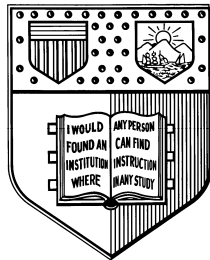


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### **Reconfiguring Law Reports and the Concept of Precedent for a Digital Age**

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Cornell Law School research paper No. 07-013

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# Reconfiguring Law Reports and the Concept of Precedent for a Digital Age\*

Peter W. Martin\*\*

## Introduction

¶1 Adherence to the “rule of law” entails a strong commitment to consistency – a belief that throughout a jurisdiction and across time judges and other public officials should treat like cases alike.<sup>1</sup> Within American jurisprudence explicit doctrines of precedent serve as important means to that end.<sup>2</sup> As expressed in standard formulations of the need to follow precedent or adhere to the rule of “stare decisis”<sup>3</sup> this is not so much a consequence of resistance to legal change, but of a set of views about the judicial role.<sup>4</sup> Patently, new legislation, administrative regulations, and court rules produce legal

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<sup>1</sup> The phrase “rule of law” has been used and abused to the point it may carry little content. See David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK L. REV. 307 (2003). Careful attempts to disaggregate the concept stress the importance of consistency, stability, and knowability. See Joseph Raz, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 221 (Oxford Univ. Press 1979, 2002).

<sup>2</sup> The U.S. is not unique in making this linkage. See generally INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997).

<sup>3</sup> The phrase “stare decisis” is often used interchangeably with notions of precedent. See, e.g., John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 513 n.25 (2000). Some scholars, however, distinguish between the two concepts. See, e.g., Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 n.11 (1987); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 84 n. 10 (2000). Since “precedent” has broader connotations than “stare decisis” that will be the term used throughout this article.

<sup>4</sup> It has even been argued that the constraint of precedent on judicial decision-making is implicit in the judicial function allocated to courts under Article III of the U.S. Constitution. In a decision by the late Judge Richard Arnold, subsequently vacated on grounds of mootness, the Eighth Circuit held unconstitutional its own rule denying “unpublished” decisions the effect of precedent. The rule, the decision said, purported “to confer on the federal courts a power that goes beyond the ‘judicial.’” *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir.), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000). Judge Arnold’s position has not found support in the judiciary, see *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), and its historic basis has been criticized by scholars, see, e.g., R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold’s Use of History in Anastasoff v. United States*, 3 J. APP. PRAC. & PROCESS 355 (2001); Thomas Healy, *Stare Decisis as a Constitutional*

change to which judges must attend. Moreover, in America's layered legal system, determinations by federal courts on matters of national law can compel a shift in how state judges decide whole categories of cases. Judges of a jurisdiction's court of last resort will, on occasion, overrule past precedent. Barring such circumstances, however, judges are expected, indeed within limits they are obligated, to adhere to precedent.

¶2 Given the spectacular variety produced by U.S. federalism, attempts to describe or analyze the operation of precedent or any other aspect of judicial function confront a daunting challenge. The difficulty is compounded during periods of rapid change. Forming a composite of all fifty states is not especially useful. History, size, and countless other variables invite but also vex attempts to gather states in categories. In all likelihood that is one of the reasons legal scholars focus so disproportionately on federal law and the federal courts. But on this topic in particular that is not an appropriate strategy.<sup>5</sup>

¶3 This exploration of precedent, law reports, and digital technology approaches the multiple-jurisdiction problem through use of a single illustrative state – Kansas. This strategy has the advantage of anchoring the analysis in concreteness while allowing comparative references to other jurisdictions.<sup>6</sup> Why Kansas? Initially, the selection was suggested by geography; Kansas is located at the geographic center of the forty-eight contiguous states. Other factors confirmed the choice. In numerous arguably more important dimensions Kansas also lies toward the middle of the full fifty-state spectrum. Its population and number of practicing lawyers are neither unusually large nor unusually small.<sup>7</sup> While the Kansas judicial structure has no idiosyncratic features,<sup>8</sup> its appellate

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*Requirement*, 104 W. VA L. REV. 43 (2001); Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187 (2007). *But see* Price, *supra* note 3, at 81.

<sup>5</sup> While not ignoring the federal courts, this article focuses primarily on the states. It does so for several reasons. First, state and federal court systems have quite different histories and face quite different challenges in the dissemination of precedent. Second, while the volume of adjudication guided by precedent in state courts vastly exceeds that in the federal courts, the bulk of the scholarly writing about precedent, citation reform, treatment of unpublished decisions, and other topics covered in this article has concentrated on the federal courts. That imbalance calls for correction. Third, within the variety of the fifty states there are, by now, many more useful illustrations of how digital technology may effect the operation of precedent than have yet emerged in the single judicial system made up of the federal courts. For purposes of this study, the federal courts are treated simply as one more U.S. judicial structure, albeit one to which all other courts must, on occasion, pay heed.

<sup>6</sup> The classic comparative study of precedent adopts a similar approach, using New York as the representative U.S. jurisdiction. *See* Robert S. Summers, *Precedent in the United States (New York State)*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 2, at 355.

<sup>7</sup> In 2000, Kansas ranked 32nd among the states in population. *See* U.S. Census Bureau, *States Ranked by Population: 2000*, available at <http://www.census.gov/population/cen2000/phc-t2/tab01.pdf>. The number of practicing lawyers in the state place it 29th. *See* American Bar Association, *National Lawyer Population by State (2006)*, available at [http://www.abanet.org/marketresearch/2006\\_national%20\\_lawyer\\_population\\_survey.pdf](http://www.abanet.org/marketresearch/2006_national%20_lawyer_population_survey.pdf).

<sup>8</sup> *See* Kansas Judicial Branch, <http://www.kscourts.org>; U.S. Dept. of Justice, Bureau of Justice Statistics, *State Court Organization*, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf> [hereinafter *State Court Organization*]. *See generally* DANIEL JOHN MEADOR, *APPELLATE COURTS IN THE UNITED STATES* (2d ed. 2006).

decisions command significant recognition and respect beyond the state’s borders.<sup>9</sup> Like many states Kansas has taken steps to unify the administration and funding of courts throughout its jurisdiction, but like most, it has not completed the task. And critically, Kansas has not, to date, made significant adjustment in the dissemination or treatment of precedent in response to digital technology – also the case with most U.S. jurisdictions.

¶4 The Kansas judicial system rests on a layer of district courts, trial courts with general jurisdiction spread across the state. These are augmented by a set of municipal courts that are funded by and generate revenue for local units of government.<sup>10</sup> Their jurisdiction is limited to traffic infractions and other ordinance violations occurring within the boundaries of 393 Kansas cities.<sup>11</sup> While the district courts operate within thirty-one judicial districts, each of the state’s 105 counties, ranging in population from Greeley County, approximately 1,500, to Sedgwick with half a million,<sup>12</sup> is served by at least one district judge.<sup>13</sup> In addition to their trial jurisdiction, Kansas district courts hear appeals from municipal court convictions<sup>14</sup> and diverse administrative determinations.<sup>15</sup>

¶5 During fiscal year 2005, Kansas district courts disposed of approximately half a million cases, of which slightly more than forty percent involved traffic infractions. The balance included approximately 36,000 criminal cases (more than half of them felonies), a comparable number of domestic relations matters, and over 175,000 civil cases of other types, of which the majority involved claims of \$25,000 or less and 10,000 fell within the “small claims” category, meaning they involved stakes of \$4,000 or less.<sup>16</sup> Add the misdemeanor, traffic, building code, noise, and other ordinance-based cases heard by Kansas municipal judges in a year plus the worker’s compensation, tax, and other agency adjudications ultimately appealable to Kansas courts, and it should become clear that achieving consistent and accurate application of the law throughout this dispersed judicial system – the ultimate aim of precedent – is an enormous challenge.

¶6 While the numerous adjudications of the Kansas District Courts are the ultimate target of precedent, this foundational layer of the Kansas judiciary, like trial courts in

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<sup>9</sup> See Jake Dear & Edward W. Jessen, “Followed Rates” and Leading State Cases, 1940 – 2005, Graph 2 and n. 23, <http://ssrn.com/abstract=978041> (forthcoming, 41 U.C. DAVIS L. REV. (2007)).

<sup>10</sup> Fines and costs imposed by Topeka’s municipal court generate well over \$3 million a year for the city while costing it approximately \$1.7 million. See Topeka, Kansas, 2007 City Budget, [http://www.topeka.org/2007\\_budget\\_adopted.shtml](http://www.topeka.org/2007_budget_adopted.shtml) (Revenue Estimation and Department Budget Information, Municipal Court).

<sup>11</sup> KAN. STAT. § 12-4104 (2007). See Kansas Municipal Courts, <http://www.kscourts.org/municts/>.

<sup>12</sup> Kansas Counties, <http://skyways.lib.ks.us/counties/>.

<sup>13</sup> KAN. STAT. §§ 20-301, 20-301b (2007).

<sup>14</sup> KAN. STAT. § 22-3609 (2007).

<sup>15</sup> KAN. STAT. § 77-609 (2007).

<sup>16</sup> See Annual Report of the Courts of Kansas, Fiscal Year 2005, Summary of District Court Caseload for the State, <http://intra.kscourts.org:7780/stats/05/CaseloadfortheState05.pdf>.

most other states, produces none.<sup>17</sup> As doctrines of precedent currently operate in Kansas, precedent can arise only when and if a trial court decision on some point or application of law is appealed, and then only under very limited conditions. To hear appeals from district court proceedings, Kansas has a two-tiered appellate structure, consisting of an intermediate court of appeals established in 1977<sup>18</sup> and a supreme court which can trace its origins back to a date prior to statehood.<sup>19</sup>

¶7 The primary responsibility of the Kansas Court of Appeals – a court comprised of thirteen judges<sup>20</sup> who normally hear and dispose of appeals in panels of three (with rotating membership)<sup>21</sup> – is to correct trial court errors, including but not limited to failures to adhere to precedent. Unlike the decisions it reviews, some, although far from all, of the decisions rendered by this front-line appellate court do operate as precedent. Under current Kansas law and court practice, roughly twelve percent of the cases decided by the Kansas Court of Appeals (143 out of 1156 during FY 2005) have precedential weight or effect.<sup>22</sup> With few exceptions all decisions of the Court of Appeals, those that count as precedent and those that do not, can be appealed to the Kansas Supreme Court. That court, the state’s highest, has several ways of disposing of appeals. With appeals as to which its review is discretionary (the case with most of them) the Kansas Supreme

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<sup>17</sup> To begin, there is no general requirement in Kansas law or constitutional principle that trial judges write out their reasons for specific legal rulings. See Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 6, <http://ssrn.com/abstract=978688>. The Kansas Supreme Court has indicated that when a trial judge decides on a sentence above the statutory minimum “it is the better practice for the sentencing court to place on the record a detailed statement of the facts and factors it considered.” *State v. Bennett*, 240 Kan. 575, 578, 731 P.2d 284, 286 (1987). But that statement can be rendered orally, and a failure to state reasons does not by itself establish an abuse of discretion. *Id.* Judges deviating from the Kansas Child Support Guidelines must either support their decisions with written findings or make “specific findings on the record.” *In re Marriage of Schletzbaum*, 15 Kan. App. 2d 504, 809 P.2d 1251 (1991). In these and other situations Kansas trial judges do, as they deem appropriate, issue written opinions. See, e.g., *Ward v. Ward*, 272 Kan. 12, 16, 30 P.3d 1001, 1005 (2001); *State v. Wonders*, 263 Kan. 582, 587, 952 P.2d 1351, 1356 (1998). But when they do there is no public mechanism for bringing those opinions to the attention of others than those directly involved in the litigation nor are judges or other public officials under any obligation to treat those opinions as precedent.

<sup>18</sup> There was an earlier Kansas Court of Appeals, established in 1895. Its legislative charter expired at the beginning of 1901. See Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of the Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L. REV. 155, 160 n.31 (1992).

<sup>19</sup> See *id.* at 160-61, *History of the Kansas Appellate Courts* (2007), available at <http://www.kscourts.org/history.htm>.

<sup>20</sup> Prior to January 2008 there were twelve. See Chief Justice Kay McFarland, *Supreme Court of Kansas, State of the Judiciary 3-4* (2007), available at <http://www.kscourts.org/pdf/Judiciary-Message/SOJ041007.pdf>.

<sup>21</sup> See KAN. SUP. CT. R. 7.02; *State Court Organization*, *supra* note 8, Table 23. For a rare example of an en banc decision of the Kansas Court of Appeals (its most recent), see *Kansas Assoc. of Public Employees v. Public Employee Relations Bd.*, 13 Kan. App. 2d 657, 778 P.2d 377 (1989).

<sup>22</sup> Out of the 1,156 opinions handed down by the Kansas Court of Appeals during FY 2005, only 143 (12.4%) were “published” and therefore precedent under KAN. STAT. § 60-2106 (2007) and KAN. SUP. CT. R. 7.04(f)(2). These figures are derived from the decision lists at <http://www.kscourts.org/kscases/datelst/datelst.htm>.

Court can simply allow the decision of the Court of Appeals to stand.<sup>23</sup> Like the Court of Appeals, it can also dispose of cases it chooses to review, as well as those it must take, with decisions that are not precedent.<sup>24</sup> While 880 appeals were filed with the Kansas Supreme Court in FY 2005,<sup>25</sup> it issued only 106 decisions that counted as precedent.<sup>26</sup>

¶8 In sum, the right of appeal, first to the Kansas Court of Appeals and subsequently to the Kansas Supreme Court, operates primarily as a direct means of correcting trial court error. Standing alone, however, unassisted by doctrines of precedent, appeals would have to be far more numerous than they are to have much effect on district court operations. Doctrines of precedent extend the reach of a small subset, 250 or so, of the decisions rendered by Kansas appellate courts each year, and thereby reduce the need for appeal, operating whenever any Kansas court (trial or appellate) confronts a question on which precedent exists.

