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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ARTICLES

ABANDONING LAW REPORTS FOR OFFICIAL DIGITAL CASE LAW*

Peter W. Martin**

I. INTRODUCTION

Like most states Arkansas entered the twentieth century with the responsibility for case law publication imposed by law on a public official lodged within the judicial branch. The “reporter’s” office was then, as it is still today, a “constitutional” one.¹ Title and role reach all the way back to Arkansas’s

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** Jane M.G. Foster Professor of Law, Emeritus, Cornell Law School, Ithaca, New York, and cofounder, Legal Information Institute. While bearing no responsibility whatsoever for any of the conclusions reached in this article, Susan Williams, Reporter of Decisions of the Arkansas Supreme Court, was enormously helpful throughout its preparation. Time and again, she responded promptly and thoroughly to my detailed questions. She found and furnished important background documents. She gathered and supplied the cost and sales figures for the period immediately prior to the Court’s 2009 decision to abandon bound reports. I am deeply in her debt.

1. The state’s post-Reconstruction constitution of 1874 provided: “The supreme court shall appoint its clerk and Reporter, who shall hold their offices for six years, subject to

admission to the Union. Since the Arkansas Supreme Court's first term in 1837, a Reporter has collected and published the justices' important decisions in numbered volumes of the *Arkansas Reports*. By 1900 the series had reached volume 67. Representative of the era, that volume was prepared by T.D. Crawford, Reporter, printed by the Gazette Publishing Company of Little Rock, and copyrighted by the state's secretary of state. In addition to the text of judicial opinions, the book consists of a table of contents, a table of cited cases, several appendices, including one containing statements eulogizing a deceased member of the Arkansas bar, and lists of cases decided but not reported plus those the court disposed of orally. It concludes with an index.² Spanning legal topics from "abandonment" to "witnesses" and including all cited statutes, this editorial addition allowed a researcher to determine whether, for example, a particular volume included any cases addressing the liability of railroads for killing livestock and, upon finding that one did, turn directly to them. Accompanying each decision is an additional set of editorial enhancements, by 1900 more or less standard in case law reports. These include headnotes that summarize the court's holding or holdings with a direct reference to the pertinent portion of the opinion, a statement of the underlying facts and the ruling below, followed by summaries of the arguments made and authorities cited by counsel for the parties on appeal and their names.³

Unlike most states Arkansas carried this publicly run system of case law dissemination into the twenty-first century. Over the years it had been altered in response to changes in judicial structure and practice, the expectations of lawyers and judges, and, significantly, the existence of commercial alternatives, first in print and then in electronic form. But volume 340 of the *Arkansas Reports*, published in 2000, is remarkably similar to its century-old predecessor. A few important features are different. First, Arkansas's practice of copyrighting the reports ended with volume 172, published in

removal for good cause." Ark. Const. art. 7, § 7 (1874). Similar language is found in the amended constitutional provisions dealing with the judicial department that took effect in 2001. Ark. Const. amend. 80, § 2(F).

2. See 67 Ark. v-xiv, 611-20, 621-37 (1900).

3. See e.g. *St. Louis, I. M. & S. R. Co. v. Landers*, 67 Ark. 514 (1900).

1927. Second, when the state judicial system acquired an intermediate appellate court, the Reporter was assigned responsibility for publishing its decisions as well, although only those that court deemed important enough for publication.⁴ Volume 340 of the *Arkansas Reports*, published in 2000, is, as a consequence, bound together with volume 69 of the *Arkansas Appellate Reports*. It was printed by an out-of-state rather than a local firm.⁵ For the most part, however, the state's law report volumes of recent vintage contain the same core elements as their counterparts of a century or more before—decision texts compiled and edited by a Reporter, accompanied by research aids including tables, indices, and headnotes, prepared by the same judicial official.⁶

In 2009 that continuity came to an end. After over 170 years, Arkansas ceased publication of print law reports. Volume 375 of the *Arkansas Reports*, bound together with volume 104 of the *Arkansas Appellate Reports*, is the last that will appear. Arkansas's Reporter continues to be responsible for putting out an official report of the state's appellate decisions. Indeed, that responsibility has been expanded to encompass much larger numbers of them. What has changed, and changed radically, is the means. For all decisions handed down after February 12, 2009, not books but a database of electronic documents “created, authenticated, secured, and maintained by the Reporter of Decisions” constitutes the “official report.”⁷ With justifiable pride, the state supreme court proclaimed Arkansas to be the first jurisdiction in the nation to switch from law report

4. See Ark. Code § 16-12-108(b) (Lexis 2010) (providing that “[t]he Reporter of the Supreme Court shall serve as Reporter of the Court of Appeals”); Ark. S. Ct. & Ct. App. R. 5-2 (Lexis 2008) (restricting publication to Court of Appeals opinions that “resolve novel or unusual questions”).

