring familiar knowledge of its vast particulars – one can become fluent in the common language of human affairs, and thereby can deal justly and reasonably with them. The temporal aspect of this approach is apparent. The *longue durée* enabled laws that Matthew Hale maintained were "not the issues of the prudence of this or that council or senate," but rather "the production of the various experiences and applications of the wisest thing in the inferior world; to wit, time."[32]

The law reports are notable participants in the creation and perpetuation of this common "language," and especially in its commitment to a continuity with past tradition. By retaining many of the formal characteristics of reports now centuries old, anti-narrativity proclaims the contemporary report's embeddedness in the common law tradition and its commitment to the *longue durée*. The quaint-sounding remnants of medieval and early modern Law French, the idiosyncratic diction and obscure narrative and syntactical structures described above all perform not only the common law's indebtedness to its past tradition, but the fact that this tradition is still alive and actively creating the law in the same way as it ostensibly always has been.

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30. The problem with this approach is easy to locate: the common law is, of course, found written and recorded in the law reports. More importantly, these reports do not record the customs of the *people* of England but of its *courts*. Both Bentham and John Austin, the positivists, were caustic about the fiction that the common law was still an original common custom. While Blackstone claimed that judges' task was simply declaratory, and that the judges were the iliving oracles" of the law, Austin talked of "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges." Peter Wesley-Smith, "Theories of Adjudication and the Status of *Stare Decisis*," in *Precedent in Law*, ed. Laurence Goldstein (Oxford: Oxford University Press, 1987), 67–8. For more on this controversy, see Evans, "Change in the Doctrine of Precedent During the Nineteenth Century."
31. Lieberman identifies common law as "a species of custom," not a custom of specific rules and practices, but a custom of "courts and legal officials charged with the administration of justice, and using specific tribunals and specific procedures." Lieberman, "Legislation in a Common Law Context," 5.
32. Matthew Hale, "Considerations Touching the Amendment or Alteration of Laws," in *A Collection of Tracts, Relative to the Law of England*, ed. Francis Hargrave (London: T. Wright, 1787). Quoted in Lieberman, "Legislation in a Common Law Context," 13.

Challenging the traditionary conception in the late eighteenth century and throughout the nineteenth, was the so-called "positivist" conception, associated most often with Jeremy Bentham and John Austin. Under this view, inherited from natural law, law is always "right reason" because it is the authoritatively declared will of the sovereign, which is accepted as the standard of what is right.[33] In this view, precedential cases stand for or embody general rules (the rules are "derived from" or embedded in the decisions). We can of course still ask why one should follow precedent, but that question is "external" to the rule. The answer is given in terms of certainty and predictability of decisions, and, in Bentham's version, in terms of the utilitarian benefits of co-ordination of social interaction and respect for established expectations. An individual case's validity requires that it *embody a general rule.* Its legal truth does not refer to the events of an individual case, but to the general rule which has consequences and meaning only within the legal system.

Keeping this in mind, we now return to the anti-narrativity of the law reports. I had argued that the insular form of the law reports creates a skeletal structure, one that can be adapted and compared to other cases with relative ease. Moreover, this insularity stems from the law reports' complex function as potential precedent. Indeed, every narrative attempt to represent reality is always accompanied by a tension between the abstract or general and the concrete or specific. This tension becomes doubly significant in light of these theories of precedent, and is reflected in the anti-narrative form of the law reports, thus revealing the truth that is at stake in them. A nineteenth-century law report has to provide more than just a precise referential account of the way a case was decided, but to represent its legal truth – the holding, or general rule which can be abstracted from this specific case. However, while the specific case gives the details that create the rule, the ruling only becomes a holding (a general rule) after it has been adopted as precedent by a subsequent court. Precedent thus needs two courts to be established as law: the appellate court whose ruling is followed and the lower court which adopts it. In writing a report that stresses the generic rather than the specifics of a single case, the reporter is in effect anticipating the holding that might – or might not – later be abstracted from it.

The law reports' form thus enabled – in different ways – both the traditional and the positivist approaches to legal precedent. But the reports are not easily or neatly classified as "traditional" or "positivist" ones. On the contrary, most of them contain a complex mélange of stylistic devices, representing the reports' need to negotiate between, rather than align with a specific approach. Like the common law which it disseminates, the form of the reports needs to be flexible enough to incorporate and contain change, but rigid enough to resist the challenges to its authority.