¶9 While the terminology used to draw the distinction varies, scholars regularly separate the operation of precedent into two categories likely to be useful here: horizontal and vertical.<sup>27</sup> “Horizontal” adherence to precedent occurs when a court follows *its own* earlier holdings in resolving the same issue in a current case.<sup>28</sup> An example of precedent applying in this fashion appears in *Kahm v. Arkansas River Gas Co.*, 122 Kan. 786, 791, 253 P. 563 (1927). There the Kansas Supreme Court wrote: “We have not failed to note the more or less analogous cases from other jurisdictions which the diligence of counsel has brought together for our perusal; but with due respect thereto we are bound to follow our own precedents....” Operating horizontally, precedent works to achieve consistency across time, through changes in judicial personnel, and, with courts divided into panels or circuits, from one panel or circuit to another.<sup>29</sup>

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<sup>23</sup> During FY 2005, the Kansas Supreme Court received 880 filings of which 619 (70.3%) were “petitions for review.” Over the same period it denied review in 505 such cases and disposed of another 59 cases without opinion. See Annual Report of the Courts of Kansas, Fiscal Year 2005, Summary of Supreme Court and Court of Appeals Caseload, <http://intra.kscourts.org:7780/stats/05/Appellate Ct Summary 2005.pdf>. The Court’s review of Court of Appeals decisions is, in general, discretionary. See KAN. STAT. § 20-3018(b) (2007). This is one of the many respects in which the Kansas judicial structure is typical. See DANIEL JOHN MEADOR, *APPELLATE COURTS IN THE UNITED STATES* 17 (2d ed. 2007).

<sup>24</sup> See KAN. STAT. § 60-2106 and KAN. SUP. CT. R. 7.04(f)(2).

<sup>25</sup> See *supra* note 23.

<sup>26</sup> This count is derived from the decision lists at <http://www.kscourts.org/kscases/datelst/datelst.htm>. The same lists show another 99 “unpublished decisions” of the court. The court’s statistical reports show a slightly larger number of decisions “with opinions” than the sum of these two figures.

<sup>27</sup> See, e.g., John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 513 n.25 (2000).

<sup>28</sup> See generally Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075 (2003).

<sup>29</sup> The application of “horizontal precedent” within courts divided into panels or circuits or districts can and does take many shapes. It may well have changed over time with the federal circuit courts. See *id.* at 516. In Kansas published decisions of one panel of the Court of Appeals are said to be binding on another panel, but not on the full court sitting en banc. See *In re L.D.B.*, 22 Kan. App. 2d 821, 825, 924 P.2d 642, 645

¶10 “Vertical” applications of precedent reflect and express the hierarchy in court structures.<sup>30</sup> When a lower court in Kansas adheres to prior holdings of a superior court (the Court of Appeals follows a decision of the Kansas Supreme Court or a Kansas district court, an opinion of either the Court of Appeals or the Supreme Court), precedent is operating vertically. Explained the Kansas Court of Appeals in *Noone v. Chalet of Wichita*, 32 Kan. App. 2d 1230, 1236, 96 P.3d 674 (2004): “We are duty bound to follow Kansas Supreme Court precedent unless there is some indication that the court is departing from its previous position.”

¶11 Judges often and scholars occasionally use the term “precedent” in a third way. When a legal question arises and there is neither vertical nor horizontal precedent, a court may nonetheless speak of an opinion by another court – one that it has no obligation to follow – as “precedent.” When a court uses the word in this way, it means simply that the issue is not “unprecedented” and that a prior court ruling may offer a useful template for its consideration, possible adaptation, and use. In *State v. Wyman*, 198 Kan. 666, 670, 426 P.2d 26 (1967), for example, the Kansas Supreme Court referred to decisions from two other states to which it had been pointed as potential “precedents” in this looser sense. More often, under these circumstances, it and other courts will refer to decisions from other jurisdictions as potentially “persuasive authority.”<sup>31</sup>

¶12 Operating in these several ways precedent, often referred to collectively as “case law,” not only induces consistency in adjudication but casts a long shadow beyond. Precedent informs private decisions about whether to litigate, how to structure negotiated settlements or business transactions, and whether and, if so, how to proceed with other activities posing potential legal consequences or risks.

¶13 In cases of prior litigation involving the same parties, several far narrower consistency doctrines operate. They bear such names as *res judicata*, collateral estoppel,<sup>32</sup> and law of the case.<sup>33</sup> What is distinctive about notions of precedent is that

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(1996); *In re Cray*, 254 Kan. 376, 382, 867 P.2d 291, 297 (1994). That seems not to prevent panels from disagreeing. *See, e.g., State v. Moody*, 282 Kan. 181, 144 P.3d 612 (2006).

<sup>30</sup> *See generally* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

<sup>31</sup> The persuasive force of such non-binding precedent can be very strong. Since the Kansas Corporation Code is based on the Delaware statute, Delaware decisions interpreting its provisions carry significant weight in Kansas. *See, e.g., Vogel v. Missouri Valley Steel, Inc.*, 229 Kan. 492, 496, 625 P.2d 1123, 1126 (1981). Similarly, federal court decisions applying the federal rules of civil procedure are “highly persuasive” on issues arising under the comparable Kansas rules. *See, e.g., Wood v. Groh*, 269 Kan. 420, 430, 7 P.3d 1163, 1171 (2000).

<sup>32</sup> “Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” *Allen v. McCurry*, 449 U.S. 90, 94 (1980). For the use of a prior decision as the basis for collateral estoppel when court rules forbid its use as precedent, *see Edwards v. State*, 862 N.E.2d 1254 (Ind. Ct. App. 2007).

<sup>33</sup> “Unlike the more precise requirements of *res judicata*, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should

they operate when the parties in the second case have no connection whatsoever with those in the earlier one and thus have no direct personal knowledge of it. The time separating the cases can be days or decades. Yet for precedent to function knowledge is essential. A judge cannot consider and apply prior opinions as precedent unless she and the lawyers arguing the case before her have some effective way to know of them. The same holds for those who would consider case law in shaping transactions or planning some other course of action. For this reason, the operation of precedent is dependent upon and therefore inescapably affected by the information dissemination, storage, and retrieval systems available to judges, lawyers, and others who would seek to gather case law bearing on a particular issue.<sup>34</sup> This article examines that connection.

¶14 In critical ways, current American ideas about precedent are the product of print law reports. The systematic publication of written decisions of America's appellate courts, which arose in the nineteenth century and flourished during the twentieth, was at least as much a source of this country's distinctive views of precedent as a consequence of them.<sup>35</sup> Inherent limits of that mode of dissemination have influenced what counts as precedent and what does not in ways that have only become evident during the recent shift to electronic distribution. With unsettling rapidity, digital technology has dislodged print law reports, in practical fact, if not yet in the way lawyers and judges talk and think about case law. Even as courts continue to distinguish between published and unpublished decisions and cite precedent using volume and page numbers, federal courts at all levels operate under a statute calling upon them to place "the substance of all [their] written opinions" on the Internet.<sup>36</sup> State courts have begun doing the same without legislative mandate. Vast numbers of "unpublished" decisions of state and federal courts, decisions that have no volume and page numbers, are now collected and organized, linked and annotated, in virtual law libraries, the online databases that have in less than a decade supplanted library shelves filled with law report volumes in the work of judges, judicial clerks, lawyers, and others searching for precedent.

¶15 Taking consistency and predictability of judicial decision-making as the ends toward which doctrines of precedent are simply means, the ultimate question this article

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continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983).

<sup>34</sup> A judgment may actually become a precedent only when it is known not only by the parties to the single case but also to other courts, to lawyers and virtually to the general public. Therefore the devices aimed at publishing judgments in order to make them known are essential to any system of precedent. If only a published judgment may be a precedent, the ways in which judgments are reported substantially determines the nature and use of precedents.

Michele Taruffo, *Institutional Factors Influencing Precedents*, in *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY*, *supra* note 2, at 437, 451. Grant Gilmore's survey of American law passes over the colonial period because of the absence of reports. Explained Gilmore: "[T]here can hardly be a legal system until the decisions of the courts are regularly published and available to the bench and bar." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 9 (1977).

<sup>35</sup> See generally Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800-1850*, 3 *AM. J. LEG. HIST.* 28, 31-35 (1959).

<sup>36</sup> E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913 (2002).



aims to explore is how ideas of precedent might be reshaped in consequence of this radically altered reality. En route to that zone of speculation, the article will, of necessity, pass by and observe some of the ways current concepts of precedent and limits inherent in print law reports are linked and identify problems that arise from the continued use of print-based ideas and practices now that case law flows along electronic channels.

## ***I. Precedent dissemination in the pre-digital era***

### **A. Public law reports**

¶16 In judicial systems that function like those of Kansas and other U.S. jurisdictions, for past judicial opinions to guide future ones, it is essential that those opinions be readily accessible to judges and to lawyers presenting them with opposing legal arguments. In addition, unless all are quite literally reading from the same page,<sup>37</sup> there must be a system of citation enabling precise reference to those past opinions and the specific passages within them pertinent to the present controversy. For over a century the mode of information dissemination fulfilling these requirements and thereby providing infrastructure for the operation of precedent consisted of judge-written opinions, distributed in publicly sponsored print law reports.

¶17 Law reports produced in this fashion developed during the nineteenth century and set U.S. judicial practice apart from its historic antecedents.<sup>38</sup> Congress authorized appointment of the first “official reporter” of decisions of the U.S. Supreme Court in 1817.<sup>39</sup> An order issued by the Court in 1834 marked the end of the practice of rendering oral opinions and regularized the flow of written decisions to the reporter.<sup>40</sup> Having official law reports was an established part of the statehood package for states admitted to the union after the Civil War.<sup>41</sup> By the end of the century nearly all states in the U.S. had established publicly sponsored law reports that disseminated opinions of at least their

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<sup>37</sup> During the early days in Kansas when law books were still scarce, that was not unknown. See Robert A. Mead & Michael H. Hoeflich, *Lawyers and Law Books in Nineteenth-Century Kansas*, 50 KAN. L. REV. 1051, 1072 (2002).

<sup>38</sup> Denis P. Duffey, Jr., *Genre and Authority: The Rise of Case Reporting in the Early United States*, 74 CHI.-KENT. L. REV. 263 (1998).

<sup>39</sup> See ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* 63 (1990).

<sup>40</sup> See *id.* at 64.

<sup>41</sup> See generally *id.* at 28. Between 1863 and 1900, West Virginia, Nevada, Nebraska, Colorado, North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, and Utah were granted statehood. In all cases, the jurisdiction’s law reports date from the first year of statehood or before. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, T.1, 202, 207, 217, 218, 226, 232, 236, 237, 238, 239 (Columbia Law Review Ass’n et al. eds., 18<sup>th</sup> ed. 2005) [hereinafter BLUEBOOK]. For an account of the origins of law reporting in one of those states, see Tim Fuller, “*The Most Accurate and Useful Law Books Possible*,” *Wash. Terr., Wash., Wn.2d, and Wn. App. – Milestones of Official Case Reporting in Washington*, WASH. ST. BAR NEWS, Nov. 2005, at 22, available at <http://www.wsba.org/media/publications/barnews/fuller-nov05.htm>. The troubled early history of Kansas delayed the appearance of its first law reports. See Mead & Hoeflich, *supra* note 37, at 1063.

highest court,<sup>42</sup> opinions written by the judges themselves rather than reconstructions by a reporter of remarks delivered *ex tempore* from the bench.<sup>43</sup>

¶18 Key elements of the public law report system can still be seen etched in the statutes of a number of states where it continues to operate.<sup>44</sup> These include Kansas<sup>45</sup> which still produces the *Kansas Reports* and the *Kansas Court of Appeals Reports*. The first step is timely delivery of written appellate opinions<sup>46</sup> to a public official, the reporter of decisions.<sup>47</sup> In many states, including Kansas, the statutory framework recognizes that not all decisions made by an appellate court warrant full opinions articulating reasons<sup>48</sup> and that not even all written opinions warrant publication.<sup>49</sup> The reporter's job is to organize all publishable opinions into volumes adding such editorial elements as syllabi, the names of attorneys, perhaps more, plus a table of contents and index.<sup>50</sup>

¶19 The reporter or a comparable public official is also responsible for overseeing law report production and distribution. Typically, that occurs in two waves – softcover advance sheets, followed months later by hardbound volumes.<sup>51</sup> Both are distributed at public expense to the jurisdiction's judges at all levels and sold, often at a controlled price, to lawyers and libraries.<sup>52</sup> The typical statute also contemplates an exchange of

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<sup>42</sup> “[B]y the end of the 19<sup>th</sup> century all reporters were on salary, and all reports were printed at the expense of the states.” Edward W. Jessen, *Official Law Reporting in the United States*, in PROCEEDINGS OF THE SECOND INTERNATIONAL SYMPOSIUM ON OFFICIAL LAW REPORTING, at 28, 31 (2004).

<sup>43</sup> The insistence that judges or least appellate judges write out their decisions was also a mid to late 19<sup>th</sup> century reform, often combined with the establishment of the office of law reporter. An 1841 Georgia statute mandated written opinions. *See id.* at 32; SURRENCY, *supra* note 39, at 41-42. A Pennsylvania statute did the same in 1845 as it authorized the appointment of an official court reporter. *See* Joel Fishman, *The Reports of the Supreme Court of Pennsylvania*, 87 LAW LIBR. J. 643 (1995).