5. Joe Christensen Printing Co. of Lincoln, Nebraska. The reports were printed by a local printer until 1984. Volume 283 of that year was printed by the Darby Printing Co. of Atlanta, Georgia. Like the Christensen firm, it published and distributed one or more other state reports during this period. For reasons discussed *infra* at § V(A)(1), these smaller law publishers have since 2000 been displaced by the two major legal information vendors, for which print is simply an adjunct to electronic research products and services.

6. See 340 Ark., 69 Ark. App. (2000).

7. See *In re Arkansas Supreme Court and Court of Appeals Rule 5-2*, 2009 Ark. 330 (also available at http://courts.arkansas.gov/court_opinions/sc/2009a/20090528/published/09-540.pdf) [hereinafter “*In re Rule 5-2*”].

publication to official legal data distribution. It will not be the last.⁸

This article examines what distinguishes this Arkansas reform from the widespread cessation of public law report publication that occurred during the twentieth century and its Reporter's official database from the opinion archives hosted at the judicial websites of most appellate courts in the United States (including that of the Arkansas judicial branch between 1996 and 2009). The article next explores the distinctive alignment of factors that both led and enabled the Arkansas judiciary to take a step that courts in other jurisdictions, state and federal, have so far resisted. That requires focusing on the importance of the Reporter's role in this shift from print to digital case law publication and leads to speculation about which other states have the capability and incentive to follow Arkansas's lead. That, in turn, necessitates a comparison of the full set of measures the Arkansas Supreme Court and its Reporter of Decisions have implemented with similar, less comprehensive, initiatives that have taken place elsewhere. Finally, the article considers important issues that have confronted those responsible for building Arkansas's new system of case law dissemination and the degree to which principal components of this one state's reform can provide a useful template for other jurisdictions.

II. WHEN AND WHY PUBLIC LAW REPORT PUBLICATION ENDED IN OTHER STATES

By 1900 the *Arkansas Reports* had a serious competitor. Volume 1 of the *South Western Reporter*, a component of West Publishing Company's National Reporter System, appeared in 1887. From the start it covered all the cases reported in Arkansas's official reports, drawing its core contents, the decision texts, directly from the state publication, but substituting its own headnotes and indices for those prepared by the Arkansas Reporter. This commercial series covered four other states as well—Kentucky, Missouri, Tennessee, and Texas. While cases from these states were not necessarily of any

8. Indeed, Illinois has already headed down the same path. See n. 93, *infra*.

greater interest to Arkansas's lawyers and judges than those of others, for the state supreme court's law library and other large law collections, the full West system furnished a compellingly attractive way to collect and to research the entire nation's case law. Because of the *South Western Reporter* the writer of an Arkansas judicial opinion or brief could not be sure that the reader would be working with the same set of law reports. Early on, that led the Arkansas Supreme Court to adopt the opinion-writing convention, when citing a case, of providing its volume and page numbers in the *South Western Reporter*, immediately following those indicating its location in the *Arkansas Reports*.⁹ There was no straightforward match up. The cases reported in volume 67 of the *Arkansas Reports* were spread through volumes 50 to 55 of the *South Western Reporter*.¹⁰ For states like Arkansas where this could be done without delaying the regional report, West's policy was to publish the official report citation along with each case so that those using its volumes could obtain the parallel reference for insertion in a memorandum, brief, or opinion without having to consult another set of volumes or a separate cross-reference table.¹¹ The *Arkansas Reports* had to acknowledge the West reporter in return, providing parallel citations to it. That began in 1938.¹² Neither set of competing reports marked the location of page breaks (star pagination) from the other within decisions. Therefore, to make parallel pinpoint references to a specific passage a researcher had to consult both sets. However, neither the rules of the court at the time nor dominant practice required parallel pinpoint references.¹³

9. See e.g. *Phelps v. Wyler*, 67 Ark. 97, 101 (1899) (citing, among other cases from Arkansas and elsewhere, "*Pillow v. Sentelle*, 49 Ark. 430, 5 S.W. 783").

10. *Magness v. State*, 67 Ark. 594 (1899) (appears at 50 S.W. 554); *State v. McNally*, 67 Ark. 580 (1900) (appears at 55 S.W. 1104).

11. For a time somewhat later during the twentieth century, publication of the *Arkansas Reports* lagged to the point that official cites ceased being included in the *South Western Reporter*. They returned in 1982 with volume 638 of the *South Western Reporter*, *Second Series*. See e.g. *Dust v. Riviere*, 638 S.W.2d 663 (Ark. 1982).

12. Parallel case citations to the *South Western Reporter* for each reported case first appeared in volume 197 of the *Arkansas Reports* (1939). They have continued since.

