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Visible and Invisible: The Case for a Territorial Reporter

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VISIBLE AND INVISIBLE: THE CASE FOR A TERRITORIAL REPORTER

*Joseph T. Gasper II**

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INTRODUCTION

The National Reporter System has unquestionably revolutionized the whole plan of law reporting¹

Imagine a land in which the only legal codes have been repeatedly amended for many years, but no compilation has been made of the amendments. Imagine, moreover, that there is no system for recording legal decisions, so that lawyers must rely upon their own briefs and records for precedents [T]his was the situation in the Virgin Islands, a territory of the United States of America as recently as 1957.²

The goal of this Essay is straightforward: to shed some light on the invisibility of opinions issued by America’s territorial courts. Surprisingly,

* © 2023, Joseph T. Gasper II. All rights reserved. Staff Master, Complex Litigation Division, Superior Court of the Virgin Islands. The author wishes to express his gratitude to the organizers of the symposium, Anthony Ciolli, Natalie Gomez-Velez, and Neil Weare, and to Maya McGrath, the Executive Symposium Editor, and appreciation to the student editors of the *Fordham Law Review*, including Kevin Green, for their assistance in getting this Essay ready for publication. The opinions expressed within this Essay are the author’s alone and should not be attributed to any member of the Virgin Islands judiciary. This Essay was prepared for the Symposium entitled *An Anomalous Status: Rights and Wrongs in America’s Territories*, hosted by the *Fordham Law Review* on October 27–28, 2022, at Fordham University School of Law.

1. W. PUBL’G CO., LAW BOOKS BY THE MILLION (1901), reprinted in Ross E. Davies, *How West Law Was Made: The Company, Its Products, and Its Promotions*, 6 CHARLESTON L. REV. 231, app. A, at 269 (2012).

2. John D. Merwin, *The U.S. Virgins Come of Age: A Saga of Progress in the Law*, 47 A.B.A. J. 778, 778 (1961).

the issue is not new.³ Yet, even though the United States of America is largely made up of former territories, the majority of states having started as territories,⁴ we seem to have been unable to settle on “a coherent territorial system.”⁵ “After the men to whom territories meant Kansas and Nebraska, and before those to whom they meant Hawaii and Puerto Rico, there came a generation to which territories meant Indian wars and mines, future congressmen and present patronage, but not a great constitutional and administrative problem.”⁶

To be sure, these great constitutional and administrative problems have plagued most, if not all, territories, and they are often left to courts to provide answers. Yet, no one has collected the decisions of these courts addressing the unique constitutional and administrative problems that territories face into a reporter. We just reached the centennial of our last-acquired territory, the U.S. Virgin Islands.⁷ Although unlikely, other territories could await us in the future.⁸ But even if the U.S. Virgin Islands is our last territory, we

3. See, e.g., 1 H.E. PRICKETT, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF IDAHO TERRITORY, FROM JANUARY TERM, 1866, TO SEPTEMBER TERM, 1880, INCLUSIVE iii–iv (1911) (“It is to be regretted that the decisions of our supreme court have not before been made public, in an authentic and durable form; not only because the public interests and the spirit of public discussion and of freedom of inquiry require that everything that so closely concerns the community should be known and understood; but for the further reason, that we now find the decisions so voluminous, that in order to include them in one volume . . . we find it necessary . . . to omit the numerous dissenting opinions and the greater portion of the briefs and arguments of counsel; and the learning and eloquence displayed in many of the written arguments on file, are thus lost.”); 1 Henry M. Bates, *Foreword* to TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805–1814, at v (William Wirt Blume ed., 1935) (“The present volumes it is believed will make available to lawyers and historians very valuable material. For the lawyer, the opinions of the territorial and early state courts, *some of which have never been published in any form*, are of definite practical value. For the first time we now have as nearly complete published reports of the transactions and opinions of Michigan courts as it is possible to make.” (emphasis added)); 1 CHARLES H. GILDERSLEEVE, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO FROM JANUARY TERM, 1852, TO JANUARY TERM, 1879, INCLUSIVE (1911) (publishing in 1911 the decisions of the Supreme Court of the Territory of New Mexico from 1852 to 1879).

4. Willie Santana, *Incorporating the Lonely Star: How Puerto Rico Became Incorporated and Earned a Place in the Sisterhood of States*, 9 TENN. J.L. & POL’Y 433, 437 n.12 (2014) (“Thirty one-states [sic] joined the Union following the process set out by the Northwest Ordinance, the most recent being the former Territory of Hawaii. In fact, only the original thirteen colonies and the states of Kentucky (ceded from Virginia), Vermont (independent), Maine (ceded from Massachusetts), West Virginia (ceded from Virginia), Texas (independent) and California (U.S. Military rule post–Mexican American War) joined the Union through a process other than that established by the Northwest Ordinance.”).

5. EARL S. POMEROY, THE TERRITORIES AND THE UNITED STATES 1861–1890, at 1 (1947).

6. *Id.* at 1–2.

7. See Joseph T. Gasper II, *Too Big to Fail: Banks and the Reception of the Common Law in the U.S. Virgin Islands*, 46 STETSON L. REV. 295, 295 (2017) (“The one-hundredth anniversary of Transfer Day—the name by which the 31st of March is known in the U.S. Virgin Islands and also a legal holiday in the Territory—will occur in 2017.” (footnote omitted)).

8. President Donald J. Trump garnered much attention when he floated the idea of purchasing Greenland from Denmark. See Peter Baker, *Cosmetics Billionaire Convinced Trump That the U.S. Should Buy Greenland*, N.Y. TIMES (Sept. 15, 2022), <https://www.nytimes.com/2022/09/14/us/politics/trump-greenland.html> [https://perma.cc/

remain unprepared to address the administrative and constitutional problems plaguing territories. A territorial reporter might be a modest start. Part I briefly touches on the history of reporters of court decisions and describes how, historically, territories have been omitted from court reporting systems largely until after attaining statehood. Part II discusses the struggles that the U.S. Virgin Islands has endured with reporting its court decisions as an example of the broader problem for present territories. Part III concludes by arguing for a reporter for the territories.