<sup>44</sup> *See, e.g.*, 705 ILL. COMP. STAT. 65/1 – 65/7 (2007); OH. REV. CODE §§ 2503.19 – 2503.25 (2007); CAL. GOV'T CODE §§ 68900 – 68905 (2007).

<sup>45</sup> KANSAS STAT. §§ 20-201 to 20-208 (2007).

<sup>46</sup> KANSAS STAT. § 20-202 (2007). Only a handful of states ever made provision for publication of trial court decisions.

<sup>47</sup> *See, e.g.*, 705 ILL. COMP. STAT. 65/7 (2007). In a number of states including Kansas, the office of reporter is established by the constitution. *See, e.g.*, KAN. CONST. art. 3, § 4.

<sup>48</sup> *See, e.g.*, MASS. GEN. LAWS 221A, § 9 (2007). Decisions by the Kansas Supreme Court not to consider cases in which review is discretionary, like decisions of the U.S. Supreme Court denying certiorari are made without any statement of reasons. Some appellate courts also deal with appeals judged to be totally without merit by summarily affirming the decision below.

<sup>49</sup> *See, e.g.*, GA. CODE § 15-4-3 (2007). The Kansas statute calls for publication only of those supreme court opinions “which the court deem of sufficient importance to be published” and those opinions of the court of appeals “which are to be published pursuant to rule of the supreme court.” KANSAS STAT. § 20-205 (2007).

<sup>50</sup> In some states, the statute specifically contemplates the outsourcing of some of these editorial functions. *See, e.g.*, 705 ILL. COMP. STAT. 65/3 (2007).

<sup>51</sup> *See id.* 65/2.

<sup>52</sup> *See, e.g.*, 705 ILL. COMP. STAT. 65/6; Kan. Stat. § 20-208(a)(6). A similar distribution list for the *Georgia Reports* and *Georgia Appeals Reports* is set forth at GA. CODE ANN. § 50-18-31 (2006).

reports with other states, a form of barter aimed at securing resources for the state law library.<sup>53</sup>

¶20 Details vary from state to state. Kansas is, today, unusual in having its reports printed and distributed by units of state government rather than under contract by a commercial publisher.<sup>54</sup> It is also one of a small number of states in which summaries of the key points of law in an opinion (the syllabus or set of headnotes) are prepared by the court itself rather than added by the reporter or a private contractor.<sup>55</sup> The fundamental policy premise underlying these various arrangements is clear: The effective and timely dissemination of precedent is a public responsibility. It is to discharge that responsibility that statutes authorize the production and distribution of volumes containing current appellate decisions to judges and public officials throughout the state together with measures designed to assure that they also have access to a full retrospective case law collection and provide for the sale of the same law reports at reasonable prices to individual lawyers, law firms, and law libraries.

## B. Public law libraries

¶21 Public involvement in the creation and support of law libraries developed in rough parallel with the establishment of public law reports, but far less rapidly or completely. Individual nineteenth century lawyers did have their own libraries, but most lawyers required access to larger collections than their practice could reasonably support. Judges needed to consult more than the published statutes and case law of their own jurisdiction. Law reports were swiftly followed by case digests and related finding aids, treatises, and other essential references. The earliest response to this collective need took the form of subscription or membership law libraries. The first of these was the Philadelphia Social Law Library, established in 1802.<sup>56</sup> These soon spread to other eastern metropolitan centers and followed settlement to the West.<sup>57</sup> The Leavenworth Law Library Association of Kansas was established in 1866 with 33 founding members.<sup>58</sup> While such libraries, where established, met the needs of their members, the desire to provide a core collection for the use of judges and other public officials, as well as lawyers not served by a subscription library led to the creation of public law libraries. By the early twentieth

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<sup>53</sup> KANSAS STAT. § 20-208 (2007). *See also* GA. CODE ANN. §§ 50-11-6, 50-18-31 (2006). The Kansas Supreme Court Law Library once participated in 58 exchanges of the state's law reports for reports of other states and law reviews. Today the number is nineteen. E-mail from Claire King, Kansas Supreme Court Library, to author, Feb. 26, 2007.

<sup>54</sup> *See* KANSAS STAT. §§ 20-205, 20-208 (2007).

<sup>55</sup> KANSAS STAT. § 20-203 (2007). Since the syllabus originates with the court, Kansas decisions will often cite to syllabus paragraphs. *See, e.g.*, *Yount v. Deibert*, 282 Kan. 619, 624, 147 P.3d 1065, 1070 (2006). Ohio appellate decisions also include court-endorsed syllabi, as do those in Minnesota and West Virginia. *See* OHIO REV. CODE § 2503.20 (2007); MINN. STAT. § 480.06 (2007); W. VA. CONST. art. VIII, § 4.

<sup>56</sup> Christine A. Brock, *Law Libraries and Librarians: A Revisionist History; or More than you ever wanted to know*, 67 LAW LIBR. J. 325, 330 (1974).

<sup>57</sup> *Id.* at 330-32.

<sup>58</sup> *See* Mead & Hoeflich, *supra* note 37, at 1070.

century many states had at least authorized systems of state and county law libraries.<sup>59</sup> By 1972 there were over 1,000 of them,<sup>60</sup> several in Kansas.<sup>61</sup>

¶22 While public law libraries were appealing in concept, with some conspicuous, largely urban, exceptions, they never achieved the reach or quality to which their supporters aspired.<sup>62</sup> As a means of assuring that front-line judges and those appearing before them had adequate legal information, this patchwork system was never a great success. As a method of providing the public with direct access to law, it was an utter failure. Most public law libraries were neither designed nor intended for that; they served the public by serving lawyers and judges. Chronic funding difficulties plagued their effectiveness long before online legal information threatened their viability. As legal publications proliferated and their cost grew in the second half of the twentieth century, public law libraries in the areas with the greatest need – thinly resourced, sparsely populated, rural areas – faced crisis conditions.<sup>63</sup>

### C. Commercial law reports: The National Reporter System

¶23 Public law reports faced funding difficulties too, but a greater threat came from the private sector, in the form of the parallel, commercially produced case reports that emerged toward the close of the nineteenth century. For a brief period there was fierce local and regional competition among commercial rivals, but by the early twentieth century there had emerged a single powerfully attractive alternative to public law reports – West Publishing Company’s National Reporter System. This series of regionally compiled state reports initially pushed public law reporters to expand and improve their editorial additions, to move decisions to print with greater speed, to publish advance sheets if they had not before, and to conform advance sheet pagination to the pagination that would ultimately appear in the bound volume.<sup>64</sup> The public entities responsible for law report production and distribution were, however, all-too-often prevented from matching West’s performance by limited funds, insufficient and often less competent

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<sup>59</sup> California’s legislation establishing county law libraries was passed in 1891. Act to Establish Law Libraries, ch. 225, 1891 Cal. Stat. 430. See Benjamin Watson, *Origins of California’s County Law Library System*, 81 LAW LIBR. J. 241 (1989); Gail H. Fruchtmann, *The History of the Los Angeles County Law Library*, 84 LAW LIBR. J. 687 (1992).

<sup>60</sup> See Bethany J. Ochal, *County Law Libraries*, 67 LAW LIBR. J. 177, 180-181 (1974).

<sup>61</sup> The present count in Kansas is eighty-three. See *County Law Libraries in Kansas*, <http://www.law.ku.edu/library/research/kslawlibs.shtml>. The Kansas statute passed in 1967 requires approval by a majority of the lawyers in the county before a county law library can be established. KANSAS STAT. § 20-3126(b) (2007). The requirement is understandable since the core funding source is an annual registration fee paid by local lawyers. *Id.* § 20-3126(c).

<sup>62</sup> Brock, *supra* note 56, at 335, 338.

<sup>63</sup> See Peter W. Martin, *Neutral Citation, Court Web Sites, and Access to Authoritative Case Law*, 99 LAW LIBR. J. 329, ¶17 (2007).

<sup>64</sup> See Jessen *supra* note 42.

staff, inferior printing technology, and general legal constraints on public contracts and sales.<sup>65</sup> Typically they had no pricing flexibility.<sup>66</sup>

¶24 Importantly, most states were unable to reprint back volumes during periods when a growing legal profession and judiciary created demand for complete retrospective sets. Supreme Court copyright decisions effectively blocked state efforts to reserve or grant exclusive publication rights.<sup>67</sup> As a result, West Publishing Company traveled an unimpeded path in producing its comprehensive national series of reports. Courts commonly insisted that those citing precedent to them refer to the volume and page numbers in the state’s “official reports,” but West was free to insert those citation parameters in its volumes when they were available before the West reports went to press and to provide cross-reference tables when they were not. This enabled users of the National Reporter System to cite to official reports without acquiring or otherwise securing access to them.

#### **D. Unpublished appellate decisions**

¶25 With the exception of West’s reports covering the lower federal courts, the National Reporter System did not compete by publishing opinions that those producing public law reports had not themselves selected for publication. For most states, at the turn of the twentieth century, that simply entailed publishing all decisions rendered with full opinions by the jurisdiction’s highest court. As noted earlier, these were not necessarily all decisions. Some appeals were disposed of summarily, with little or no explanation. Lacking detailed explication, these summary dispositions were, even when noted in law reports, of no value as precedent. And in some states, Kansas being one, public law reports were not required to include all supreme court opinions, but only those the court “deemed important.”

¶26 During the formative years of public law reports, only the federal judiciary and a handful of states had multi-level appellate structures, with an intermediate appellate court placed between trial courts and the court of last resort. During the latter half of the twentieth century, however, growing caseloads led more and more states to adopt this model;<sup>68</sup> Kansas did so in 1977. By the dawn of the digital age approximately three-

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<sup>65</sup> Jessen observes that an increased volume of decisions toward the end of the 19<sup>th</sup> century not matched by corresponding growth in public funding for law reports caused publicly produced reports to fall further and further behind. At the time West launched its *Northwestern Reporter* in 1879 all seven of the states it covered were “several years tardy in publishing opinions.” See Jessen *supra* note 42, at 35.

<sup>66</sup> Kendall Svengalis notes that the legal constraints under which state agencies operate created particular problems for the pricing of back volumes which inevitably compete with used books. KENDALL F. SVENGALIS, *LEGAL INFORMATION BUYER’S GUIDE & REFERENCE MANUAL* 68 (2006) [hereinafter SVENGALIS 2006].

<sup>67</sup> These were *Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); and *Callaghan v. Myers*, 128 U.S. 617 (1888). See generally L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 U.C.L.A. LAW REV. 719 (1989).

<sup>68</sup> See MEADOR, *supra* note 8, at 5, 11-12.

quarters of the states had intermediate appellate courts.<sup>69</sup> Decisions of these intermediate courts were fed into the law report systems, state and commercial, but only a fraction of them. Most states setting up intermediate appellate courts specified that only selected decisions from this judicial layer should be published.<sup>70</sup> Within the federal judicial structure, the move to selective publication of U.S. Court of Appeals decisions also began, or at least became a significant and acknowledged practice in the latter half of the twentieth century.<sup>71</sup> Decisions withheld from public law reports under such policies were listed in West's National Reporter System (as so-called "table cases") but not printed in full. The decision not to publish an opinion effectively kept it out of both the official and commercial precedent distribution channels. Being invisible it could not operate as precedent.

¶27 With few exceptions, invisibility was the fate of all trial court decisions.<sup>72</sup> In those few jurisdictions where some were published, the criteria for publication were stringent, the allotted space severely limited.<sup>73</sup> Here too, West Publishing Company's National Reporter System simply tracked the official reports. West's decision to publish selected decisions of the U.S. District Courts in a *Federal Supplement* reporter<sup>74</sup> and the more focused *Federal Rules Decisions* demonstrated that trial court decisions were not without value to bench and bar. That value was also reflected in sustained local publication of

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<sup>69</sup> See *State Court Organization*, *supra* note 8, Table 1, at 9-10.

<sup>70</sup> See MEADOR, *supra* note 8, at 59. The creation of intermediate appellate courts and selective publication were viewed as complementary measures for dealing with an appellate caseload crisis. See I THE ADVISORY COUNCIL FOR APPELLATE JUSTICE, APPELLATE JUSTICE: 1975, at 6-7, 10-11 (1975). In 1973 the Advisory Council for Appellate Justice circulated a model rule setting forth strict standards for publication of appellate decisions that proved influential. See V THE ADVISORY COUNCIL FOR APPELLATE JUSTICE, APPELLATE JUSTICE: 1975, at 128-29 (1975); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 122 (1994).

<sup>71</sup> See Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1442 (2004); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U.L. REV. 757, 761 (1995).

<sup>72</sup> According to the New York Law Reporting Bureau, the only states now publishing lower court decisions other than New York are Connecticut and Ohio. See New York Law Reporting Bureau, Selection of Opinions for Publication, <http://www.courts.state.ny.us/reporter/Selection.htm>.

<sup>73</sup> Under New York Judiciary Law § 431 the New York Law Reporting Bureau is authorized to publish any lower court decision it "considers worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest." Currently, the Bureau selects approximately 600 decisions in this category each year (roughly 1 in 6 submitted). See New York Law Reporting Bureau, Selection of Opinions for Publication, <http://www.courts.state.ny.us/reporter/Selection.htm>. A good number of those not selected for print publication are now placed online by the Bureau. See *id.*

<sup>74</sup> When West Publishing Co. launched the Federal Reporter in 1880 both U.S. District Courts and Circuit Courts were trial courts. With the creation of the U.S. Courts of Appeals in 1891 volumes of the Federal Reporter included its decisions together with those of the U.S. District Courts; however, West also offered its opinions in a separate series, the *Circuit Courts of Appeals Reports*. See SURRENCY, *supra* note 39, at 70-71. It was only in 1932 that federal trial court decisions were diverted to the separate *Federal Supplement*. See *id.* at 71.

trial court decisions in a few states.<sup>75</sup> But jurisdiction-wide publication of even selected trial court opinions was a rarity.