13. Compare the official report with the West version of the embedded quotation in *Vaughn v. Herring*, 195 Ark. 639, 643, 113 S.W.2d 512, 513 (1938). In the former the quoted passage is cited without a pinpoint reference. The *South Western Reporter* adds one and only one, that being to its own version of the earlier decision. For another example of

Both sets of reports were able to furnish parallel case citations to the other because of another important feature of twentieth century law report publication, the issuance of incremental paperbound compilations commonly called “advance sheets” ahead of the final hardbound volumes. West offered advance sheets for the *South Western Reporter*; Arkansas, advance sheets for the *Arkansas Reports*.¹⁴ Both contained the volume numbers and pagination of the final books. As a consequence, those producing the respective hardbound versions could extract parallel citations from the other’s advance sheets. Advance sheets also enabled cross references to very recent cases to be filled in before final publication and, of course, afforded access to citable versions of decisions long in advance of their appearance in the final, hardbound reports.

While the *Arkansas Reports* held their own against the West volumes as a source of Arkansas case law, there were numerous dimensions in which they and other official state reports simply could not compete. To begin, the regional reporter was but one component of a comprehensive, integrated library that West offered courts, public law libraries, and practitioners. In addition to state case law, the company published federal reports and statutes,¹⁵ practice guides, and treatises. West sales representatives were ready to assist potential purchasers with advice and financing.¹⁶ Its editorial staff facilitated cross-jurisdictional research by imposing a single matrix of legal categories on all federal and state case law through headnotes, individual volume indices, and case digests. All these advantages and more West could and did advertise in professional journals, at bar meetings, and through other forms

this practice, compare the two versions of *Haynes v. Clark*, 196 Ark. 1127, 1131, 121 S.W.2d 69, 70 (1938).

14. Indeed, West “pioneered” in the publication of advance sheets containing the same pagination as would appear in the final bound volumes. Kendall F. Svengalis, *Meeting Patron Needs in a Technological Age*, 44 R.I. Bar J. 19, 19 (Oct. 1995).

15. See e.g. 1 Ark. Law. 9 (Oct. 1968) (West advertisement: “Most of [your best clients’] everyday activity is *governed* by federal law. That’s why many lawyers check *both* state and federal law as a matter of routine.”) (emphasis in original).

16. See e.g. 1 Ark. Law. 19 (Mar. 1968) (West advertisement: “planning a library isn’t cheap it’s free! . . . Our representative can give you the advice you need in planning a library. He’s an expert.”); 1 Ark. Law. 21 (Dec. 1967) (West advertisement: “Your KEY MAN . . . can show you how to establish a basic library for only a few dollars a month with *no carrying charge*.”) (emphasis in original).

of contact with law students, lawyers, and judges. The comparative strengths that West emphasized in marketing its regional reporters included the quality of the headnotes and their consistency over time and across jurisdictions, the pace at which cases moved from advance sheets to bound volume, and the quality of its editorial review of decision texts.¹⁷ At the point when printing technology made it feasible, West began to offer single-jurisdiction offprints from its regional reports so that lawyers in one state would not have to pay for or devote shelf space to the case law of another. These included such titles as *Arkansas Cases*, *Florida Cases*, *Illinois Decisions*, and *Missouri Cases*.¹⁸

Over the course of the twentieth century, a majority of states, concluding that they could not compete with West, ceased law report publication. Unlike Arkansas's recent step, this was not done to break the jurisdiction's reliance on print, for in all cases it occurred before establishment or widespread use of legal databases. Instead, the move amounted to relinquishment of public law reporter functions and law report publication to the commercial sector. Generally, that meant ceding an exclusive role to West.¹⁹ By 1973 none of Arkansas's immediate neighbors had a reporter of decisions or published its

17. See e.g. 9 Ark. Law. 123 (Oct. 1975) (West advertisement: "West's Arkansas Digest gives you access to all reported Arkansas case law. . . . [I]f you can't find it in West's Arkansas Digest the Arkansas Supreme Court has not yet dealt with that question.") (emphasis in original); 9 Ark. Law. 84 (July 1975) (West advertisement: "Consistency in case law headnoting . . . yours with West's Arkansas Cases").

18. See e.g. 11 Ark. Law. 185 (Oct. 1977) (West ad: "Vital Arkansas Law Books . . . Arkansas Cases"); *About Lawyers*, 1 Ark. Law. 13 (Sept. 1967) (including this ad: "[f]or sale . . . 'South West Reporter, Arkansas Cases'"); see generally WestStore, Trusted Legal Resources from Thomson Reuters, <http://west.thomson.com/products/books-cds/default.aspx> (enter "[state name] cases" or "[state name] decisions" in the search box at the top of the page to pull up a list of relevant titles) (accessed June 10, 2011; copy on file with Journal of Appellate Practice and Process).