I. REPORTING COURT DECISIONS

“Eighteenth century lawyers and judges used parchment and wax to memorialize their legal precedents.”⁹ Thankfully, the printing press, advances in typesetting machines, and later computers and the internet, made reporting decisions much, much easier. But for much of the nation’s history, no uniform approach existed. Eventually, state and federal court decisions became available in “authorized reports.”¹⁰ But these authorized reports were specific to each jurisdiction.¹¹ With no “American reports” to rely on, American lawyers relied on English cases and their own notes of prior decisions.¹²

Over time, American lawyers relied less on English cases and came to disdain them,¹³ relying more on broader principles found in American cases.¹⁴ But there was still no uniform approach to reporting the decisions of American courts, and those reporters that did exist “varied widely in the style, accuracy and frequency of their reports.”¹⁵ In fact, legislatures were

AQ2P-3JKY] (“One of the odder moments of Donald J. Trump’s presidency came when he publicly floated the idea of buying Greenland. It caused a predictable furor, generated gales of late-night television jokes and soured relations with Denmark, which rejected the idea of selling the giant Arctic territory.”). But President Trump was not the first American politician to suggest buying Greenland. *See, e.g.,* Brainerd Dyer, *Robert J. Walker on Acquiring Greenland and Iceland*, 27 MISS. VALLEY HIST. REV 263, 263 (1940) (“In the summer of 1867 when William H. Seward, secretary of state, was negotiating with Denmark for the acquisition of St. Thomas and St. John, Walker suggested to him ‘the propriety of obtaining from the same power Greenland, and probably Iceland also.’”); *American Troops in Iceland*, 18 BULL. INT’L NEWS 948, 948 n.1 (1941) (“*The Christian Science Monitor* (June 8, 1940) recalled, however, that in 1867, when Anglo-American relations were not good, a proposal was made that the United States should purchase Greenland and Iceland as a diplomatic move against Great Britain.”).

9. Susan W. Brenner, *Of Publication and Precedent: An Inquiry into the Ethnomethodology of Case Reporting in the American Legal System*, 39 DEPAUL L. REV. 462, 462 (1990).

10. *See, e.g.,* *W. Publ’g Co. v. Edward Thompson Co.*, 169 F. 833, 847 (C.C.E.D.N.Y. 1909) (“The decisions of the courts in the form of opinions, preceded by statements of fact, and by a digest or syllabus of the important points of the decision, have long been published in authorized reports, or in volumes compiled from the decisions of the courts themselves.”), *modified on other grounds* by 176 F. 833 (2d Cir. 1910).

11. *See id.*

12. Brenner, *supra* note 9, at 490 (quoting LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 282 (1973)).

13. *See id.*

14. *See id.*

15. *Id.*

the first to require that courts issue written decisions.¹⁶ “The first American court reports were published in 1789. After a slow start, the number of reports began to grow rapidly. In 1810 there were eighteen volumes of American reports; by 1910, the number had grown to 8,208, excluding some 2,000 volumes of reprint.”¹⁷ This advance was due largely to state statutory and even constitutional mandates that judges issue written decisions.¹⁸

To accommodate these mandates, officials were appointed to “report” on the decisions of the courts to the public.¹⁹ Early reporters often included more than the decisions, however.²⁰ In fact, these earlier court reporters were often known not by the name of the court whose decisions were being reported, but by the name of the reporter.²¹ States eventually remedied the situation once they realized the value of “official” reporters.²² Reporting the decisions of courts quickly became “a valuable legal commodity.”²³

Territories, of course, lagged behind. The absence of reporters compiling the decisions of the earliest territorial courts is unsurprising, considering that written decisions were uncommon for all courts. For the earliest territories, very few decisions were made available, and written decisions only emerged several years later, “so that there was little of value to print when the time came.”²⁴ What’s more, the way in which territorial courts reported their decisions varied by judge.²⁵

Yet another reason why territories lagged behind—in a world where profit dictated the availability of a court’s decision, there was likely little demand, and even less willingness to pay, for a reporter of the decisions of these earlier

16. *See id.* at 492 (“Idiosyncratic law reporting’s demise was hastened by another innovation, ‘the appointment of official court reporters, whose duty it was to attend the courts and publish judicial opinions.’ The Supreme Court made the first such appointment in 1790 and several states followed suit.” (quoting Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 55 (1981))).

17. Byron D. Cooper, *The Role of Publishing Houses in Developing Legal Research and Publication: The United States*, 38 AM. J. COMPAR. L. 611, 618 (1990) (footnotes omitted).

18. *See id.*

19. Brenner, *supra* note 9, at 492.

20. *See id.* at 493 n.190 (“[I]t is difficult for modern lawyers to comprehend the extent to which these early reporters ‘participated’ in the creation of their reports.”).

21. *See id.*

22. *Id.* at 493 (“[B]y the end of the nineteenth century, most jurisdictions had established a system of ‘official’ reports.”).

23. *Id.* at 494.

24. John Welling Smurr, *Territorial Constitutions: A Legal History of the Frontier Governments Erected by Congress in the American West, 1787–1900*, at 19 (June 1960) (Ph.D. dissertation, Indiana University) (ProQuest).

25. *See, e.g.*, William Wirt Blum & Elizabeth Gaspar Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions* (pt. 2), 61 MICH. L. REV. 467, 477 n.70 (1963) (“The judges . . . would deliver oral opinions from notes or from completely written manuscripts. In some instances written opinions were recorded in the court’s journal; a few were deposited in the court’s files; a few were published in local newspapers. Usually, the judge retained his notes or manuscript with his own personal papers.”).

territorial courts.²⁶ Compiling and publishing early decisions of territorial courts eventually fell to industrious persons with an eye to preserving history, often decades after the decisions had been issued, rendering their use as precedent more historical than practical.²⁷ Take Michigan, for example, which became a state on January 26, 1837. The Supreme Court of the Territory of Michigan held its first session on July 29, 1805.²⁸ More than a century would pass before the most “complete published reports” that could possibly be made “of the transactions and opinions of Michigan [territorial] courts” would appear.²⁹ And then came John Briggs West.