## E. The disappearance of independent state published reports

¶28 In time competition from West's National Reporter System led many states to cease publishing their own reports. For anyone needing access to the multi-jurisdiction coverage of the West reports (a group that included ever more judges and lawyers, as federal law and decisions climbed in importance and national commerce and interstate activity of all kinds expanded through the first half of the twentieth century) public reports seemed a costly redundancy, even when they were timely and well done. With advance sheets, bound reports, and digests that were in many cases far swifter to arrive, a system of summarizing and headnoting that strung decisions on the same issue together not only within a jurisdiction but beyond, together with a strong reputation for accuracy, West offered a full information package with which few states could compete. Where the market warranted the company was more than ready to produce a single state offprint from its regional reporter so that courts, lawyers, and the libraries serving them did not have to acquire case law of other jurisdictions along with each full set of local precedent.

¶29 Beginning with Florida in 1948,<sup>76</sup> a parade of states, including three quarters of those immediately adjoining Kansas,<sup>77</sup> joined the lower federal courts in ceding all law report publication to West. The step reduced public payroll and got the state out of the business of storing and distributing law books. It also shifted the judiciary as well as all other units of state government into a totally dependent posture, buyer of the state's own precedent from a single source.

¶30 By the mid 1990s nearly half the states openly relied on West for their law reports. Others quit law report publication less conspicuously and in some cases less completely. The *Pennsylvania State Reports*, prepared by a state reporter, reach back in an unbroken sequence of volumes to 1845. For over thirty years, however, they have been prepared and published by West (now Thomson). Volume 458 was prepared by Joseph W. Marshall, State Reporter, and published under his supervision. He retired in 1974. Volume 459 was published by West and included the summaries and headnotes prepared by its editors for the *Atlantic Reporter*. The pattern continues to this day. Similar shifts

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<sup>75</sup> Pennsylvania's county law reports and legal journals such as the *Bucks County Law Reporter* are an example. A commercial series entitled *Pennsylvania District & County Reports* has been in continuous publication since 1921. See BLUEBOOK, *supra* note 41, T.1, 229 (Columbia Law Review Ass'n ed. eds., 18<sup>th</sup> ed. 2005).

<sup>76</sup> A useful account of the Florida courts' evolving relationship with West appears in *Oasis Publ. Co. v. West Publ. Co.*, 924 F. Supp. 918 (D. Minn. 1996). With the cessation of the Florida Reports, the Florida Supreme Court declared West's *Southern Reporter* the "official publication" of its decisions. *Id.* at 920. West proceeded at once to produce a *Southern Reporter* offprint entitled *Florida Cases*. *Id.* Years later the legislature codified the relationship in a statute, still in effect, which states "The reports of the opinions of the Supreme Court and the district courts of appeal shall be known as Florida Cases." FLA. STAT. 25.381 (2007).

<sup>77</sup> The Oklahoma Reports ended in 1953, the Missouri Reports, in 1956, and the Colorado Reports in 1980. See BLUEBOOK, *supra* note 41, T.1, 227, 216, 202 (Columbia Law Review Ass'n ed. eds., 18<sup>th</sup> ed. 2005).

to what might be called officially sanctioned commercial publication took place in other states, which viewed from a distance would appear to to have maintained independent production of their own reports.<sup>78</sup>

¶31 Even in those states that have continued to supervise production of their own law reports, less and less of the work is performed inhouse. Today, Kansas is unusual in handling the editorial, production, and distribution process from start to finish. The prevailing approach is to contract out the latter functions while retaining ultimate editorial control. Faced with budget cutbacks, state law reporters have had to let go of staff and outsource editorial functions they once carried out themselves.<sup>79</sup>

¶32 To conclude, by the end of the twentieth century, public control over and responsibility for the distribution of precedent had been severely compromised by the effectiveness and market dominance of a single system of commercial law reports. And, in part as a consequence, the judiciary's need for law reports had, in most jurisdictions, led to a deep level of dependence on the proprietary methods and format of that system of reports. As it deemed necessary, West was not reluctant to remind states of that.<sup>80</sup>

## ***II. The arrival of virtual law reports and virtual law libraries***

### **A. Lexis / Westlaw**

¶33 It was only a decade ago that a serious alternative to libraries of print law reports became available to judges, lawyers, and others in the United States. Although the two major online services, LexisNexis and Westlaw, date back to the 1970s, for most of their history these were case-finding tools. They supplemented but did not substitute for print reports. In infancy both were costly proof-of-concept services, with serious scope limitations.<sup>81</sup> Launched in 1969, Lexis was, by 1976, offering federal case law reaching back fifty-one years for the Supreme Court, thirty-one years for the U.S. Court of Appeals, and sixteen years for the District Courts. But its state materials were meager –

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<sup>78</sup> Wisconsin stopped contracting for production of the *Wisconsin Reports* in 1975, but Callaghan, later Lawyer's Coop, and still later Thomson / West continued the series without interruption as *Callaghan's Wisconsin Reports*. At the point Callaghan no longer had a contract with the state, West asked that its *Northwestern Reporter* be designated the "official reports" of state decisions. Rather than make a choice between Callaghan and West, the state supreme court labeled both "official." Telephone Interview with Marcia Koslov, Library Director, Los Angeles County Law Library, and Wisconsin State Law Librarian, 1974–2000 (Oct. 8, 2006). The rule doing so imposed and still imposes the condition that the Wisconsin Reports be entitled "Callaghan's Wisconsin Reports," no doubt to signal their proprietary nature. *See* WIS. SUP. CT. R. 80.01. The rule also speaks of *Wisconsin Reports* as a publication of Lawyers Cooperative Publishing. Neither Callaghan nor Lawyers Cooperative Publishing exist today. Thomson acquired both publishing entities prior to its acquisition of the West Publishing Company. That acquisition brought both sets of Wisconsin "official reports" into the hands of a single publisher, Thomson / West.

<sup>79</sup> *See* Fuller, *supra* note 41.

<sup>80</sup> During the early 1990s West reportedly threatened state courts considering citation schemes to which it was opposed that it might omit elements on which they depended from its reports.

<sup>81</sup> *See* William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 LAW LIBR. J. 543 (1984-85).



comprehensive but chronologically thin collections for nine states, plus a selection of Delaware corporate law decisions.<sup>82</sup> At roughly \$125 per hour this package drew few subscribers.<sup>83</sup> Westlaw in these early days avoided any risk of displacing West's print publications by offering only headnotes. Its depth was eight years for the states, fifteen years for federal cases.<sup>84</sup>

¶34 By the mid-1980s, a Lexis threat to add star pagination keyed to West's National Reporter System to its case data raised the prospect of researchers working mostly, if not totally, from electronic versions of the print volumes. That provoked a West copyright suit.<sup>85</sup> By the time the parties settled their litigation in 1988 with a cross-licensing agreement, allowing Lexis (at a heavy price) to insert West pagination in its database, Westlaw had itself added pagination. In the meantime, access to both systems had moved from large terminal and printer installations in libraries first to desktop terminals and then to PCs with modems.<sup>86</sup> The scope of their collections had been expanded; both held reported cases from all fifty states. Limited historic depth, however, still forced researchers to the books for older cases. Lexis reached back at least to 1965 for all states, further for some like New York (1940), California (1945), and its home state of Ohio (1921).<sup>87</sup> Westlaw's retrospective coverage was comparable.<sup>88</sup> By 1989 both systems had online cite-checking.<sup>89</sup> About the same time they declared their intent to provide full 50-state statutory coverage.<sup>90</sup>

¶35 It was not until the mid to late 1990s that these systems attained sufficient scope and functionality to become full research environments – virtual libraries – rather than simply places to begin case research. No single change, but rather a series of them, many the consequence of external developments and pressures, led to online case reports becoming not only a plausible substitute for the print originals, but a compelling albeit still costly alternative. Competition with CD-ROM-based legal research products of the early nineties spurred several key software improvements. One was hyperlinked references, standard in the early law CD-ROMs, but not an easy transplant onto the character-based, non-scrolling terminal interface with which Lexis and Westlaw users had to cope. Lexis first employed “link markers” set off in brackets adjacent to citations (e.g., <=160>). To follow such a reference, the user had to key in the bracketed formula (e.g., “=160”).<sup>91</sup> Link markers eventually morphed into link tokens to which one could

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<sup>82</sup> See James A. Sprowl, A MANUAL FOR COMPUTER-ASSISTED LEGAL RESEARCH 11-12 (1976).

<sup>83</sup> See *id.* at 8. Sprowl reports “close to 200 subscribers” in 1976. *Id.*

<sup>84</sup> See *id.* at 55, 57; Harrington, *supra* note 81, at 553.

<sup>85</sup> See West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219 (8<sup>th</sup> Cir. 1986).

<sup>86</sup> See JOHN E. KINSOCK, LEGAL DATABASES ONLINE: LEXIS & WESTLAW 2, 4, 77 (1985).

<sup>87</sup> *Id.* at 81-89.

<sup>88</sup> *Id.* at 90-99.

<sup>89</sup> With Lexis this was “Auto-Cite” licensed from Lawyer's Coop; Westlaw's cite-checker was named “Insta-Cite.” See KATHLEEN M. CARRICK, LEXIS: A LEGAL RESEARCH MANUAL 101 (1989).

<sup>90</sup> See FRED R. SHAPIRO, LEXIS: THE COMPLETE USER'S GUIDE 164 (1989).

<sup>91</sup> See LEXIS-NEXIS: THE LEGAL BASICS 34 (1995).

jump with the tab key,<sup>92</sup> and finally, as lawyers and judges migrated (ever so slowly) to a Windows interface, to links operated by means of a mouse. While links made it far easier to leap from one text to another than had ever been possible in print, the online systems remained dramatically inferior as a reading environment or print source. To begin, reading an online case on a PC meant paging through it screenful by screenful. Downloading proceeded in the same small increments. Generating print copies was both clumsy and in many instances inadequate. By contrast CD-ROM case law products permitted users to extract cases formatted as word-processor documents. While Westlaw and Lexis eventually responded,<sup>93</sup> scrolling up or down through the full text of an opinion, saving or printing it in its entirety became fully possible only when both systems moved to the World Wide Web and a standard Web browser (rather than proprietary software) interface. That did not occur until 1998.<sup>94</sup> One precondition for this new WYSIWYG window on decisions was Internet access at sufficient bandwidth to allow their delivery in full, rather than screen-sized chunks. The shift also required major fresh investment in both software and data throughout what were by then quite large systems. Neither database had been built with this future in mind.<sup>95</sup>

## **B. New players in this new environment**

¶36 At roughly the same time that Westlaw and Lexis were succeeding in putting case law research on the desktops of lawyers practicing in large firms, new players with new business models began to bring electronic case law within the budgets of small firm lawyers. Here too CD-ROM technology was an important catalyst. Through the early 1990s, Westlaw and Lexis offered more than most small firm lawyers needed at prices they couldn't afford. Both charged in ways that made their services unattractive to those

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<sup>92</sup> Westlaw was the initiator here with its "JUMP" feature. See DISCOVERING WESTLAW: THE ESSENTIAL GUIDE 10 (2d edition 1992).

<sup>93</sup> With Lexis this was in the form of software that removed the headers that separated each screen of text from the next and the hard returns. See JEAN SINCLAIR MCKNIGHT, THE LEXIS COMPANION: A CONCISE GUIDE TO EFFECTIVE SEARCHING 131-32 (1995) ("LEXFORM" by Jurisoft).

<sup>94</sup> See DISCOVERING WESTLAW: THE ESSENTIAL GUIDE 4 (8th edition 1998); David Beckman & David Hirsch, *Don't Duck This Web Feat: With Lexis and Westlaw on the Internet, access to research opens up*, 84 A.B.A.J. 86 (1998). While the systems became accessible via the Web; many experienced users were slow to switch and both Lexis and Westlaw continued to support access via the old more limited dedicated interface. See Hope Viner Samborn, *Standing Firm on Software*, 85 A.B.A.J. 78 (1999).

<sup>95</sup> The necessary data work included converting diverse proprietary formats to XML/SGML. See Linnea Christiani, *Meeting the New Challenges at West and LexisNexis: Post-SIIA Summit interviews with Michael Wilens and Lisa Mitnick*, SEARCHER, May 1, 2002, at 68. It also required fresh editorial investment. Consider italics, often used in opinions for emphasis. Since italics could not be presented through the original terminal and printer technology, italics had not been encoded when cases were digitized by West and Mead Data Central. This can still be seen in scattered portions of both systems. See, e.g., the Lexis and Westlaw versions of *Geo. H. Haggart, Inc. v. North Dakota Workmen's Compensation Bureau*, 171 N.W.2d 104, 110 (1969). (One looks in vain for the "emphasis added" to the quoted statute.) Another example of typography not represented in early Westlaw or Lexis data are strike-through and underlining used to show amended text. See, e.g., *Denver by Board of Water Comm'rs v. Vail Valley Consol. Water Dist.*, 751 P.2d 68, 69 (Colo. 1988); *Woodard v. Pennsylvania Nat'l Mut. Ins. Co.*, 534 So. 2d 716, 719 (Fla. Ct. App. 1988).

making repeated use of a single state's cases and statutes. In 1995 Law Office Information Systems (LOIS) began selling state-specific CD-ROMs for a flat \$600 per year.<sup>96</sup>

¶37 By 2000 a striking array of less costly research options were available to U.S. lawyers, including importantly those practicing in small firms. LOIS, by then Loislaw, had moved to the Internet and expanded to all fifty states. It was under-priced in some jurisdictions by small CD-ROM publishers and everywhere by VersusLaw which offered a national online case law library priced at only \$83.40 per year for a solo practitioner.<sup>97</sup> Lexis and Westlaw had themselves created fixed rate plans designed and priced for small firms.<sup>98</sup> By then public, non-profit and advertising supported sites had begun offering law over the Internet without charge.