19. During the period in which large numbers of states were ending their own case law publication, the brand "West" was synonymous with the products and services of the West Publishing Company. In the period since that legal publisher was acquired by Thomson (a deal completed in 1996), which later merged with Reuters (2008), several different publisher-attributions have appeared in the National Reporter System, Westlaw, and other legal publications of this evolving entity. All have continued the "West" brand in some form. To avoid unnecessary confusion, this article will also use "West" throughout rather than shifting according to the year involved from "West Publishing Co." to "West Group" to "Thomson/West" to "West, a Thomson Reuters business."

own law reports.²⁰ This left their lawyers, judges, and others working with case law no choice but to do their research in and cite to the volumes of West's National Reporter System.

Other states ended law report publication during this same period, but less conspicuously, as they allowed a commercial publisher (usually but not always West) to assume full responsibility for a series of law reports they had previously produced under the supervision of a public reporter of decisions. West assumed publication of the *Pennsylvania State Reports* in 1974,²¹ the *New Jersey Reports* in 1948.²² Appellate rules in both states still refer to these reports as "official" and require citation to them,²³ but while these volumes are produced with judicial cooperation, they are not at all public law reports like those published by Arkansas through 2009. The editorial work on the decisions they contain, the case summaries and headnotes, and their indices are all the work of the editors of the National Reporter System. They are copyrighted and sold by West, at prices it sets. Such commercially produced, but court sanctioned, jurisdictional law reports exist in at least six states.²⁴ In one or more additional jurisdictions such West produced and copyrighted volumes are contracted for by the state to comply with statutory provisions requiring law report publication.²⁵ Two states, Oregon and Nevada, still publish their own reports, but no longer have reporters of decisions to prepare headnotes for

20. *Louisiana Reports* ended in 1972; *Missouri Reports*, 1956; *Oklahoma Reports*, 1953; *Mississippi Reports*, 1966; *Tennessee Reports*, 1972; and *Texas Reports*, 1962. See Columbia Law Review, et al., *The Bluebook: A Uniform System of Citation* tbl. T1 (19th ed., Harv. L. Rev. Assn. 2010); Association of Legal Writing Directors & Darby Dickerson, *ALWD Citation Manual: A Professional System of Citation*, Appx. 1 (4th ed., Aspen Publishers 2010).

21. See Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 Vill. L. Rev. 1, 18 (2008).

22. See 1 N.J. (1949).

23. See N.J. R. App. Prac. 2:6-2(a)(5) (Westlaw 2011); Pa. R. App. P. 2119(b) (Westlaw 2007).

24. In addition to New Jersey and Pennsylvania, the six include Arizona, Idaho, South Carolina, and West Virginia. Unlike the straight National Reporter System offprints, the West law reports published for these states have consecutive pagination. However, the order of decisions in this group is influenced by, and in some cases drawn directly from, the order of their appearance in the regional reporter. That means among other things that decisions of a state's court of last resort and its intermediate appellate court are interspersed. See e.g. 131 Idaho (1998).

25. One such state is New Mexico. See *infra* § V(C)(2).

them or oversee publication. Editorial material for their reports is drawn under license from the National Reporter System. Finally, there are several states (including some large and important ones) that retain the office of reporter but outsource major reporter functions, from citation and quotation checking to headnote writing. They do so by contracting for these services from the report publisher.

In some states withdrawal from public responsibility for official reports occurred in stages with final severance occurring only upon the retirement of a particular reporter. Volume 35 of the *Arizona Reports* was published in 1935 by the Brancroft-Whitney Company. Its editorial content was prepared under the supervision of Alice M. Birdsall, Reporter of Decisions. The volume was copyrighted by her “For the Benefit of the State of Arizona.” Volume 36, overseen by her successor, Pearl H. Collier, was similarly copyrighted, although it included headnotes and indexing prepared and copyrighted by West. This pattern continued through volume 63, overseen by Reporter of Decisions Thomas F. Sullivan and published in 1947. Volume 64 was published and copyrighted in its entirety by West. Its content is drawn, key numbers and all, straight from the *Pacific Reporter*. No state reporter of decisions is listed. When the Arizona Court of Appeals was established in 1965, West launched an *Arizona Appeals Reports* series, also drawn from the *Pacific Reporter*. In 1976 that publication ended as the *Arizona Reports* became, with volume 114, a compilation of decisions from both the Supreme Court and Court of Appeals of Arizona intermixed in the order and format they appear in West’s *Pacific Reporter*. State statute calls upon both appellate courts to publish their decisions.²⁶ They comply by furnishing them to West. The statute authorizes the Supreme Court to contract for the volumes in which its opinions are published and, until recently, specified a long list of state entities and officials to which those volumes should be distributed.²⁷ The Arizona rules of appellate procedure refer to the *Arizona Reports* as “official” and require citation to their volume and page

26. See Ariz. Rev. Stat. Ann. §§ 12-107 (West 2011), 12-120.07 (West 2011).

27. See Ariz. Rev. Stat. Ann. § 12-108 (West 2008). This provision was amended in 2008 to speak more generally to the publication of as many reports as the market demands.

numbers.²⁸ But for sixty years those reports have been a commercial publication, and the state has had no public reporter of decisions nor effective ownership of or control over the final and official version of its case law.