West’s foray into the legal publication market began in 1874 with an appreciation for the state of disarray that it was in.³⁰ He quickly realized the value of printing softcover volumes, which in turn allowed him to provide attorneys with “all new decisions promptly and cheaply.”³¹ His success also originated with “resuscitating a practice from the era of the Year Books.”³²

26. See generally POMEROY, *supra* note 5, at 31–33 (discussing the challenges and pushback that territories encountered from the U.S. Department of the Treasury with appropriations for printing costs).

27. See generally *supra* note 3. Take, for example, the following note written by Samuel H. Hempstead as a preface to his 1856 reporter compiling the decisions of the territorial and state courts of Arkansas from 1820 to 1856:

This volume of reports is presented to the profession to preserve the decisions of the federal courts of Arkansas in a more enduring form than in tradition. Adjudged cases become precedents, and it is therefore important that they should be known. In fact, if we have to appeal to recollection, or neglected records, justice safely administered can hardly be expected. Those practising in these courts have felt the inconvenience arising from the want of a published report of their decisions. If this volume shall wholly or partially remove the evil, my labor will not have been lost. It can never be a source of profit to me, and certainly distinction is not won by performing the duties of reporter. It forms a sort of judicial history of Arkansas from its commencement as a Territory down to this time, and in that point of view will possess some interest there, if not elsewhere. The decisions of the superior court are embraced, because it is conceded on all hands that the court was always an able one; and although this book, no doubt, contains many cases of little or no value, yet in that respect it is not different from other reports. Whilst tautology has been omitted in the opinions, the substance, and generally the exact language of the court, has been preserved. Cases sustaining a principle decided have been added; and if time had permitted, I should have made full notes to the cases.

SAMUEL H. HEMPSTEAD, REPORTS OF CASES ARGUED AND DETERMINED IN THE UNITED STATES SUPERIOR COURT FOR THE TERRITORY OF ARKANSAS, FROM 1820 TO 1836; AND IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARKANSAS, FROM 1836 TO 1849; AND IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF ARKANSAS, IN THE NINTH CIRCUIT, FROM 1839 TO 1856, at vii–viii (1856).

28. See TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805–1814, *supra* note 3, at ix.

29. *Id.* at v.

30. Robert M. Jarvis, *John B. West: Founder of the West Publishing Company*, 50 AM. J. LEGAL HIST. 1, 1 (2008) (“[West] realized that there was [a] multiplicity of reports published in both official and unofficial form and in journals.” (second alteration in original) (quoting John W. Heckel, *Questions and Answers*, 75 LAW LIBR. J. 299, 305 (1982))).

31. *Id.* at 2 (quoting John W. Heckel, *Questions and Answers*, 75 LAW LIBR. J. 299, 305 (1982)).

32. Brenner, *supra* note 9, at 494. As Professor Susan W. Brenner explains, the Year Books were “rudimentary reporters.” *Id.* at 469.

West would provide advance sheets and slip opinions, printed initially in paperback, that were later reprinted in a bound volume once a sufficient number of opinions were available.

What's more, unlike his competitors, West also saw the need to expand beyond the common state-by-state approach to reporting court decisions.³³ West decided instead "to report the decisions from a group of states in one 'Reporter.'"³⁴ This approach became the National Reporter System that we know today, which West first implemented in the 1880s.³⁵ Eventually, West divided the United States into several regions—Atlantic, Northeastern, Northwestern, Pacific, Southern, Southeastern, and Southwestern—and reported the opinions and decisions from the courts in those regions in the same books.³⁶ The National Reporter System "unquestionably revolutionized" how decisions were reported.³⁷ And it is no exaggeration to say that West—and the company he founded, the West Publishing Company—"single-handedly revolutionized" the American legal profession.³⁸ By combining decisions from different but neighboring

[Year Books] began in 1292 as guides to court procedures. The Year Books were periodically updated, and these updates came to include case annotations

The earlier Year Books "resemble not so much the modern law report as a professional newspaper which combines matters of technical interest with the lighter side of professional life."

They did share one feature with modern reporters. Case reports were noted on slips of parchment and copied into pamphlets that circulated as "advance sheets." The materials in the advance sheets were later recopied into permanent volumes which became the "Year Books." Because reports were prepared by a number of individuals, "there were frequently found to be two, three, four, or even more versions of one case, so different that collation was impossible." However, between 1377 and 1399, the variation in reports disappeared and consistent reporting was a standard feature until the Year Books were replaced by "modern" case reports.

The Year Books "did not exist for the same reason as the modern law report," that is, they were not "collections of precedents whose authority should be binding in later cases." It was custom rather than "precedent" that controlled. "[C]ases are used only as evidence of the existence of a custom of the court. It is the custom which governs the decision, not the case or cases cited as proof of the custom."

In the sixteenth century, "modern" case reports replaced the Year Books and references to "precedent" began to appear. Although decisions were not yet accorded binding precedential effect, they were recognized as having some value, and this recognition created a market for volumes which reported the decisions that the judges were making.

Id. at 469–70 (footnotes omitted) (quoting T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 33–34, 270, 347 (5th ed. 1956)).

33. *Id.* at 495.

34. *W. PUBL'G CO.*, *supra* note 1, app. A, at 270.

35. *Christianson v. W. Publ'g Co.*, 53 F. Supp. 454, 455 (N.D. Cal. 1944).

36. *Id.*

37. *W. PUBL'G CO.*, *supra* note 1, app. A, at 269.

38. *Jarvis*, *supra* note 30, at 2. *But cf.* Erwin C. Surrency, *Law Reports in the United States*, 25 *AM. J. LEGAL HIST.* 48, 48–49 (1981) ("Lawyers have been inclined to see early law reporting as primitive and to view developments in the Nineteenth Century as steps in a gradual progression to modern, sophisticated forms of the art. Such a view, however, is faulty. Lawyers in different eras have reported cases to suit their needs, and methods of reporting have not so much progressed as merely changed in accordance with the changing needs of the profession.").

jurisdictions, West was able to get more information—more law—into the hands of attorneys faster and cheaper than any of his competitors.³⁹ And the rest, as they say, is history.