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33. Natural law depended on God's authority, later manifested in the divine right of kings. As such, it was always right. Under positive law, the divine sovereign is replaced by a solely human one.

And in fact, Postema also identifies a third, "conventionalist" conception, which he associates with David Hume and which draws on both of the above approaches. The work needed to discover analogies and disanalogies to past precedents is, in Hume's view, more like the capacity to formulate novel sentences which a community of speakers of the language can recognize as appropriate. The conventionalist conception borrows from the positivist theory in giving a *general* account of the underlying authority or binding force of precedent in terms of achieving regularity and effective coordination of social interaction. Drawing on the traditionary conception, it offers an account of how regularity and coordination are achieved, that is not by appeal to natural reason, nor by appeal to artificially generated general rules laid down by a recognized sovereign or his deputies. Rather, regularity and coordination are best achieved through the careful working out of a shared understanding of common practices. What is "common" is not a set of general rules, but a mutually recognized and widely practiced process of reasoning from the particulars of a common life.[34] This approach creates and identifies a general framework or form which can then be particularized according the specific details of each instance. The new, imagined by analogy, can only be imagined in terms of the old; it is limited by the forms and structures already in place and widely used.

While the conventionalist approach appears to be an elegant solution to the debate,[35] it is in fact far more messy than its structural formulation might imply. The creation of a common language of meaning making (and as a result a "common law") requires an active and dynamic process, a constant testing out and inclusion of new ideas, rules or forms while preserving a sense of continuity and tradition. Through the inclusion of both old and new tropes, stylistic devices, narrative and anti-narrative forms, the common language of the law reports is constantly (but not consistently) in the process of creation and negotiation of its commonality. The already difficult requirement to report "[c]ompendiously yet truly and narratively"[36] is further complicated by the fact the very meaning of these terms is in flux. No wonder then, that many nineteenth-century British law reports read like a high-wire act of narrativity, balanced between the poles of specific and general.

Anti-narrativity enables us to trace the tension between the general and the specific, the abstract legal rule and the concrete case upon which it is based. However, this form signals not only the tension between the specific case and the general rule which is its potential precedent but also that between an "immemorial" tradition and an ever-changing present. It reveals how messy and complicated a "mutually recognized and widely practiced process of reasoning from the particulars of a common life" actually is, and how many conflicting considerations it needs to take into account in the production – and defense of a common law through precedent.

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34. Postema, "Some Roots of Our Notion of Precedent," 30.
35. And perhaps the approach most attractive to our present-day sensibilities.
36. See above, Moran, *The Heralds of the Law*.

VII. Conclusion

In his recent essay on narratology and the law, Peter Brooks forcefully demonstrates the role that narrative analysis could have in legal studies.[37] Like I have done here, though in the context of American law, Brooks also conducts formal narrative analyses of judicial "Statements of Facts." In one of his examples he shows how a certain story, involving the question of foreseeable harm in a tort case, was presented so as to make the judge's legal point more salient:

> Cardozo, like many judges, *only appears to tell the story* of the event under adjudication. He recasts the story events so that they make a legal point, rendering it a narrative recognizable in terms of legal principle.[38]

What Brooks finds problematic – "only appears to tell the story" – I regard as instructive. Narrative analysis is indeed as important an analytical tool for legal studies as Brooks claims it is.[39] However, I argue that its importance lies not in revealing how legal stories should be written, but rather in revealing the judicial, historical, political and social stakes in their having written the way they were.

Nineteenth-century British law reporters might not have been fully (or even partially) aware of the various narrative strategies they used, their historical origins or doctrinal implications. Nonetheless, close attention to a narrative's formal specificities, historicized and read on the background of the legal and narrative cultures of the Victorian period, takes on an explanatory force. As I have shown, the law report narratives are a product of a long discursive tradition; their insular and skeletal forms enable the process of precedential reasoning and arguing. Read in their historical, legal, and narrative contexts, their anti-narrativity reveals how they negotiate the larger socio-political challenges to the legal culture in which they function. By negotiating the tension between a concrete case and the abstract rule which is its potential precedent, anti-narrativity enables the communal nature and goal of precedential reasoning: the creation of a common law, dating from "time immemorial." Anti-narrativity thus constitutes and reveals the (troubled) narrative form of the (troubled) legal doctrine of *stare decisis* of the British nineteenth century.

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37. Brooks, "Transactions."
38. Op. Cit.: 14.
39. Op. Cit.: 28.

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