In sum, the public office of law reporter entered the digital era and twenty-first century an endangered species. Today, far fewer than half the states have a judicial officer so denominated and there are no more than a baker's dozen of jurisdictions (twelve states plus the United States Supreme Court) in which a public reporter of judicial decisions and staff perform the full range of functions traditionally associated with official case law publication.²⁹ Throw in the three states for which headnotes are written and other editorial work is performed by a private publisher although still under contract with and the supervision of a public reporter of decisions, and the count reaches sixteen.³⁰ It is in this relatively small group that one might first expect to find other jurisdictions with the capacity and incentive to attempt a direct shift from print to electronic publication of the sort that the Arkansas judicial department has undertaken.

III. ARKANSAS'S REFORM—A GIANT STEP BEYOND PLACING “SLIP OPINIONS” ONLINE

Like many other appellate courts in this country, those in Arkansas began releasing their opinions to a public website

28. Ariz. R. Civ. App. P. 13(a)(6) (West 2011).

29. In addition to the Supreme Court, the list includes Arkansas, Georgia, Illinois, Kansas, Massachusetts, Michigan, North Carolina, Nebraska, New York, Ohio, Vermont, and Virginia. Some states have a reporter who no longer prepares reports. The North Dakota Century Code still provides that “[t]he judges of the supreme court shall appoint a person who is experienced and learned in the law and of known integrity to act as supreme court reporter, state law librarian, and legislative reference librarian.” N.D. Cent. Code Ann. § 27-04-01 (West 2011). Although publication of the *North Dakota Reports* ceased in 1953, the state law librarian is still formally also the supreme court reporter. *Id.* In two states that no longer publish their own reports, Tennessee and West Virginia, the attorney general is still, under the constitution, *ex officio*, the reporter. *See* Tenn. Const. art. 6, § 5 (requiring the state supreme court to appoint an “Attorney General and Reporter for the State”); W. Va. Const. art. vii, § 7(1) (providing that the attorney general shall be “ex officio reporter of the court of appeals”).

30. California, New Hampshire, and Washington fall in this category.

more than a decade ago.³¹ Today the judicial branch in most states maintains a site that serves a variety of public information and educational functions including access to the jurisdiction's most recent appellate decisions. In the federal system a statute requires each court to place "the substance of all written opinions" at a public site.³² Typically, court websites provide access to opinions on the day of release. In a majority of states and in the federal courts these original "slip opinions" are thereafter retained in an open archive. As a way of furnishing prompt detail on appellate court output this form of distribution holds many advantages over its print precursors. It has definitely reduced the burden on court public affairs offices. However, as implemented in Arkansas prior to 2009 and in most other jurisdictions still, these sites fall far short of being a potential replacement for print law reports. What sets Arkansas's reform apart are several discrete steps its judiciary and reporter have taken to change that.

The web-accessible versions of three decisions rendered by other state courts during a single week in June 2009 illustrate the deficiencies that prevent most court websites, in their present form, from displacing print law reports:

- The Kansas Supreme Court releases decisions on Fridays. Those posted to the Kansas Judicial Branch website on Friday, June 11, included one laying out the standard of proof that an insurer must meet when seeking to rescind a policy on grounds of fraud.³³
- Decision day for the Florida Supreme Court is Thursday. Thursday, June 10, the court posted a

31. The decision archive at the Arkansas judicial website begins with decisions released on January 16, 1996. See Arkansas Judiciary, <http://courts.arkansas.gov/> (click on "Courts"; click on "Supreme Court"; click on "Link to Opinions"; click on "Supreme Court Opinions Spring Term 1996 to Fall Term 2008"; scroll to bottom of page and click on "Spring Term 1996, January–July" under "Supreme Court").

32. E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2910, 2913 (2002).

33. *Chism v. Protective Life Insur. Co.*, No. 99,291 (Kan. June 11, 2010), <http://www.kscourts.org/Cases-and-Opinions/Opinions/SupCt2010/20100611/99291.pdf> (accessed June 10, 2011; copy on file with Journal of Appellate Practice and Process).

decision in a lawyer-discipline case, outlining the responsibility that real estate lawyers bear in overseeing access by others to escrow accounts.³⁴

- The same day, June 10, the California Supreme Court resolved a circuit split on an issue of bail forfeiture.³⁵ The decision was promptly uploaded to the state judiciary's site.