¶38 More recently, state bar organizations have become major players in the case law dissemination picture, contracting with a still newer set of commercial providers on behalf of their members. Leading this development is the "Casemaker" consortium, established by the Ohio Bar Association and a small electronic publisher. Bar groups joining the consortium provide its online service to their members without charge. Currently, Casemaker claims twenty-eight state bar association members.<sup>99</sup> A recent addition to the group is the Kansas State Bar, which introduced this service to its membership in late 2006.<sup>100</sup>

¶39 A second entrant using this business model (as well as a search engine that has learned some lessons from Google) is Fastcase.<sup>101</sup> In the past three years, Fastcase has signed up ten state bars plus a good number of local or specialty bar associations and membership libraries.<sup>102</sup>

¶40 As the market for legal information sped through these quite rapid changes, networked computers moved to the desktops of nearly all lawyers and judges – providing writing space, communication channel, scheduling and management tools. Print publishing was itself transformed. With courts producing opinions on computers, those publishing print law reports sought and acquired access to electronic rather than hard copy versions. Electronic publishers, including the new entrants, pressed for the same.

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<sup>96</sup> KENDALL F. SVENGALIS, LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL 125 (1996).

<sup>97</sup> *Id.* at 111.

<sup>98</sup> Lexis led the way with its MVP program. *See* STEVEN L. EMANUEL, LEXIS FOR LAW STUDENTS 1-26 (1994). *See generally* Martin, *supra* note 63, ¶¶73-74.

<sup>99</sup> *See* SVENGALIS 2006, *supra* note 66, at 148 (2006). The State Bar of North Dakota brought the Casemaker count to twenty-eight in the summer of 2007. *See* Casemaker, [http://www.sband.org/sband\\_blast/082207/casemaker\\_info.pdf](http://www.sband.org/sband_blast/082207/casemaker_info.pdf).

<sup>100</sup> *See* Kansas Bar Association Joins Casemaker Database, [http://www.ksbar.org/public/kba/2006\\_news/casemaker.shtml](http://www.ksbar.org/public/kba/2006_news/casemaker.shtml).

<sup>101</sup> *See* <http://www.fastcase.com/>.

<sup>102</sup> E-mail from Philip Rosenthal, President, Fastcase, Inc., to author, Oct. 4, 2007 (on file with author). *See generally* Alan Cooper, *Fastcase Awarded Contract by Virginia State Bar*, VIRGINIA LAWYERS WEEKLY (Feb. 6, 2006).

¶41 The cumulative result, taken for granted today but unimaginable not that long ago, is a fully electronic work environment. As recently as 1995, lawyers, especially those a decade or more out of law school, relied heavily on printed reports when researching case law.<sup>103</sup> Today, most writing by lawyers and judges – whether memoranda, briefs, or judicial opinions – is composed and revised at a computer. Most case law research is done there as well. Quotations are copied from digital sources, not rekeyed. Lawyers, young and old, write briefs without ever pulling a law report volume from the shelf. Libraries pressed for shelf space and funds have ceased acquiring new volumes<sup>104</sup> and even sought to rid themselves of old ones.<sup>105</sup>

### **III. The problematic and costly status quo**

¶42 Despite the recent dramatic change in how precedent is accessed and the accompanying increase in the number of alternative distribution channels, case law remains confined by concepts and practices rooted in print law reports. Although understandable, that is a source of serious negative consequences. The widespread failure of courts to adjust to the new reality casts large though diffuse costs upon the nation's judicial systems, the legal profession, and the public. Furthermore, so long as digital dissemination of precedent is subordinated to print, important changes made possible by the new technology cannot be realized. The situation in Kansas illustrates many of these costs and blocked opportunities.

#### **A. Costs or inefficiencies resulting from the continued dominance of print concepts and practices**

##### **1. Citation norms still dependent on print**

¶43 In most U.S. jurisdictions, precedent must still be cited to print reports, those of the National Reporter System and where as in Kansas they continue public reports as well. Decisions of Kansas courts and briefs submitted to them are required to cite state precedent using the following format, even though the writer has found and read the opinion using Westlaw, Lexis, Casemaker, or some other digital source:

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<sup>103</sup> See Donna M. Bergsgaard & William H. Lindberg, *A Dissenting View*, in TASK FORCE ON CITATION FORMATS, AM. ASS'N OF LAW LIBRARIES, FINAL REPORT (1995), reprinted in 87 LAW LIBR. J. 580, 609 (1995) (“While slightly more than half of the [Wisconsin] bar now use computers to some extent in legal research, the remaining 45% are using printed sources *exclusively*.”).

<sup>104</sup> See John D. Edwards, *LEXIS and WESTLAW Training Centers: Law School Opportunities*, 80 LAW LIBR. J. 459 (1988); Donald J. Dunn, *Why Legal Research Skills Declined, or When Two Rights Make a Wrong*, 85 LAW LIBR. J. 49, 59-60 (1993).

<sup>105</sup> In March 2003 the following appeared on several law listservs:

Washburn University Law Library has several sets of Kansas Reports available for sale.  
We seek to dispose of these items by April 15, 2003.  
For further information please see <http://washburnlaw.edu/library/usedbooks/>  
Thanks for your interest.- Martin Wisneski

See Kansas Reports Available, <http://legalminds.lp.findlaw.com/list/kansasattorneys-1/msg00756.html>.

Lawless v. Cedar Vale Regional Hosp., 252 Kan. 1064, 1072-73, 850 P.2d 795 (1993).

Note that because the state has an “official” set of reports and the National Reporter System includes “star pagination” to it, the pinpoint or specific passage reference need employ only the pagination of the *Kansas Reports*. Since the system depends on volume and page numbers, however, there is inevitably a significant period during which any citation to a case must be incomplete or temporary. While decisions of the Kansas Supreme Court and Kansas Court of Appeals are available on the day of their release at a public Web site, three to four weeks pass before they receive their volume and page number assignments in the National Reporter System on Westlaw. (Those relying on the print advance sheets have to wait several weeks longer.) Another three months pass before decisions acquire their official *Kansas Reports* or *Kansas Court of Appeals Reports* citations or at least before those citations are added to Westlaw and Lexis. Lawyers, judges, and legal scholars have, of course, coped with this “citation lag” for as long as there have been law reports. What has changed is that the Internet and court Web sites have at once given the problem greater salience and offered a straightforward solution.<sup>106</sup> Furthermore, the multiplicity of electronic distribution channels has quite literally multiplied the inconvenience and cost of retrofitting print-derived citation information on opinions weeks and months after their release. That is because each electronic publisher must perform this redundant task. This, in turn, reinforces the market position of the established, more expensive online systems; for through a variety of means they are able to gain and apply print citations to their case data with greater speed and economy. To eliminate the citation lag, these costs, and consequent barriers to greater competition, Kansas (as well as thirty-odd other states and the federal courts) need simply do what over a dozen states have already done – and that is implement a system of court-attached citation that does not depend on where a decision is ultimately placed in one or more sets of print law reports or its designation in a commercial database.

¶44 On April 10, 2007, the North Dakota Supreme Court released seven opinions. A month later they had all been assigned volume and page numbers in the National Reporter System. These were first displayed in Westlaw, shortly thereafter in Lexis, and slowly these print-derived numbers rippled through the other online services. However, from the day of release and forever thereafter, all of them could be cited using a system illustrated by the following citation:

Odden v. Rath, 2007 ND 51, ¶ 18.

Since this method of reference is based on the year, court, decision and paragraph number and since all its components were embedded in the opinion by the court, *Odden* could readily be cited from the moment the decision was available at the court Web site or in Lexis, Westlaw, Casemaker and the rest. Any researcher could use that medium-neutral,

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<sup>106</sup> Because of the publication lag, judges often cite using placeholders relying on the reporter or publisher to fill them in subsequently. When *State v. Drennan*, 278 Kan. 704, 101 P.3d 1218 (2004) was decided by the Kansas Supreme Court on December 17, it had to cite its decision of the same date, *State v. Hurt*, as “278 Kan. \_\_\_, \_\_\_ P.3d \_\_\_ (2004).”

non-print-dependent, non-proprietary citation to retrieve *Odden* from the same range of sources and proceed directly to the cited passage.

¶45 So long as decisions' citation information and other revisions are added after initial release and are authoritatively implemented by but one among several disseminators, all the others must, in one way or another, secure that data and incorporate it into their versions of the same decisions. This necessity injects wasteful expense, time lag, risk of error, and in the case of proprietary pagination, licensing costs or litigation risk into the business of electronic law publishing.<sup>107</sup>

## 2. Publicly accessible digital opinions, neither official nor final

¶46 It is not only citation norms that tie Kansas precedent to print. The Web site to which the Kansas appellate courts release their “published” opinions carries this notice:

Slip opinions [as those at the site are denominated] ... are subject to modification orders and editorial corrections prior to publication in the official reporters. Consult the bound volumes of *Kansas Reports* and *Kansas Court of Appeals Reports* for the final, official texts of the opinions of the Kansas Supreme Court and the Kansas Court of Appeals.<sup>108</sup>

Since the print reports remain the official dissemination path, the lengthy period prior to final publication in the final bound volumes is available for editorial and even substantive revision. This notice warns both direct users and publishers that the versions of opinions publicly accessible on the Web are not subsequently conformed to the final, revised, official print versions. To date relatively few states have realized the importance of minimizing post-release revision and of posting all changes to opinions at their Web sites when they occur.<sup>109</sup>

## 3. The risk of inconsistent versions

¶47 Print may be the “official” channel for Kansas precedent, but most lawyers and judges in the state, like lawyers and judges elsewhere, draw case law from one of the competing virtual libraries. The judiciary's failure to release appellate decisions

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<sup>107</sup> Wrote the Department of Justice, Antitrust Division, in 1997:

Even if [competitors] ... may star paginate to West's reporters without having to pay a royalty, star pagination is not costless. It still entails the expense of accurately ascertaining where page breaks fall in West's volumes, and accurately incorporating that information in another product. This process unnecessarily consumes resources which could be more efficiently employed to make a better or less costly product.

Comments of the Department of Justice Before the Committee on Automation and Technology, Judicial Conference of the U.S. (Mar. 14, 1997), available at <http://www.hyperlaw.com/jccite/346.txt>.

<sup>108</sup> See Kansas Supreme Court / Kansas Court of Appeals Opinions, <http://www.kscourts.org/kscases/>.

<sup>109</sup> Some have. The Michigan Court of Appeals tags opinions at its Web site once they have been through editorial review and forwarded to the publisher of its “official reports.” At that point the final version is substituted for the original slip opinion. See Michigan Court of Appeals – Court Opinions, <http://courtofappeals.mjud.net/resources/opinions.htm>. See also Martin, *supra* note 63, ¶¶ 26-29.

electronically in an official, final, and citable form gives rise to an indeterminate risk that those online versions may be inconsistent. Furthermore, there is no ready means of verifying the accuracy of a critical passage other than tracking down a copy of the “official” print report.

¶48 Kansas Supreme Court and Kansas Court of Appeals judges as well as staff assisting them use Westlaw.<sup>110</sup> (While contracting practices and licensing terms vary from jurisdiction to jurisdiction, appellate courts across the United States subscribe to Westlaw, Lexis, or both for their judges, clerks, and other legal staff. The same is not uniformly true for the trial courts beneath them.) Because funding responsibility for library and electronic legal research services for Kansas district courts continues to lie with the state’s 105 counties and because those counties vary enormously in scale and resources, the online research services available to the state’s trial judges range from Westlaw or Lexis to none at all.<sup>111</sup> Although state monies continue to assure trial court access to Kansas precedent in print by dispatching copies of *Kansas Reports* and *Kansas Court of Appeals Reports* to all district judges, there is no effective assurance that they or the lawyers appearing before them will have as complete, accurate, and up-to-date a collection of Kansas precedent as the appellate judges who establish it.

¶49 Like lawyers across the country, those in Kansas constitute a complex market. Type and prosperity of practice, size of firm, and location lead to quite different decisions about online services. But there is now a baseline. Like lawyers in a majority of states, those in Kansas who are members of the state bar association have access, at no additional charge, to Casemaker. For them Casemaker has replaced the county law library collection of law reports. It is therefore all the more problematic that there is no official digital source from which Casemaker can draw or against which it or any other online service can authenticate the text of Kansas decisions.

#### **4. The temptation to trade privileged data access or official status for online services**

¶50 While courts produce case law, they are, by a large factor, net consumers of legal information. By bestowing “official status” on one set of print reports (and their digital derivatives) and in a variety of less obvious ways, court systems can, and more than a few do, grant one commercial provider favored access in return for discounts on their bills for legal information (both online and in print), for editorial and technology support, and even for cash.

¶51 While Kansas publishes its own official reports, of those states still nominally producing law reports a majority outsource the activity. Over the past decade, contracts for official report publication have concentrated in two companies – Thomson / West and LexisNexis. In states like California, New York, and Ohio, where the demand for legal information is high, these contracts, which afford the commercial publisher unique access

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<sup>110</sup> Telephone interview with Jack Fowler, Executive Assistant and Counsel to Chief Justice Kay McFarland, Kansas Supreme Court (Feb. 1, 2007).