The decline of official reporters of state courts only quickened in the years that followed. Official reports, while initially filling an important need, were never quick.⁴⁰ Hence, commercial, “unofficial” reports became “more valuable to lawyers.”⁴¹ Official reports just could not compete. As a result, many states “discontinued the official publication of reports for their courts of last resort.”⁴² And what of the territories?

West Publishing Company initially included the decisions of territorial supreme courts within its National Reporter System, occasionally reprinting previously reported decisions within the appropriate regional reporter.⁴³ One example stands out—decisions of the Supreme Court of the Territory of Arizona were included within the Pacific Reporter from the very first volume published in 1884, even though Arizona would not become a state for another thirty years.⁴⁴ The inclusion of territorial court decisions may have been a recognition that territories will eventually become states and that including them in the regional reporters would avoid the need to reprint in future volumes decisions that were previously only available in official reporters.⁴⁵ However, even though West went on to publish several topic-based reporters—such as West’s Bankruptcy Reporter and West’s Military Justice Reporter, and even West’s American Tribal Law Reporter—West eventually ceded the reporting of territorial court decisions to other publishers.⁴⁶

39. See *W. PUBL’G CO.*, *supra* note 1, app. A, at 270.

40. See Cooper, *supra* note 17, at 621.

41. *Id.*

42. *Id.*

43. See, e.g., *Territory v. Potter*, 25 P. 529, 529 n.1 (Ariz. Terr. 1883) (“This case, filed January, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.”); *Territory v. Couk*, 47 N.W. 395, 395 n.1 (Dakota Terr. 1879) (*per curiam*) (“This case, filed at October term, 1879, is now published by request, with two others, in order that the Northwestern Reporter may cover all cases in volume 2, Dakota Reports.”); *Territory v. Woolsey*, 24 P. 765, 765 n.1 (Utah Terr. 1867) (“This case, filed October 24, 1867, is now published by request, with 16 others, in order that the Pacific Reporter may cover all cases in volume 3, Utah Reports.”).

44. Arizona became a state on February 14, 1912. The title page of volume 1 of the Pacific Reports includes the Territory of Arizona (along with other then territories such as Montana and Washington), though decisions from those courts do not actually appear until later volumes. 1 THE PACIFIC REPORTER (Saint Paul, West Publ’g Co. 1884). *But cf.* *Story v. Black*, 1 P. 1 (Mont. Terr. 1883).

45. See, e.g., *State v. Barbour*, 22 A. 686, 686 n.1 (Conn. 1885) (“This case, filed June 8, 1885, is now published by request, with others, in order that the Atlantic Reporter may cover all cases in volume 53, Connecticut Reports.”); *Smith v. State*, 17 S.W. 560, 560 n.1 (Tex. Ct. App. 1886) (“This case, filed June 15, 1886, is now published by request, with others, in order that the Southwestern Reporter may cover all cases in volume 21, Texas Appeals Reports.”).

46. *But see infra* note 81 (explaining that West had published decisions of Alaskan territorial courts).

II. ONE EXAMPLE OF THE STRUGGLE: THE U.S. VIRGIN ISLANDS

The U.S. Virgin Islands became a territory of the United States on March 31, 1917, when “the islands of St. Thomas, St. John, St. Croix (and the adjacent cays) formally changed sovereignty.”⁴⁷ A hundred years later, it remains a territory. For the majority of that time, “no system for recording legal decisions existed in the Virgin Islands.”⁴⁸ In fact, nearly forty years would pass before the first volume of the Virgin Islands Reports was printed, containing decisions from the District Court of the Virgin Islands (including decisions of District Court commissioners), the U.S. Court of Appeals for the Third Circuit, and the local police courts.⁴⁹

Subsequent volumes continued to include opinions of the District Court and the Third Circuit, and later, the Municipal Court of the Virgin Islands and its successor courts—the Territorial Court of the Virgin Islands, which later became the Superior Court of the Virgin Islands.⁵⁰ When an intermediate appellate division, consisting of a three-judge panel within the District Court, was created, the Virgin Islands Reports also embraced decisions of the Appellate Division of the District Court of the Virgin Islands. Decisions of the recently established Supreme Court of the Virgin Islands are also now printed in the Virgin Islands Reports.

The Virgin Islands Reports were long overdue. Before then, “the opinions of the local courts for the most part ha[d] not been readily available, being buried unpublished, undigested and unindexed in the voluminous files of the clerks of the courts.”⁵¹ By 1959, the Virgin Islands Reports “supplied an urgent need of the legal profession that had existed ever since the acquisition of the Virgin Islands from Denmark in 1917.”⁵² Unfortunately, the Virgin Islands Reports have also been buffeted by the same economic winds that have affected many state reports, as well as West’s competitors.

Like other legislatures, it was the Legislature of the Virgin Islands that first “provided for the preparation and the first publication of legal decisions affecting the Virgin Islands” in the Virgin Islands Reports.⁵³ From initial publication in 1959 until approximately 1988, the Virgin Islands Reports was published by Equity Publishing Corporation in Orford, New Hampshire.

How Equity Publishing Corporation was selected to publish the Virgin Islands Reports is unknown, though the U.S. Department of the Interior had entered into a contract with Equity Publishing Corporation to publish the

47. Gasper, *supra* note 7, at 295.

48. *In re* Adoption of the Rule on Uniform Reporting and Citation of Opinions, No. 2018-008, 2018 WL 6012457, at *1 (V.I. Nov. 15, 2018).

49. See Merwin, *supra* note 2, at 780.

50. The Territorial Court of the Virgin Islands was renamed the Superior Court of the Virgin Islands in 2004 as part of the legislation that created the Supreme Court of the Virgin Islands as a court of last resort for the Territory.