For a person, entity, or group following one of these specific cases, monitoring any of the areas of law they touch upon or the work of the state courts in question, immediate web access to these decisions is an incredible boon. Moreover, redistributors, regardless of type or purpose, are free to harvest this legal data, add value, and publish. Yet because of enduring print-anchored practices and entrenched interests, both commercial and bureaucratic, the California, Florida, and Kansas judicial websites store these and other opinions in a form that is seriously flawed.

To begin, as initially posted and subsequently archived, the opinions lack critical information that deciding courts and others will, shortly after release, insist be included in any citing reference—namely, permanent citations. In addition the decision texts are maintained in the form in which they were initially released, that is without the revisions emerging from the subsequent editorial review process that takes place during law report publication, as sets of decisions are moved from “slips” into paperback “advance sheets” and only much later into bound law reports. All three court sites warn of their inadequacy. The Kansas language is typical:

Slip opinions . . . 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

34. *Fla. B. Assn. v. Hines*, No. SC08-2297 (Fla. June 10, 2010), <http://www.florida.supremecourt.org/decisions/2010/sc08-2297.pdf> (accessed June 10, 2011; copy on file with Journal of Appellate Practice and Process).

35. *People v. Ind. Lumbermens Mutual Insur. Co.*, No. S175907 (Cal. June 10, 2010), <http://www.courtinfo.ca.gov/opinions/archive/S175907.PDF> (accessed July 1, 2011; copy on file with Journal of Appellate Practice and Process).

texts of the opinions of the Kansas Supreme Court and the Kansas Court of Appeals.³⁶

Until recently, the California warning was, if anything, more emphatic, beginning with “This archive is **not** provided for purposes of legal research.”³⁷ Florida, being among the numerous states relying on the National Reporter System for law report publication alerts those downloading opinions from its judicial site: “These opinions are . . . subject to formal revision before publication in the Southern Reporter, 3rd Series.”³⁸ Furthermore, Florida’s rules of appellate procedure require citation using volume and page numbers drawn from that commercial reporter.³⁹

To transform its web repository of decisions into an effective replacement for printed law reports the Arkansas judiciary had, at a minimum, to address those deficiencies that, prior to 2009, its site shared with the websites of California, Florida, Kansas, and most other jurisdictions in the United States.⁴⁰

36. Kansas Judicial Branch, *Kansas Supreme Court and Kansas Court of Appeals Opinions*, <http://www.kscourts.org/Cases-and-Opinions/opinions> (accessed June 10, 2011; copy on file with Journal of Appellate Practice and Process). For legal professionals, the site need not add “and also for the volume and page number of any decision or passage within it.” Similar language once appeared at the Arkansas site. See Timothy N. Holthoff, *Finding Case Information on the Arkansas Judiciary Home Page*, 35 Ark. Law. 8, 8 (Winter 2000).

37. California Courts, *Opinions of Supreme Court and Courts of Appeal: Archive*, <http://web.archive.org/web/20101117054247/http://www.courtinfo.ca.gov/opinions/opinionarch.htm> (emphasis in original) (copy on file with Journal of Appellate Practice and Process). Currently, the site simply explains that the archived slip opinions “do not reflect enhancement, editing and correction,” while Official Reports contain “the citable, published opinions that reflect postfiling corrections.” California Courts, *Opinions—Published Opinions*, <http://www.courts.ca.gov/opinions-slip.htm> (accessed July 1, 2011; copy on file with Journal of Appellate Practice and Process).

38. Florida Supreme Court, *2011 Supreme Court Opinions*, <http://www.floridasupremecourt.org/decisions/opinions.shtml> (accessed June 10, 2011; copy on file with Journal of Appellate Practice and Process).

39. See Fla. R. App. P. 9.800.

40. The slip opinions archived at the Arkansas Judiciary site did include some updating at the time headnotes were added by the reporter to the prior week’s decisions, but with limited exceptions subsequent editorial changes were not incorporated. See Holthoff, *supra* n. 36, at 8.