<sup>111</sup> *Id.*

to final decision texts, editorial enhancements, and official citation data in digital format, have become a mechanism for extracting substantial benefits for the judiciary – including free or discounted use of the publisher’s online system.<sup>112</sup> Absent such a publishing contract, the judiciary’s subscription agreement for online services itself can provide the framework for trading assistance with data acquisition for favorable use terms. Since the Westlaw contract with the Kansas appellate courts has a “non-disclosure” provision,<sup>113</sup> there is no sure way to tell whether its price terms are tied to the the courts’ active cooperation with Thomson’s production of the *Pacific Reports* or its delivering certain Kansas data to Westlaw. Such provisions do exist in Thomson’s contracts with other states.<sup>114</sup>

¶52 Bundled with “official report” services, both Thomson / West and LexisNexis are prepared to provide a free and “open-to-the-public” case law site for a state. They do so, however, on terms that prevent competitors from drawing data from the site or lawyers from using it professionally.<sup>115</sup>

## 5. Market dominance reinforced, competition inhibited

¶53 Continuing to tie precedent to print reinforces the market positions of the two dominant legal information vendors, Thomson / West and Reed Elsevier, to the detriment of smaller competitors. It enables Thomson / West to use the century long judicial and professional acceptance of its National Reporter System and the resulting network effects (consistency of format and editorial treatment over the full expanse of a jurisdiction’s case law and across jurisdictions, a citation scheme deeply engrained in both habit and practice norms, brand loyalty) to maintain the leading position in the market for online legal information. LexisNexis, working under the undisclosed terms of its cross-licensing agreement with Thomson, is able to come close to Westlaw in the timeliness, comprehensiveness, and citability of its case law collection and to surpass it in other

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<sup>112</sup> See Martin, *supra* note 63, ¶¶ 45-49.

<sup>113</sup> Telephone interview with Jack Fowler, Executive Assistant and Counsel to Chief Justice Kay McFarland, Kansas Supreme Court (Feb. 1, 2007).

<sup>114</sup> Letter from Ann S. Koto, State Law Librarian, to author (Feb. 5, 2007) (on file with author) (“[C]ontract amount is tied in with the courts’ agreement to electronically transmit appellate court dispositions to Thomson/West.”); Letter from Karen Quinn, State Law Librarian, Rhode Island (Feb. 22, 2007) (on file with author) (“Unlimited and gratis access to the Rhode Island Briefs is afforded under this contract due to the assistance of the Rhode Island Judiciary in providing West with the data involved.”).

<sup>115</sup> See, e.g., the Thomson / West copyright notice for Alaska Case Law Service, <http://government.westlaw.com/akcases/> (“West hereby grants users of this West site permission to reproduce materials available therein for the sole purpose of educating authorized users and potential users of West products or services. Re-use or reproduction or distribution for commercial purposes is prohibited.”) and the LexisNexis limitations on use of its database of California Supreme Court decisions, <http://www.courtinfo.ca.gov/opinions/continue.htm> (“There is no charge for using the Official Reports page and there is no copyright on opinion text, but the page is limited to personal use (see the publisher’s limitations on use). ... The Official Reports page is primarily intended to provide effective public access to all of California’s precedential appellate decisions; it is not intended to function as an alternative to commercial computer-based services and products for comprehensive legal research.”) In both instances the limitation is reinforced by the removal of star pagination necessary for citation.



ways. LexisNexis has the capacity to compete with Thomson for contracts to publish official print reports. Through aggressive price competition, Lexis has secured substantial numbers of judicial subscriptions. Measured either in revenues or use, it is a strong number two among lawyers.<sup>116</sup> The lower cost vendors on which many small firm lawyers rely either don't include essential citation information (i.e., print volume and page numbers) and post-release revisions (VersusLaw) or include them but only long after they have appeared in Westlaw and Lexis. To obtaining the critical volume and page numbers along with any post-release revisions, they must redigitize the opinion texts from the still "authoritative" print reports. (With Casemaker, the resulting delay is approximately eight months.)

¶54 As a consequence, researchers using the lower tier online systems are not only burdened with the resulting unnecessary costs passed on through their charges, but they are forced to use other sources for the most recent decisions and to employ the more costly ones or print to obtain citation information for any recent decisions they need to cite.

## **B. Simple means for court systems to re-establish public control over the dissemination of their precedent**

¶55 During the mid nineteen nineties, a series of reports urged the nation's courts to attach full medium-neutral citation data to decisions before release and revise their rules governing citations in briefs and memoranda to require use of this non-proprietary scheme. Jurisdictions were also urged to create digital archives holding all their case law in final, official, citable form – archives open on equal terms to all publishers and members of the public. Today these companion reforms can be seen at work in several states – at work and accessible via Web sites that feature capable search engines, other case finding tools, and complementary elements that make them useful tools for the direct public dissemination of precedent. They also enable frictionless redistribution by all commercial players.<sup>117</sup> These are totally feasible, foundational reforms that Kansas and other states still stuck in the print law report paradigm need to undertake. Their doing so should open the way to more expansive and richer conceptions of precedent made possible by digital dissemination.

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<sup>116</sup> See Mark D. Killian, *Who's Using What? Technology in Today's Law Offices*, FLORIDA BAR NEWS, Jan. 15, 2005, at 5; Sarah Kellogg, *Web Wars: Online Legal Research at the Crossroads*, 65 OR. ST. B. BULL., Aug./Sept., 2005, at 8, 10; Sarah Palmer, *If You Can't Beat 'em, Train 'em: How Lawyers Conduct Legal Research*, LEGAL INFORMATION ALERT, Jan. 1, 2006, at 1.

<sup>117</sup> See Martin, *supra* note 63.

## ***IV. Opportunities for more expansive and richer conceptions of precedent once digital dissemination displaces print as the official channel***

### **A. Removal of the sharp dichotomy between decisions that are published and those that are not**

¶56 Print law reports are costly to produce, distribute, and store. They are also difficult to search. As a consequence, print dissemination of precedent encourages, if it doesn't force, selection. As reported earlier, whether or not state high courts engaged in selective publication, the addition of intermediate courts of appeal to state judicial systems was almost invariably coupled with policies limiting publication of their decisions. In most states, the decision not to publish a decision effectively denied access to it. And because of the serious issues that could arise were unpublished and therefore unknown decisions to be, nonetheless, binding precedent, most jurisdictions declared unpublished decisions to be non-precedential.

¶57 Although the nomenclature used to distinguish published, precedential opinions from those simply disposing of a case and the criteria for choosing which opinions belong in the precedential category varied among jurisdictions, selective publication became the norm.<sup>118</sup> As the volume of appeals handled by appellate courts climbed during the latter quarter of the twentieth century, the percentage of opinions distributed as precedent declined.<sup>119</sup>

¶58 Kansas court rules divide appellate decisions into two categories: published formal opinions and memorandum opinions.<sup>120</sup> Decisions are placed in the first category only if they address new issues or are otherwise thought to have "value as precedent." Memorandum opinions are not "binding precedents," and their citation, while not forbidden (the case in some other states<sup>121</sup> and, not so long ago, in Kansas<sup>122</sup>), is said to

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<sup>118</sup> See Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 LAW LIBR. J. 21, 22 (1991); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 125 (1994).

<sup>119</sup> See COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 1998, at 101 (1999); COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2001, at 85 (2002); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307 (1990). Kansas exemplifies the trend. In 1980, 39% of the opinions of the Kansas Court of Appeals (169 of 433) were published. By 1995, the figure had dropped to 15.8% (187 of 1181). See 4 KANSAS COURT OF APPEALS REPORTS xi-xiii; 5 KANSAS COURT OF APPEALS REPORTS xi-xvii; 20 KANSAS COURT OF APPEALS REPORTS xiii-xxxiii; 21 KANSAS COURT OF APPEALS REPORTS xxxii-lvi.

<sup>120</sup> This distinction is authorized but not required by statute. See KAN. STAT. § 60-2106.

<sup>121</sup> See Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 6 J. APP. PRAC. & PROCESS 349 (2005); Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003).

<sup>122</sup> See *id.* at 349; Hinderks & Leben, *supra* note 18, at 158 n.15 (1992).

be “not favored.”<sup>123</sup> Nearly ninety percent of the decisions rendered by the Kansas Court of Appeals are delivered by such non-precedential opinions.<sup>124</sup>

¶59 Following the early lead of Lexis, online redistributors of court decisions have not restricted their databases to opinions published in print law reports. Judicial proceedings are public in the U.S. and, subject to very limited exceptions, the resulting judgments are available to any database builder prepared to make the arrangements necessary to secure them. When Lexis first loaded “unpublished” decisions into its federal and state files this entailed obtaining physical copies from court clerks or reporters and digitizing them. As courts moved to word processors and began placing opinions on dial-up bulletin boards the process became simpler and open to a wider range of private sector redistributors. By the end of the twentieth century, court bulletin boards had been supplanted by Web sites, most offering many more decisions than were being distributed in print law reports. In some U.S. jurisdictions, legislative action encouraged or even mandated this more comprehensive release of court opinions. The E-Government Act of 2002 requires that federal courts at all levels furnish “[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter” at a public Web site.<sup>125</sup> And while the act allows other digital information about closed cases to be removed after a year, it mandates that “all written opinions ... remain available online.”<sup>126</sup>

¶60 In numerous states where appellate courts produce “unpublished” non-precedential opinions, those decisions are nonetheless systematically disseminated via the Internet with their status clearly indicated. With some, this occurred only after pressure from lawyers and lower courts.<sup>127</sup> Some states, Ohio being one, have gone further and erased or moderated the distinction between “published” and “unpublished”, “precedential” and “non-precedential decisions.”<sup>128</sup> Kansas has yet to start down this path. Unpublished Kansas decisions are available, but only upon request from the Supreme Court Library.<sup>129</sup>

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<sup>123</sup> KAN. SUP. CT. R. 7.04.

<sup>124</sup> See *supra* note 22.

<sup>125</sup> Pub. L. No. 107–347, § 205(a)(5), 116 Stat. 2910, 2913 (2002).

<sup>126</sup> *Id.* § 205(b)(2), at 2914. This requirement to archive applies only to opinions issued after the section’s effective date, April 17, 2004. *Id.*

<sup>127</sup> In an order dated August 21, 2006 the Indiana Supreme Court granted the request of that state’s court of appeals that its “Not for Publication” decisions be released and stored at the Indiana Courts Web site. See Indiana Supreme Court Order, Aug. 21, 2006, *available at*: <http://www.in.gov/judiciary/orders/other/2006/94s00-0608-ms-299.pdf>.

<sup>128</sup> See OHIO SUP. CT. RULES FOR REPORTING OF COURT DECISIONS, R. 4. See also *Grand County v. Rogers*, 2002 UT 25, ¶¶ 7-18, 44 P.3d 734.

<sup>129</sup> See, e.g., the list of Court of Appeals opinions released on Jan. 5, 2007, <http://www.kscourts.org/kscases/ctapp/2007/20070105/20070105.htm>. While Lexis loads dispositions “without published opinion” by both the Kansas Supreme Court and Kansas Court of Appeals, it does not go to the trouble of gathering and disseminating either court’s memorandum opinions. See, e.g., *State v. Waldrup*, 2005 Kan. LEXIS 414 (June 10, 2005). By contrast, both Lexis and Westlaw provide access to “unpublished” decisions of the Wisconsin Court of Appeals, which they are able to collect at the state Web site, warning users that under the Wisconsin’s appellate rules these decisions have “no precedential value”

Apparently, however, they are regularly requested by Thomson, for they do appear in full text in Westlaw, often on the day of release.<sup>130</sup> They are not to be found, however, on Lexis, Casemaker, or any of the other online systems. Recall that while Westlaw is the system used by Kansas appellate judges not all district judges in the state have access to it nor, of course, do all lawyers.

¶61 With a medium that does not require selective dissemination, the case for distinguishing between appellate decisions that are precedent and those that are not on the basis of print publication is difficult, if not impossible, to make.<sup>131</sup> The consequences of continuing such policies are particularly troubling when “unpublished” “non-precedential” decisions are in fact available through one or more commercial systems but not at the judiciary’s public site.<sup>132</sup> The digital environment allows appellate courts to tag those opinions they believe to involve routine application of settled law and for those conducting case research to focus initially on other opinions, without giving rise to all the problems that can flow from withholding opinions from general circulation on that ground or declaring those opinions non-precedential and uncitable.<sup>133</sup>

## **B. Inclusion of trial court decisions in the flow of precedent**

¶62 The same capacity, cost, and search concerns that induced most U.S. jurisdictions to publish only selected appellate decisions led, with but a few exceptions, to trial court decisions being completely excluded from organized distribution and availability as precedent.<sup>134</sup> Trial courts are, of course, bound by vertical precedent flowing down from the jurisdiction’s appellate courts, but they have not generally been seen as producing precedent in any form. Yet the experience of those jurisdictions that publish some trial court decisions and examples from others where local distribution channels – legal newspapers, bar publications, and in recent years Web sites – have given courts and counsel access to trial decisions demonstrate their value as precedent in the looser non-binding sense. There is also, of course, the conspicuous example of the federal courts.

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and “may not be cited.” *See, e.g.,* Wood v. Anacker, 2005 WI App 176 (Wis. Ct. App. 2005) (listed in a disposition table in the state’s print law reports, 285 Wis.2d 807, 701 N.W.2d 654 but available in full text at the court Web site and on both Westlaw and Lexis).

<sup>130</sup> *See, e.g.,* State v. Sheppard, No. 95,660, 2007 WL 959618 (Kan. Ct. App. Mar. 30, 2007).

<sup>131</sup> Even so some jurisdictions have continued to reaffirm a policy of denying unpublished decisions any precedential value, reinforced by rules forbidding their citation. *See, e.g.,* In re amendment of Wis. Stat. § (Rule) 809.23 (3) regarding citation to unpublished opinions, 2003 WI 84.