51. Albert B. Maris, *Foreword to THE VIRGIN ISLANDS REPORTS* vii, viii (1959).

52. Merwin, *supra* note 2, at 780.

53. *Id.*

Virgin Islands Code.⁵⁴ More likely than not, Equity Publishing Corporation was chosen because of its involvement with the Virgin Islands Code. But Equity Publishing Corporation also appears to have recognized a blind spot of West Publishing Company: the territories. By 1960, when the advertisement below was printed in the *Harvard Law Review*, Equity Publishing Corporation had become the publisher of the legal codes for the Territories of Alaska, the Canal Zone, Puerto Rico, and the Virgin Islands. Equity Publishing Company also would go on to publish the Navajo Tribal Code.⁵⁵ Equity became the de facto legal publisher for many jurisdictions ignored or overlooked by West Publishing Company, publishing court decisions of the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa. But in late 1988, Equity was acquired by Butterworth.⁵⁶ A series of later acquisitions would leave the territories somewhat lost in the corporate shuffle.⁵⁷

54. See Fred A. Seaton, *Foreword to 1 VIRGIN ISLANDS CODE ANNOTATED: HISTORICAL DOCUMENTS, ORGANIC ACTS, AND CONSTITUTION ix* (“This Code was edited and prepared under a contract between the Department of the Interior and the Equity Publishing Corporation of Orford, New Hampshire . . .”); Revised Organic Act of the Virgin Islands, ch. 558, § 8(e), 68 Stat. 497, 501 (1954) (repealed 1982) (“The Secretary of the Interior shall arrange for the preparation, at Federal expense, of a code of laws of the Virgin Islands, to be entitled the ‘Virgin Islands Code,’ which shall be a consolidation, codification and revision of the local laws and ordinances in force in the Virgin Islands. When prepared, the Governor shall submit it, together with his recommendations, to the legislature for enactment. Upon the enactment of the Virgin Islands Code it and any supplements to it shall be printed, at Federal expense, by the Government Printing Office as a public document.”).

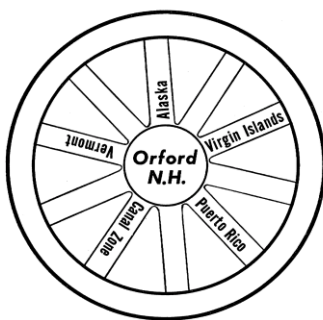
55. Equity Publishing Corporation Wheel Advertisement, in 73 HARV. L. REV. (1960), following p.816; Equity Publishing Corporation “Follows the Law” Advertisement, in 66 A.B.A. J. 614, 634 (1980).

56. A. Michael Beaird, *My Alternate (or Aberrational Some Might Say) Career!*, 93 LAW LIBR. J. 381, 383 (2001).

57. For example, Equity Publishing Corporation published all volumes of the Trust Territory Reports but only the first volume of the Guam Reports, which includes the “opinions of the appellate division of the District Court from 1955–1980, opinions of the Superior Court of Guam from 1974–1979 and the only opinion from 1975 of the short-lived Supreme Court of Guam.” GUAM L. LIBR., PACIFIC ISLANDS LEGAL MATERIALS, SELECTED BIBLIOGRAPHY OF LIBRARY HOLDINGS 11 (2011), <https://guamlawlibrary.org/wp-content/uploads/2013/01/pilm-2011.pdf> [<https://perma.cc/V7HE-EZ4C>]. The second volume was published by the former Office of Compiler of Laws for Guam. See *id.* The decisions of the courts of Guam are now only available online.

Figure 1:
Equity Publishing
Corporation Wheel
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Figure 2:
Equity Publishing
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RELX Group, previously Reed Elsevier, acquired LexisNexis, Michie, and Butterworth in 1994, and Matthew Bender and Shepard’s in 1998.⁵⁸ The LexisNexis we know today did not set out to be the de facto publisher of legal materials for the territories. Instead, LexisNexis inherited whatever publication rights Equity Publishing Company had following Butterworth’s acquisition of Equity. Unfortunately, the care that Equity showed (at least initially) has not been matched by its successors.⁵⁹

58. See Leslie A. Street & David R. Hansen, *Who Owns the Law?: Why We Must Restore Public Ownership of Legal Publishing*, 26 J. INTELL. PROP. L. 205, 218 (2019).

59. See *Alexander v. Todman*, 5 V.I. 137, 157 (3d Cir. 1964) (noting the “instrumental” role of Equity Publishing Company); *Gov’t of V.I. v. Fredericks*, 15 V.I. 558, 607 (3d Cir. 1978) (detailing correspondence between Equity’s president and Third Circuit chief judge regarding changes to Virgin Islands Code). *But see Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 539 n.7 (V.I. 2015) (noting LexisNexis printed a decision designated not for publication); *Ronan v. Clarke*, 63 V.I. 95, 97 n.4 (Super. Ct. 2015) (noting amendments to the Virgin Islands Code from 2012 were not reflected in 2013 or 2014 supplements); *People v. Rohn*, 55 V.I. 100, 111 n.3 (Super. Ct. 2011) (“The publishers of the Virgin Islands Code Annotated reflected that amendment for all sections within Chapter 35 except Section 378.”), *rev’d on other grounds*, 57 V.I. 637 (V.I. 2012); *Ballentine v. United States*, No. 1999-130, 2001 U.S.

In 1959, when the first volumes of the Virgin Islands Reports were published, there was much hope for Virgin Islands case law.⁶⁰ But twelve years later, in 1967, only one additional volume had been printed, containing decisions from 1959 to 1964.⁶¹ Later volumes also came on an inconsistent basis.⁶² Further complicating matters, for the majority of its existence, the District Court of the Virgin Islands exercised jurisdiction both as a U.S. district court and as a court of general jurisdiction for the Virgin Islands.⁶³ The District Court would hear a vast range of cases and proceedings, with many not involving federal law.⁶⁴ Since federal district courts never had “an ‘official’ case reporter,”⁶⁵ West would decide which decisions of the District Court of the Virgin Islands were worthy of publication in the Federal Supplement or the Federal Rules Decisions. Of course, West does not publish every decision issued by federal district court judges, even though “[t]he decision to publish an opinion rests with the judge who wrote it.”⁶⁶

Dist. LEXIS 16856, at *12 n.5 (D.V.I. Oct. 15, 2001) (“For some unfathomable reason, when Butterworth was the publisher of the Virgin Islands Code, it deleted the full text of the 1936 Organic Act from the historical and reference materials preceding title 1 in the current edition of Volume 1 of the Virgin Islands Code. It is available, however, in the 1967 Equity Publishing Company edition of Volume 1 of the Virgin Islands Code.”). *But cf.* Willie v. Amerada Hess Corp., 66 V.I. 23, 67 n.15 (Super. Ct. 2017) (“Although *Gomes* was also reported in volume 6 of the Virgin Islands Reports, on pages 163 to 166, the portion of the opinion that adopted contribution for the Virgin Islands was not. It only appears in the version reported in the Federal Reporter, perhaps because the issue was addressed on petition for rehearing.”).