A. Establishing a Means of Citation Independent of Print or Publication Channel and Posting Final Edited Opinions

Following the cut-off date for volume 375 of the *Arkansas Reports*, individual decisions and passages within them could no longer be identified by publicly assigned volume and page numbers. The solution? Adoption of a citation system that employs identifiers attached to decisions at the point of initial release, one that does not rely on or wait for publication in a set of books. In taking this step, Arkansas's appellate courts joined the roster of those in the United States and elsewhere implementing medium- and vendor-neutral citation.⁴¹ The idea was not new to the state. Key members of the ABA Task Force and American Association of Law Libraries committee recommending this approach during the 1990s were from Arkansas.⁴² They and others led the Arkansas Bar Association to urge its adoption on the Arkansas Supreme Court over a decade ago.⁴³

Because Arkansas decisions are released before they have received full editorial scrutiny from the Reporter's office, the preliminary or slip versions of opinions initially stored at the revamped website must later be replaced by the final version. The rule establishing Arkansas's new case law regime provides:

After an opinion is announced, the Reporter shall post a preliminary report of the opinion's text on the website. This version is subject to editorial corrections. After the mandate has issued, and any needed editorial corrections are made, the Reporter shall replace the preliminary report with an . . . electronic file containing the permanent and final report of the decision.⁴⁴

41. See generally Peter W. Martin, *Neutral Citation, Court Web Sites, and Access to Authoritative Case Law*, 99 L. Libr. J. 329 (2006).

42. See Lynn Foster, *Medium-Neutral Citation Form: It's Here*, 32 Ark. Law. 6, 6 (Winter 1997).

43. *Id.* at 7.

44. Ark. Sup. Ct. & Ct. of App. R. 5-2(b)(2) (available at http://courts.arkansas.gov/court_opinions/sc/2009a/20090528/published/09-540.pdf) (accessed June 10, 2011; copy on file with Journal of Appellate Practice and Process).

B. Designating the Electronic File as Official and Providing Effective Means of Authentication

Had Arkansas done no more, its 2009 reform would have been commendable but not unique. Beginning as early as 1993, twelve states had preceded Arkansas in adopting some form of medium- and vendor-neutral citation. A few of that number, although not a majority, had also implemented the practice of archiving the final versions of all precedential decisions at a public website.⁴⁵ Concededly, none of them had declared the resulting court-held files to be the “official” versions of opinions or implemented these measures as an explicit and direct means of ending reliance on print law reports.⁴⁶ However, the Arkansas Judicial Branch took two further steps that mark it as a true pathbreaker. First, it provided specifically that the “preliminary report” of a decision posted at the time of release should, once the period for judicial modification and editorial revision had passed, be replaced by the final version as embodied in an “authenticated . . . electronic file.”⁴⁷ While the court rule using the term does not explain this authentication requirement, features of the Reporter’s implementation illustrate its fundamental quality. Preliminary versions of decisions are watermarked so that the notation “SLIP OPINION” appears on every page of the document file. Final versions carry, in the same place, an image of the deciding court’s seal, together with a digital signature applied by the Reporter’s office. The latter provides assurance through technological means that the opinion file has not been modified since being released in final form by the Reporter on a specified date. Arkansas is the first court system in the country to provide this level of assurance of the authoritativeness and quality of its online legal data.⁴⁸

45. See Martin, *supra* n. 41, at 343.

46. With the exception of Ohio and now Illinois, all other neutral citation jurisdictions in the United States fall in the group that abandoned public production of law reports in the latter half of the twentieth century.

47. Ark. Sup. Ct. & Ct. of App. Rule 5-2(b)(2).

48. When Arkansas committed to this approach, the state coming closest was Ohio. The decisions at the site maintained by its reporter of decisions do contain a digital signature. See The Supreme Court of Ohio & the Ohio Judicial System, *Office of the Reporter*, <http://www.supremecourt.ohio.gov/Rod> (click on “Opinions and Announcements Search for Supreme Court,” then click on any opinion to open that

C. Eliminating the “Unpublished” Decision Category

The Arkansas Supreme Court also took the jettisoning of print reports as furnishing sufficient rationale for it to heed calls from both bar and state legislature that lawyers and judges be allowed to cite “unpublished” decisions.⁴⁹ The expense of print dissemination had led the Arkansas appellate courts, like many others, to limit the number of decisions they published and to refuse to consider the rest as binding precedent. With the cost barrier removed, the Arkansas Supreme Court concluded that all its decisions and, more importantly, all those of the Arkansas Court of Appeals should, going forward, be citable as precedent. Decisions issued as “unpublished” prior to July 1, 2009, may not be cited, but “[e]very Supreme Court and Court of Appeals opinion issued after [that date] is precedent and may be relied upon and cited by any party in any proceeding.”⁵⁰

In summary, while individual components of Arkansas’s new case law publication system can be found in other United States jurisdictions, nowhere else in this country has electronic case law reporting so thoroughly and officially replaced print. That invites such questions as:

- What prompted Arkansas’s decision to change?

document and view the signature) (accessed June 12, 2011; copy of main page on file with Journal of Appellate Practice and Process). Following Arkansas’s lead, the New Mexico Compilation Commission began authenticating the final electronic versions of that state’s published decisions in 2011. See New Mexico Compilation Commission, *New Mexico Supreme Court, Current Year Opinions*, <http://www.nmcompcomm.us/nmcases/NMSCCurrent.aspx> (click on any opinion to open that document and view the signature) (accessed June 12, 2011; copy of main page on file with Journal of Appellate Practice and Process).