<sup>132</sup> Unequal access has been an enduring problem with “unreported decisions.” *See Dragich, supra* note 61, at 778; Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 955 (1989).

<sup>133</sup> *See, e.g.,* Patricia M. Wald, *Judicial Opinion Writing: The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995).

<sup>134</sup> *See supra* ¶¶ 6, 27.

Decisions of the U.S. District Courts, including many not published in print, are widely cited and relied upon even though they are not binding precedent.<sup>135</sup>

¶63 Important legal questions can recur in litigation numerous times without being appealed. For example, the question whether data available from an automobile's black box can be admitted as evidence of the vehicle's speed without a prior hearing on reliability has been addressed by appellate courts in a few states<sup>136</sup> but not New York. The issue must, therefore, be addressed by New York trial courts without the direction of vertical precedent. Because trial court decisions do circulate in New York, including significant numbers beyond those selected for publication in the official reports, any New York lawyer or judge confronting this question can find guidance in several unappealed lower court rulings.<sup>137</sup>

¶64 There are particular legal domains within which important legal issues are repeatedly litigated without ever being appealed to a court producing decisions eligible for publication in a law report. Family law is one. Since 1977 selected opinions of Delaware's state-wide family court have been published in print,<sup>138</sup> on average 5-6 per year.<sup>139</sup> Beginning in the 1980s first Lexis and then Westlaw began to load the court's "unpublished decisions." Today both systems have significant collections of Delaware family court precedent.<sup>140</sup> All of Delaware's judiciary, including family court judges, have access to both online services.<sup>141</sup> On such context-dependent questions as the division of assets and liabilities in a divorce,<sup>142</sup> the termination of alimony because of "cohabitation,"<sup>143</sup> or extension of parental custody preference to a "de facto" relationship,<sup>144</sup> Delaware family courts are able to find more guidance in other family court decisions than in opinions of the state's supreme court.<sup>145</sup>

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<sup>135</sup> See, e.g., *TMF Tool Co., Inc. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990); *United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1987).

<sup>136</sup> See, e.g., *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 776 N.E.2d 262 (2002).

<sup>137</sup> *People v. Slade*, 233 N.Y.L.J. 11, 2005 N.Y. Misc. LEXIS 3217 (N.Y. Sup. Ct. 2005), *People v. Hopkins*, 2004 NY Slip Op 51748U, 2004 N.Y. Misc. LEXIS 2902 (N.Y. Cty. Ct. 2004), *People v. Christmann*, 3 Misc. 3d 309, 776 N.Y.S.2d 437 (N.Y. Vill. Just. Ct. 2004).

<sup>138</sup> See BLUEBOOK, *supra* note 41, T.1, 204 (Columbia Law Review Ass'n et al. eds., 18<sup>th</sup> ed. 2005).

<sup>139</sup> As of June 15, 2007, Westlaw contained 167 Delaware Family Court decisions with "A.2d" citations.

<sup>140</sup> For 2006, Westlaw added 228 decisions; Lexis, 233.

<sup>141</sup> E-mail from Chris H. Sudell, Deputy State Court Administrator, Delaware, to author (Feb. 26, 2007) (on file with author).

<sup>142</sup> See *P.L. v. W.L.*, No. CN05-04694, 2006 Del. Fam. Ct. LEXIS 264 (Dec. 13, 2006).

<sup>143</sup> See *M.D. v. C.D.*, No. CN01-09121, 2007 Del. Fam. Ct. LEXIS 11 (Mar. 15, 2007).

<sup>144</sup> See *Dep't of Servs. for Children, Youth and their Families v. T.P.*, No. CN05-04690, 2007 Del. Fam. Ct. LEXIS 32 (Feb. 20, 2007).

<sup>145</sup> Many of the most challenging issues that family court judges confront fall within zones of discretion not reviewed by the Delaware Supreme Court. See, e.g., *Jones v. Lang*, 591 A.2d 185, 188 (Del. 1990).

¶65 Providing vastly expanded access to trial court decisions is feasible in a digital age. In many states that may require a coordinated public initiative. Montana illustrates the point. Until recently the official publisher of opinions of the Montana Supreme Court was a local firm, State Reporter of Helena. The firm also operated an online database.<sup>146</sup> While not publishing Montana trial court opinions in print, it began to add them to this online system, offering free access to those courts that contributed decisions.<sup>147</sup> Eventually all responded. By the year 2001, approximately 2,000 district court opinions were being added per year.<sup>148</sup> Lawyers referred to them; district judges cited them.<sup>149</sup> When LexisNexis acquired State Reporter in 2005, this database of over 16,000 trial opinions became part of Lexis, but the relationship with Montana's district courts was ruptured. The annual flow dropped dramatically.<sup>150</sup> Competing collection development priorities make it unlikely, at least in the short term, that Lexis will restore it.<sup>151</sup> Montana's district courts have been brought under the state judiciary's Lexis contract so that all judges in the state have access to this collection of trial court opinions, but its value is no longer being maintained.<sup>152</sup> Longer term, an electronic case document system planned by the state may, as it has other jurisdictions,<sup>153</sup> open trial decisions to direct public access and facilitate commercial redistribution (by more than a single provider).

¶66 Including trial opinions in the pool of available precedent not only provides trial judges with useful guidance in situations where they are not bound by vertical precedent, but it affords appellate courts a broader view of individual appeals by enabling them to see how trial courts collectively have dealt with vexing issues. Access to trial court decisions is valuable as well to those who are seeking to avoid litigation, deciding whether to litigate, contemplating settlement of a dispute, or weighing the need for legislation in an area.<sup>154</sup> Lastly, accessible trial court opinions may make it possible for

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<sup>146</sup> "Montlaw" was established in 1990. See Wayback Machine, <http://web.archive.org/web/20000824074346/www.statereporter.com/company.htm>.

<sup>147</sup> Telephone interview with Judy Meadows, Montana State Law Librarian (Jan. 1, 2007).

<sup>148</sup> The Montana district court decisions now on Lexis total 2162 for 2001, 1986 for 2002, 2030 for 2003, 2008 for 2004.

<sup>149</sup> See, e.g., *Mitchell v. Stevens*, No. ADV-2003-722, 2005 Mont. Dist. LEXIS 1423 (Nov. 17, 2005); *Valley Capital v. Smith*, DV 99-370, 2001 ML 4684, 2001 Mont. Dist. LEXIS 2664 (Dec. 14, 2001).

<sup>150</sup> Lexis contains only 1379 Montana district court decisions for 2005, 1075 for 2006, 216 for the first six months of 2007.

<sup>151</sup> E-mail from Jane W. Morris, Director, Customer Programs, Primary Law Editorial & Content Development, LexisNexis, to Judy Meadows, Montana State Law Librarian (July 13, 2007) (on file with author).

<sup>152</sup> Meadows, *supra* note 138.

<sup>153</sup> The federal courts' CM/ECF system is one example. See Case Management/Electronic Case Filing, <http://pacer.psc.uscourts.gov/announcements/general/ecfnews.html>. New York's eCourts system is another. See E-Courts, <http://www.courts.state.ny.us/ecourts/>.

<sup>154</sup> See Lynn Mather, *Policy Making in State Trial Courts*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 119 (John B. Gates & Charles A. Johnson, eds., 1991).

some appellate decisions to be brief.<sup>155</sup> In the evident belief that there is potential demand Westlaw has very recently begun collecting and offering “State Trial Court Orders.” Already, the database holds over 350,000 decisions, most from the largest states and dating from the past five years.<sup>156</sup>

### **C. Opinions structured not merely for print but for digital distribution, navigation, and search**

¶67 Most state court Web sites, like that of the U.S. Supreme Court, offer digital files that are designed to replicate the paper “slip opinions” for which they substitute. This has the advantage of assuring consistent pagination and format – indented quotations are indented, emphasized text is shown in bold or italics, embedded maps, photographs, and other graphic material are displayed in context. The dominant format is pdf. That approach, powerful evidence in itself of the continuing hold of the print paradigm, is seriously deficient for documents destined to reach readers by means of a database search or other electronic process.

¶68 The Kansas judicial site neither preserves all the print features of the decisions it distributes (Indented quotations, for example, display no indentation.) nor enhances them with fields, metadata, and other structural attributes that would facilitate their use in today’s virtual libraries. (e.g., searches by date, docket number, or opinion author). In short, the medium is not taken seriously.

¶69 Taking digital dissemination seriously requires encoding the structure not merely the appearance of opinions – separating such distinct data elements as Westlaw and Lexis have taught researchers they should be able to search on – syllabus, judge, date, cited authority – linking to cited references, and revealing the structure of opinions’ legal analysis as reflected in their headings and subheadings. The data standard capable of doing all this (XML) is now built into most forms of text handling software from Word and WordPerfect through Adobe Acrobat to contemporary Web browsers. That capacity needs to be used. Taking this largely invisible step can have a positive effect on the usefulness of court Web sites and, at the same time, reduce the costs of redistribution

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<sup>155</sup> See, e.g., *Millivision, Inc. v. Gardner*, No. MW 05-054, 2006 Bankr. LEXIS 514 (B.A.P. 1st Cir., Apr. 10, 2006) (unpublished):

The bankruptcy court's rationale is fully explicated in its written decision, *Ostrander v. Gardner (In re Millivision, Inc.)*, 331 B.R. 515 (Bankr. D. Mass. 2005). Judge Boroff thoroughly considered appellants' arguments and laid each to rest, applying correctly this circuit's summary judgment standard. *Id.* at 520.

Where, as here, the lower court's accurate, clearly articulated legal conclusions lay all appellants' complaints to rest, nothing would be added by a lengthy recapitulation of fact or law on our part. We need not, will not, toot our own trumpet in view of these premises.

For the reasons ably stated by the court below, its judgment is AFFIRMED.

<sup>156</sup> E-mail from Timothy Nixon, Thomson / West, to author (Oct. 10, 2007) (on file with author). See Westlaw Litigator – State Trial Court Orders, <http://west.thomson.com/westlaw/litigator/statetrialcourtorders/?tf=90&tc-14>.

through commercial systems. It might even have a long range beneficial effect on the analytic structure of decisions.

#### **D. Precedent augmented by related data**

¶70 Throughout their history, U.S. print law reports, whether prepared by public reporters or commercially published, have bundled pertinent other material with judicial opinions.<sup>157</sup> Editorial notes, summaries of arguments of counsel, indices were and still are common features. In addition, opinion authors have, on occasion, placed important background material in appendices.<sup>158</sup> Limitations of the medium effectively required some of these editorial enhancements (hyperlinks not being an option), but print also severely restricted the amount of supplementary data and forced hard choices about placement in relation to opinion text. The digital environment has at once reduced the need for some editorial features, dramatically relaxed the quantitative constraints, expanded format options, and enabled direct access to vast amounts of background material previously unavailable to all but the most resolute researchers.

¶71 With limited exceptions the headnotes and issue summaries prepared for official print reports by public law reporters have not accompanied the decisions themselves onto the Web or into commercial online collections. For Westlaw and Lexis their inclusion would be redundant; for most of the others, too costly. Following the historic approach of the National Reporter System, except as its publishing contracts require otherwise, Westlaw replaces all state-produced notes with proprietary editorial matter. Lexis now does much the same although for some states, including a few for which it publishes the print reports, the service inserts “official headnotes” following its own. Loislaw, which adds no analytic summaries of its own preparation, includes reporters’ notes in a somewhat larger number of jurisdictions, presumably those states important to its subscriber base for which acquiring both the data and rights to use it are not especially difficult. The other online case law services simply omit law report content not authored by the court itself. Apparently, they have concluded, not unreasonably, that in a searchable collection of precedent jurisdiction-specific editorial additions contribute insufficient value to justify the substantial costs of including them. These costs exceed those of gathering the underlying court opinions for two reasons. First, with only a handful of exceptions, state preparation of headnotes, syllabi, and the like occurs well after release of the decisions. Being generated during the print publication process, these post-release enhancements never join the opinions at a court Web site. Any online distributor desiring to merge them with the underlying opinions must, therefore, digitize their text from the print reports. The difficulty is compounded by copyright issues. States and publishers producing such supplementary material, even those that

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<sup>157</sup> The earliest American law reports actually devoted more attention to these matters than to the words coming from the judges. See Kempin, *supra* note 35, at 35; Tiersma, *supra* note 4, at 1223.

<sup>158</sup> See, e.g., *Alaskans for Efficient Gov't, Inc. v. State*, 153 P.3d 296, 302-03 (Alaska 2007); *People v. Tenneson*, 788 P.2d 786, 800-02 (Colo. 1990).



acknowledge that judicial opinions per se are in the public domain, quite commonly assert copyright in all law report editorial additions.<sup>159</sup>

¶72 Only when digital dissemination and competitive redistribution are taken seriously will those jurisdictions still preparing case summaries and analytic indices for print be likely to attend to the challenge of adapting content of this sort to online case law and let go of concerns about redistribution. Beyond linked and searchable headnotes and case summaries are myriad possibilities. Courts systems have begun to deploy computer-based case and file management systems. Some encourage or even require electronic filing of briefs and other case documents. Many now record all oral arguments digitally. Increasingly, those reading a judicial opinion online should be able, if they choose, to read it against the full arguments made by counsel, the record on appeal, and perhaps statistical data on the judges' dispositions in similar cases. A number of these elements are already in place at state court Web sites.<sup>160</sup>

## E. Opinions employing more than text

¶73 The world to which law and therefore precedent must relate has color, shape, texture, sound, and movement. The technology and economics of print law report publication have effectively limited precedent to text.