60. *See* Merwin, *supra* note 2, at 780 (“It can well be said that this series of Virgin Islands Reports represents as fine a presentation of legal decisions as can be found anywhere. With their advent into the field of legal bibliography in the territory, phase two of our legal maturity was achieved.”).

61. Equity Publishing Corporation Advertisement, 1 V.I. BAR J. (1967), following p.69 (“The Virgin Islands Reports consists of four bound volumes. The latest, Volume 4, covers cases from 1959 to 1964. These Reports are kept current by means of an annual Advance Pamphlet Service, the latest of which is Volume 5, No. 2.”).

62. *See infra* note 73 and accompanying text.

63. *See* Brow v. Farrelly, 994 F.2d 1027, 1032 (3d Cir. 1993) (“Section 1612 vested the District Court of the Virgin Islands with the jurisdiction of a District Court of the United States in all causes arising under the Constitution, treaties and laws of the United States, regardless of the sum or value of the matter in controversy, and general original jurisdiction over all other matters in the Virgin Islands, subject to the exclusive jurisdiction of the local courts of the Virgin Islands over civil actions wherein the amount in controversy is less than \$500.”); *see also id.* at 1034 (“[E]ffective October 1, 1991, the Territorial Court shall have original jurisdiction in all civil actions regardless of the amount in controversy.” (quoting V.I. CODE ANN. tit. 4, § 5-76(a) (1991))).

64. *See* Herman E. Moore, *The Virgin Islands and Its Judicial System*, 3 NAT’L BAR J. 349, 356 (1945) (“In the work of the District Court of the Virgin Islands it is often necessary to turn in one day from a case involving domestic relations and support of children to one in admiralty. Often within one session of court the jurisdiction of the District Court may run the gamut, beginning at the opening of the session with the admission of new citizens to the United States in naturalization cases, and the hearing of Federal cases, then turning to a local appeal from the police courts, and from police court appeal to domestic relations, from domestic relations to an insanity hearing; and from civil hearings to criminal, from criminal to probate, from probate to chancery, and from chancery to admiralty, and then back to a local paternity charge.”).

65. Brenner, *supra* note 9, at 499.

66. Cooper, *supra* note 17, at 622.

Instead, West selects which opinions will be reported.⁶⁷ As a result, in the context of the Virgin Islands, where the District Court served as both a federal and a local court, many opinions designated for publication were never published by West.⁶⁸ And even though the Virgin Islands Reports was dedicated exclusively to publishing Virgin Islands decisions, it too failed to include District Court opinions that were designated for publication.⁶⁹

Perhaps for this reason, the judges of the District Court began in the 1970s to assemble their own “homemade” reporters, dubbed the St. Thomas Supplement and the St. Croix Supplement. These “reporters” were more like slip opinions or advance sheets than true reporters, though there was an effort at annotating the volumes. Each volume is organized by year and contains the typewritten decisions issued in the respective district, along with occasional orders and opinions of the Third Circuit in cases appealed from that district. At some point, the Third Circuit covered the cost to have these supplements bound. But the bound version only contains photocopies of typewritten opinions, paginated by hand in ink. Courts do cite the supplements.⁷⁰ But the supplements only exist on the shelves of a few select libraries, containing many decisions—found only in the pages of these supplements—from a time when the District Court served as the court of general jurisdiction for the Territory.⁷¹

67. See, e.g., *Board Adopts Resolution on Citations and Public Databases*, AM. ASS'N L. LIBRS. NEWSL. (Am. Ass'n of L. Librs., Chicago, Ill.), Dec. 1994, at 168 (“West selects opinions for reporting from the Federal District Courts, the Bankruptcy Courts and the U.S. Courts of Appeals. For example, there are over 700,000 case dispositions per year in the U.S. District courts and Bankruptcy Courts. From that number, West chooses to publish approximately 7,000 case reports in *Federal Supplement* and approximately 2,500 case reports in *Bankruptcy Reporter*. Approximately 15,000 are selected for inclusion on WESTLAW.”).

68. See, e.g., *FDIC v. Creque*, 19 V.I. 6 (D.V.I. 1982) (an appeal from the Territorial Court of the Virgin Islands that was published in the Virgin Islands Reports but not in the Federal Supplement).

69. See *Gilbert v. Ahn*, No. 1993-0187, 1994 WL 16972430, at *1 (D.V.I. App. Div. Apr. 19, 1994) (“FOR PUBLICATION” noted at the top of the opinion above the name of the court).

70. See, e.g., *Banks v. Int'l Rental & Leasing Corp.*, Nos. 08-1603 & 08-2512, 2011 U.S. App. LEXIS 26905, at *5 (3d Cir. Apr. 19, 2011) (citing *Pool v. Hertz Corp.*, 1977 St. Croix Supp. 520 (D.V.I. 1977)); *Pomper v. Thompson*, 836 F.2d 131, 133 (3d Cir. 1987) (citing *Benjamin v. Gov't Emps. Serv. Comm'n*, 1978 St. Thomas Supp. 315 (D.V.I. 1978)); see also *Gov't of the V.I. v. Steele*, 26 V.I. 190, 197 (Terr. Ct. 1991) (citing *In re Deverita Carty Sturdivant for Admission to the Bar*, 1982 St. Thomas Supp. 162 (D.V.I. 1982)).

71. See, e.g., *Saludes v. Ramos*, 19 V.I. 544, 547 (D.V.I. 1983) (“To the extent that *Davis v. Knud Hansen Mem'l Hosp.*, 1978 St. T. Supp. 262 (D.V.I. July 7, 1978), rev'd on other grounds, 635 F.2d 179 (3d Cir. 1980), stands for the proposition that compliance with both statutes is required under circumstances such as those presented in the present case, it is hereby reconsidered and overruled.”), *vacated on other grounds and remanded*, 774 F.2d 992 (3d Cir. 1984); see also *Dickson v. Hertz Corp.*, 559 F. Supp. 1169, 1174 (D.V.I. 1983) (citing *Palley v. Martin Marietta Corp.*, 1977 St. Croix Supp. 275, 279–85 (D.V.I. 1977) (holding that the “jurisdictional presence of parent corporation [can be] imputed through subsidiary”). The *Palley* decision is not available on Westlaw or Lexis and exists only in the 1977 volume of the St. Croix Supplement. Similarly, the *Pool* decision cited by the Third Circuit in *Banks*, see *supra* note 70, is also unavailable on Westlaw or Lexis, though it appears in table format as having been affirmed by the Third Circuit. See *Pool v. Hertz Corp.*, 661 F.2d 915 (3d Cir.

The situation eventually improved with advancements in technology. CD-ROMs made it easier to make Virgin Islands case law (and statutory and regulatory law) available to the bench and bar, and the internet reduced the delay in making opinions available. But the hopes that the Virgin Islands Reports inspired waned. On October 7, 1986, in an affidavit submitted in support of a motion to intervene filed by the Virgin Islands Bar Association in *Barnard v. Thorstenn*,⁷² then president of the Virgin Islands Bar Association, Patricia D. Steele—later a judge of the Territorial Court of the Virgin Islands and Superior Court of the Virgin Islands—highlighted some of the difficulties involved in accessing Virgin islands case law:

[T]here are very lengthy delays between the issuance of opinions by the Virgin Islands Courts and their publication, if they are published. The most recent volume of the Virgin Islands Reports contains opinions issued in 1983 and early 1984. Slip opinions are generally not disseminated to attorneys. They are available only by reviewing the opinions in the office of the law clerks for the District Court judges. Many significant opinions are “published” only in the St. Croix and St. Thomas Supplements.⁷³

Things have changed but also stayed the same. The Supreme Court of the Virgin Islands recently adopted a public domain citation format for local opinions.⁷⁴ But that too has had its challenges, as Superior Court opinions have not complied with the format.⁷⁵ Superior Court opinions have also been issued inconsistently, resulting in gaps on Lexis and Westlaw and gaps in the Virgin Islands Reports.⁷⁶ The Virgin Islands may be moving in the same direction as those “states [who] began to abolish the reporters that they had so painfully established in the nineteenth century.”⁷⁷ The problem is that “in those jurisdictions, publication in a West reporter became the only means by which decisions could appear in print and thereby attain precedential status.”⁷⁸

1981). The *Davis* decision, cited in *Saludes*, is also not on Westlaw or Lexis, but the decision on appeal is. See *Davis v. Knud-Hansen Mem'l Hosp.*, 635 F.2d 179 (3d Cir. 1980).

72. 489 U.S. 546 (1989).

73. Joint Appendix at 33–34, *Barnard v. Thorstenn*, 489 U.S. 546 (Nos. 87-1939 & 87-2008), 1988 U.S. S. Ct. Briefs LEXIS 237, at *33.

74. *In re* Adoption of the Rule on Uniform Reporting and Citation of Opinions, No. 2018-008, 2018 WL 6012457 (V.I. Nov. 15, 2018).

75. Promulgation Order No. 2018-008 implemented two citation formats: one for opinions designated for publication, e.g., “2022 VI Super 1,” and another for opinions not designated for publication, e.g., “2022 VI Super 1U.” The Superior Court effectively combined the two with “2022 VI Super 2U” after “2022 VI Super 1.”

76. For example, *Williams v. Groundwater & Environmental Services, Inc.*, 2020 VI Super 1, and *People v. Rodriguez*, 2020 VI Super 3U, are available on LexisNexis, but cases in 2020 VI Super 2 are not. Both *Williams* and *Rodriguez* are available on Westlaw as well, but *Williams* can only be retrieved via the public domain citation format by inputting “2020 VI Super 001,” and *Rodriguez* must include the “U” or it cannot be retrieved except through a targeted search.

77. Brenner, *supra* note 9, at 498.

78. *Id.*

III. UNIQUE, BUT NOT SO UNIQUE

The foregoing discussion has given a glimpse into the struggle faced by all territories, not just present-day territories, in making their case law available. But a simple solution is not readily available. Although the Legislature of the Virgin Islands commissioned the preparation of the Virgin Islands Reports, no agreement exists today between the Legislature and the current publisher, LexisNexis (successor to Equity Publishing Corporation). Instead, LexisNexis continues to report the decisions of Virgin Islands courts more out of habit than contractual obligation.⁷⁹

Further, considering that many states have discontinued their official reporters—largely because West makes the decisions of their courts of last resort available within its regional reporters—the Territories find themselves caught between a rock and a hard place. Being reported in a bound volume, particularly one published by West, is seen as synonymous with having precedential value.⁸⁰ However, at present, West does not report decisions of territorial courts.⁸¹ To be clear, Westlaw (like LexisNexis) does make decisions of territorial courts available electronically.⁸² But West does not

79. In fact, it is not clear whether LexisNexis owns the right to publish under the title the “Virgin Islands Reports,” as the initial volumes of the Virgin Islands Reports ascribe the copyright to the Virgin Islands.

80. See Brenner, *supra* note 9, at 498 (“As the use of ‘official’ reports declined, publication in an ‘official’ reporter ceased to have any significance with regard to a decision’s precedential status: ‘The fact that [decisions published in a West reporter] were unreported in the official reports in no way lessen[ed] their authority as precedents.’ If publication in an official report had no effect upon a decision’s precedential value, then there seemed to be little if any reason to maintain two systems for reporting the same cases. Consequently, states began to abolish the reporters that they had so painfully established in the nineteenth century. In those jurisdictions, publication in a West reporter became the only means by which decisions could appear in print and thereby attain precedential status.” (alterations in original) (quoting MILES O. PRICE & HARRY BITNER, *EFFECTIVE LEGAL RESEARCH* 119 (1953)).