¶74 Over a decade ago, the U.S. Supreme Court delivered an important trademark opinion in *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995). Writing for a unanimous Court, Justice Breyer construed the language defining the reach of the Lanham Act – “word, name, symbol, or device” – as encompassing color. Qualitex had registered “a special shade of green-gold” as a trademark for pads it sold to dry cleaning firms. The litigation that brought this issue to the Court arose when a competitor, Jacobson Products, began selling pads of a similar color. Prior law on this point was far from settled, but market realities had already broken down narrow readings of the Act.

¶75 The Court's decision explored and ruled on the role of color in identifying the Qualitex pressing pads without aid of an image of this “green-gold” object or its “similar” competitor. Three years earlier in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992) the Court dealt with the question whether Taco Cabana's restaurant décor constituted trade dress protected by section 43(a) of the Lanham Act. The issue came framed by a jury finding that the restaurant chain's interior and exterior had not acquired

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<sup>159</sup> See, e.g., N.Y. JUD. LAW § 438 (2007); Agreement between Gary D. Spivey, New York State Reporter, and West Publishing Co. § 7 (Oct. 25, 2005), available at [http://www.access-to-law.com/elaw/contracts/NY\\_2005.PDF](http://www.access-to-law.com/elaw/contracts/NY_2005.PDF). The distinction between the opinions per se and a reporter's editorial additions traces back to *Callaghan v. Myers*, 128 U.S. 617 (1888).

<sup>160</sup> See, e.g., the site of the North Dakota Supreme Court, <http://www.court.state.nd.us/>. All recent decisions of the court carry a link to their docket entries which, among other things, provide access to the parties' briefs and audio recordings of the oral arguments. At the Oklahoma State Courts Network site, recent opinions of the state supreme court link back to the trial court proceedings, providing docket entries and documents filed or issued below. See, e.g., *Oklahoma City Zoological Trust v. State*, 2007 OK 21, at the OSCN site, <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448713>. The Michigan Supreme Court site offers briefs filed in cases from April 2002 forward. See <http://courts.michigan.gov/supremecourt/Clerk/msc-orals-2001-2002-session.htm>.

secondary meaning but were “inherently distinctive.” The opinion begins with a short description of Taco Cabana’s Mexican trade dress. A photograph or two drawn from the record would undoubtedly have been more useful.

¶76 In the years since, the Supreme Court has begun to incorporate images and color in its opinions. From the beginning of 1999 through the end of the October 2006 term, ten opinions issued by the Court have included a graph, map, or other image.<sup>161</sup> The previous decade there were none. In April 2007, with a case in which a 16-minute police video was pivotal, the majority opinion effectively incorporated the clip by means of a link to a digital video file loaded onto the Supreme Court Web site. Wrote Justice Scalia:

Justice Stevens suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. ... We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at [http://www.supremecourtus.gov/opinions/video/scott\\_v\\_harris.rmvb](http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb) and in Clerk of Court’s case file.

Scott v. Harris, \_\_\_ U.S. \_\_\_, \_\_\_ n.5 (2007)<sup>162</sup>

¶77 The Supreme Court’s movement in this area has paralleled a gradual shift in the lower federal courts and states. That graphics-capable computers have prompted inclusion of non-textual material in court opinions just as they have in many other forms of writing is hardly surprising. More revealing, perhaps, is how slow the change has been. U.S. precedent remains heavily text bound. Out of the thousands of federal court decisions decided in 2006 and loaded into Lexis, only 157 include a chart, map, photograph or other graphical element. The count for the same year’s state court decisions is 63. Ironically, such figures can readily be determined on Lexis because the service does not include images in its database – apparently without serious market disadvantage to date. Wherever an opinion contains a photograph, diagram, map, form, or other image, Lexis replaces it with an editorial note referring the user to the “printed opinion” or the “original.”<sup>163</sup> Today, that “original” as mounted at a court Web site will, in all likelihood, include the graphic material, in color where called for. Fastcase, Casemaker, and VersusLaw join Lexis in omitting non-textual material. Westlaw and LoisLaw provide scanned images, but only in black and white.

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<sup>161</sup> See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999); *Hunt v. Cromartie*, 526 U.S. 541, 554 (1999); *New Jersey v. New York*, 526 U.S. 589, 602 (1999); *Kyllo v. United States*, 533 U.S. 27, 52 (2001); *New Hampshire v. Maine*, 532 U.S. 742, 756 (2001); *Overton v. Ohio*, 534 U.S. 982, 986 (2001); *United States v. Arvizu*, 534 U.S. 266, 278 (2002); *Williams v. United States*, 535 U.S. 911, 922 (2002); *Nike, Inc. v. Kasky*, 539 U.S. 654, 685 (2003); *Vieth v. Jubelirer*, 541 U.S. 267, 342 (2004).

<sup>162</sup> Contrast a recent decision of the Pennsylvania Supreme Court that concerned the use at trial of a computer-generated animation depicting the prosecution’s theory of how a murder took place. *Commonwealth v. Serge*, 586 Pa. 671, 896 A.2d 1170 (2006). The opinion’s guidance for trial judges having to rule on such demonstrative evidence would have been far clearer had it, like *Scott v. Harris*, directed readers to the video clip in question rather than relying on a brief textual description.

<sup>163</sup> See, e.g., the Lexis versions of *Williams v. United States*, *supra* note 122 (“[Graphic images omitted. See printed opinion.]”) and *Sunday v. Harboway*, 2006 MT 95, ¶ 8, 332 Mont. 104, 136 P.3d 965 (“[SEE ILLUSTRATION IN ORIGINAL]”).

¶78 A moment's reflection on today's Web environment should make it clear that once dissemination of precedent is liberated from the economics and technical limits of print and commercial databases respond as they will have to to opinions containing images and charts, complete with color, there are numerous situations where clarity should be enhanced. After all, visual exhibits can be immensely effective in the trial setting. If the proverbial picture – word ratio holds, opinion length could be reduced. Major second order consequences are also likely.<sup>164</sup> Ethan Katsh and others have argued that the absence of images from printed law promoted the use of abstract concepts and that the shift to electronic media is likely to reduce their hold on our legal system.<sup>165</sup>

## **VI. Institutional inhibitions and sources of resistance**

¶79 All these changes in the content, format, and function of precedent are attainable and, over enough time, very likely inevitable. None of them will come soon, easily, or uniformly across the United States. Sources of inhibition, incapacity, and affirmative resistance are numerous.

¶80 Old habits die hard, especially when they are embedded in institutional architecture. Techniques for working with and referring to precedent are learned in the first year of law study. As swiftly as possible, they are mastered to the point of becoming background tasks, to be performed with a minimum of conscious effort. To those generations who learned to find and analyze cases using print law reports and to cite opinions using volume and page numbers, electronic versions delivered online are most comfortably thought of in relation to that prior form. Learning a new mode of citation can seem as daunting as changing a golf swing or mastering a non-QWERTY keyboard and as unnecessary.

¶81 Second, powerful commercial interests have a stake in slowing if not blocking these changes and maintaining the judiciary's dependence on the private sector for precedent dissemination, including such core functions as citation information, quality assurance, editorial enhancement, and archiving.

¶82 Third, while it is common to speak of a state's courts as a "judicial system" or even a "unified system," the array of courts in many U.S. jurisdictions do not comprise coherent units, administered and financed as a whole. Adapting the model of state responsibility for dissemination of precedent represented by preparation and distribution of public law reports and the maintenance of public law libraries to the new reality of online law requires a level of jurisdiction-wide leadership, administration, and funding all-too-rare in the states. Even in jurisdictions, like Kansas, where trial courts fall under a significant measure of state control and funding, decisions about and the funding of

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<sup>164</sup> See generally Richard K. Sherwin, Neal Feigenson & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. L. REV. 227, 239-45 (2006).

<sup>165</sup> See M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 247-265 (1989); M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* 133-71 (1995). See also Kenneth H. Ryesky, *Accessing the Law: From Pens to Pixels: Text-Media Issues in Promulgating, Archiving, and Using Judicial Opinions*, 4 J. APP. PRAC. & PROCESS 353, 358-65 (2002).

online research services together with other support costs often remain a county or judicial district responsibility. The most complete embrace of digital methods of disseminating precedent has occurred in states where responsibility for meeting the legal information needs of judges at all levels, not merely those hearing appeals, has been consolidated within court systems that are unified in reality, not simply in name.<sup>166</sup>

¶83 Finally, judges are, and ought to be, busy being judges. In the press of performing that distinctive role, systemic issues of citation, opinion format, and case law dissemination may seem peripheral at best. From the perspective of an appellate judge, proposals to include more opinions in the pool of precedents can easily sound like more work, unjustified by speculative gains. Those judges who hold key leadership and administrative responsibilities are in most instances served by high-end legal information services, and are likely, as a consequence, to have limited appreciation of the diffuse burdens of cost and inconvenience experienced by small firm lawyers, trial judges, other government workers, and the general public.

### **Conclusion**

¶84 The good news is that within the experimental space created by our nation's fifty-state federal structure, vision, leadership, and capacity have already aligned in a number of states to furnish at least a foretaste of what precedent in a digital age can look like and to provide solid examples or prototypes on which other states and the federal courts can draw. These developments warrant greater attention. Achieving more efficient, more effective, and less costly dissemination of precedent, while expanding and deepening its scope are goals well within reach. They are, however, attended by challenges that call for serious scholarly inquiry, identification and exchange of best practices, and sustained public leadership.

¶85 The World Wide Web has presented researchers of all sorts with quantities of information far beyond past imagining, thereby giving rise to concerns about information overload. Similarly, the prospect of digitally accessible case law that includes all appellate decisions (not simply a small selected fraction), many decisions of trial courts, deep background data on cases, and non-textual material inevitably prompts fears of lawyers and judges being overwhelmed, with adverse consequences for the cost and quality of justice. That is a possible outcome but only if both the way precedent operates and the tools for searching, filtering, and ranking legal information remain static. The historic interplay between ideas about precedent and the means for its dissemination suggests the former is unlikely. The rapid development of sophisticated Internet search tools provides strong evidence that with the right combination of public sector involvement and private competition in the dissemination of legal information the latter need not occur. Some have suggested that access to vastly more judicial opinions may induce a return to much earlier notions of precedent that gave greater weight to facts and outcome than what the judges said.<sup>167</sup> A related speculation is that weight of opinions as precedent will come to be less dichotomous (binding versus of no precedential effect)

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<sup>166</sup> See Martin, *supra* note 63, at ¶53.

<sup>167</sup> See Tiersma, *supra* note 4, at 1272.

with the force of a non-binding decision becoming much more a function of the reputation of the court and opinion author, the evident thoroughness of research, and the clarity and force of its reasoning.<sup>168</sup> Should either or both of these shifts occur, it is not difficult to imagine software tools being devised that would facilitate retrieval and analysis of relevant decision data by legal professionals, scholars, and others, including the public. Opinions identified by a search could, for example, be arrayed by the number of citations to them in subsequent decisions and briefs.<sup>169</sup> Statistical and other forms of pattern analysis are likely to prove useful in some fields.

¶86 In many, if not most states, the front-line trial courts that adjudicate the broad range of civil disputes, divorces and other domestic issues, traffic violations, and criminal charges are widely dispersed. Historic norms of geographic proximity and local accountability place judges in sparsely populated and under-resourced areas.<sup>170</sup> Effective legal representation at the trial court level is more an aspiration than pervasive reality. Error-correction through appeal is spotty; less than 1/3 of one percent of trial court decisions are appealed.<sup>171</sup> For these reasons and more no one should suppose that improvements in the dissemination and operation of precedent of the sort surveyed here will, without more, dramatically enhance the consistency and accuracy of trial court decision-making. While they constitute a critical component, the larger goal calls for attention to judicial qualifications and training, the creation and distribution of manuals, benchbooks, and computer-based systems capable of furnishing “on demand” guidance, greater administrative supervision and accountability. Many of these measures draw upon the precedent system and with therefore, at least indirectly, benefit from its improvement. (Most of them can also gain substantial leverage from digital information and communication technologies. But those are topics for another day.) Precedent, broadly conceived and reconfigured for digital dissemination and access, has more than enough practical and symbolic connection to broader notions of rule of law, stability, and predictability, to warrant serious study on its own.

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<sup>168</sup> See *id.* at 1273; Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 9-12 (2002).

<sup>169</sup> One of the options Fastcase furnishes users is the presentation of a set of search results in order of the number of citations to each of the retrieved decisions.

<sup>170</sup> New York's Town and Village Justice Courts presided over by roughly 2,000 justices hear 2 million cases a year. Under the state constitution they are more closely tied to local government than New York's "Unified Court System." The majority of these justices are not lawyers, and in smaller communities court infrastructure is minimal. See New York, Unified Court System, Action Plan for the Justice Courts (2006), <http://www.courts.state.ny.us/publications/pdfs/ActionPlan-JusticeCourts.pdf>.

<sup>171</sup> State trial courts have over the last decade received a fairly steady flow of 33,600 cases per 100,000 residents, a ratio that yields a current annual court filing figure in the neighborhood of 100 million. See National Center for State Courts, *Examining the Work of State Courts*, 2005 at 14, [http://www.ncsconline.org/D\\_Research/csp/2005\\_files/3-EWOverview\\_final\\_1.pdf](http://www.ncsconline.org/D_Research/csp/2005_files/3-EWOverview_final_1.pdf). During the same period, state appellate courts received fewer than 300,000 appeals a year. See *id.* at 74, [http://www.ncsconline.org/D\\_Research/csp/2005\\_files/9-EWAppellate\\_final\\_1.pdf](http://www.ncsconline.org/D_Research/csp/2005_files/9-EWAppellate_final_1.pdf).