81. Ironically, as noted earlier, West initially included decisions of territorial supreme courts. See *supra* note 43 and accompanying text. The Supreme Court of the Dakota Territory was included within the Northwest Reporter. See, e.g., *Territory v. Gay*, 2 N.W. 477 (Dakota Terr. 1879). And the first decision reported in volume 1 of the Pacific Reporter is a decision of the Supreme Court of the Territory of Montana. See *Story v. Black*, 1 P. 1 (Mont. Terr. 1883). The decisions of Alaskan and Hawaiian courts would not be added to the Pacific Reporter until volume 347 of the second series, published in 1960, a year after each had become a state in 1959. Compare PACIFIC REPORTER: SECOND SERIES: VOLUME 346 P.2D (1960) (listing jurisdictions included within the volume), with PACIFIC REPORTER: SECOND SERIES: VOLUME 347 P.2D (1960) (same). However, West had published the decisions of the Alaskan territorial courts separately under the title the Alaska Reports, and later, in 1938, added the Alaska Federal Reports “[t]o supplement the Alaska Reports.” Marian G. Gallagher & Mary W. Oliver, *Questions & Answers*, 50 LAW LIBR. J. 568, 568 (1957) (“*Alaska Federal Reports*, in 5 volumes, is a 1938 reprint of cases [arising out of the Territory of Alaska that were] previously published in *Federal Cases*, *Federal Reporter*, and the *U.S. Supreme Court Reports*.”).

82. Anecdotally, when I first started as a law clerk at the Superior Court of the Virgin Islands in 2010, we used Westlaw for online research but had to get pincites for Virgin Islands citations from the bound volumes of the Virgin Islands Reports or from a CD-ROM produced by LexisNexis containing Virgin Islands primary law. Even though Westlaw made Virgin Islands case law available online, it did not include page numbers to decisions in the Virgin Islands Reports because LexisNexis was the publisher. Westlaw eventually came around in

publish any decisions of territorial courts in its regional reporters. There is no T. or T.2d, for example, in which the opinions of the Supreme Court of Guam or the Supreme Court of Puerto Rico can be found. The Territories are also not included, geographically, in the closest regional reporter. Virgin Islands cases are not reported in the Southern Reporter, for example. Canal Zone cases were not reported in the South Western Reporter. Apart from the obvious result that the Territories are excluded from the broader national conversation, it also means that territorial court opinions cannot be found through West's Key Numbering System.

This blind spot may have contributed somewhat to the great administrative and constitutional challenges that territories have faced throughout the life of this nation. Blame cannot be laid only at the feet of Westlaw. Take, for example, the opinion of the Superior Court of Louisiana in *Desbois' Case*,⁸³ which held that inhabitants of the Territory of Orleans became citizens of the United States once Louisiana became a state. Both LexisNexis and Westlaw have made the case available on their platforms,⁸⁴ but only Westlaw has added a headnote. Further, at least two other opinions cited *Desbois' Case*,⁸⁵ yet neither appears within the citing history on LexisNexis or Westlaw. One is left to wonder how many more “invisible” opinions are out there—efforts of past judges and justices grappling with the same great administrative and constitutional challenges of American territories.⁸⁶

large part because of requests from the law clerks to fix the problem. But to this day, some decisions reported in the Virgin Islands Reports still do not appear on Westlaw. *See, e.g.,* *Lubick v. Travel Servs., Inc.*, 23 V.I. 120 (D.V.I. 1981). The *Lubick* opinion can be retrieved on LexisNexis, but a search in “All Content” on Westlaw for “Marvin Lubick,” the plaintiff, retrieves only an earlier decision in the same case.

83. 2 Mart. (o.s.) 185 (La. 1812).

84. *See* *Desbois' Case*, 2 Mart. (o.s.) 185, 1812 WL 764, 1812 La. App. LEXIS 1 (La. 1812).

85. *See* *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 165–66 (1892) (“In 1813, in *United States v. Laverty*, 3 Martin, 733, Judge Hall of the District Court of the United States held that the inhabitants of the territory of Orleans became citizens of Louisiana and of the United States by the admission of Louisiana into the Union; denied that the only constitutional mode of becoming a citizen of the United States is naturalization by compliance with the uniform rule established by Congress; and fully agreed with the decision in *Desbois's case*, which he cited.”); *People ex rel. Kimberly v. De La Guerra*, 40 Cal. 311, 335 (1870) (“We refer the Court to the cases of *Cryer v. Andrews*, (11 Texas Reports, p. 182); and to *Desbois's case*, (Martin La. Rep. N. S. 285); and to the case of *The United States v. Laverty*, decided in the District Court of the United States, and reported in the same volume of Martin, p. 747. These cases fully establish the respondent's citizenship.”). Neither case appears when Shepardizing it on LexisNexis or checking citing references on Westlaw. Citations to *Desbois' Case* were found by running text searches through all cases on both platforms.

86. The lack of access to English translations of decisions issued by Puerto Rico's courts is probably the starkest example of the “invisibility” of territorial court decisions. The Supreme Court of Puerto Rico does provide official English translations of its opinions. But, as the brief history of court reporters discussed earlier shows, official reporters and commercial reporters have always been at odds. *Cf. supra* note 40 and accompanying text. Nothing precludes a publisher like West or Lexis from retaining its own translators and simply noting that the English translation is not the official version, particularly since commercial reporters always outpace official reporters.

CONCLUSION

We are overdue for a territorial reporter. It may take the form of a regional reporter similar to those in West's National Reporting System, treating the Territories like a geographic region,⁸⁷ or a topic-based reporter, like Bender's Immigration Case Reporter. Given that we have already passed the centennial of the nation's last territorial acquisition, with no change to the status quo in sight, it is high time to bring past (if not also present and future) decisions of America's territorial courts together in a common reporter.

87. West has, in the past, published formerly unpublished decisions on request. *See Gulf, Co. & Santa Fe Ry. Co. v. Sumrow*, 18 S.W. 135, 135 (Tex. Ct. App. 1887) ("This case is published by request, never having been published in the State Reports.").