49. In making this change, the Arkansas Supreme Court was, it explained, acceding to recommendations from its own Committee on Civil Practice and the Arkansas Bar Association and the “view” of the state legislature. See *In re Rule 5-2*, *supra* n. 7. As that view was expressed in a statute purporting to amend the relevant court rule, the supreme court’s acquiescence on the point headed off a potential separation-of-powers dispute. See An Act to Amend Supreme Court Rule 5-2, 2009 Ark. Acts 162 (available at <http://www.arkleg.state.ar.us/assembly/2009/R/Acts/Act162.pdf>) (accessed June 12, 2011; copy on file with Journal of Appellate Practice and Process). See generally Jillian R. Jones, Student Author, *Bound by Precedent: Arkansas Practitioners Win the Debate over Unpublished Decisions*, 63 Ark. L. Rev. 619 (2010).

50. Ark. Sup. Ct. & Ct. of App. Rule 5-2(c).

- Which other jurisdictions are most (or least) likely to follow?
- How useful a model does Arkansas provide for other jurisdictions?
- What issues does its experience to date reveal?

IV. WHAT PROMPTED ARKANSAS TO TAKE THIS RADICAL STEP—ESSENTIAL AND FAVORABLE CONDITIONS

A. The Prospect of Substantial and Direct Savings to the Judicial Budget

As is true in other states that continued to take responsibility for the publication of appellate court decisions into the twenty-first century, Arkansas's framework for law report production and distribution was cemented in statute. Legislation prescribed not only the institutional structure but also the method. Prior to amendment in 2009, that legislation required publication in bound volumes, each containing headnotes, an index, title page, and alphabetical list of cases. It specified the maximum size for each volume (two and a half inches, an expanded width the judiciary achieved through legislative amendment in 1995),⁵¹ placed publication under the supervision of the Reporter, required that certain terms be included in the publication contract, and directed the Administrative Office of the Courts to distribute volumes at no cost to a lengthy list of officials and public institutions throughout the state, to exchange them with "other states and countries" for their comparable reports, and to sell them on a

51. See Ark. Code Ann. § 25-18-218(a) (Lexis 1995) (providing that "[t]he reports of the Supreme Court and the Court of Appeals shall each be printed in continuous paging until there shall be sufficient matter to form a volume, the text block to be no thicker than two and one-half inches (2 ½'')") and indicating in a historical note that "[t]he 1995 amendment rewrote (a)"). Prior to that amendment, the statute, strictly interpreted, mandated a thinner volume. See Ark. Code Ann. § 25-18-218 (Lexis 1994) (specifying "no thicker than the current volumes," which at the time of enactment measured 1¾ inches). The increase in width achieved cost savings by reducing the number of volumes per year. See Memo. from Marlo M. Bush, Reporter, Ark. S. Ct., to Robert L. Brown, J., Ark. S. Ct., *Re: Printing Contract* (May 27, 1994) (copy on file with author).

cost-recovery basis to others.⁵² Decisions of the Arkansas Supreme Court “not of sufficient importance to justify the expense” could, upon the concurrence of the Chief Justice, be withheld from publication.⁵³ Decisions of the intermediate appellate court, the Arkansas Court of Appeals, were to be published only when that court determined publication to be warranted by their resolution of “novel or unusual questions.”⁵⁴ General procurement statutes established the ground rules for letting the necessary printing contract.⁵⁵ Critically, legislation also established the budgetary framework for law report publication, which, as will be explained shortly, was a key factor inducing the judiciary’s decision to switch to electronic publication.

Since the process of law report publication was mandated in detail by statute, the substitution of electronic law reports for print required legislative authorization. The necessary amendments were, however, the direct result of judicial initiative. Possible conversion from print to official electronic publication had been under review by the Arkansas Supreme Court for some time. It first floated the idea in a 2003 communication that referred to the posting of appellate decisions to the judiciary website, the steadily increasing reliance by lawyers and judges on electronic versions of the reports, and growing budget constraints. The court invited comments on how to proceed “while keeping faith with the tradition of nearly two centuries of official law reporting.”⁵⁶ Three years later the court warned of the likelihood of change in view of the law reports’ shrinking subscriber base (fewer than 100) and resulting budgetary concerns.⁵⁷ Finally, in late 2008, the court backed a

52. Ark. Code Ann. §§ 25-18-210 (Lexis 2008) (titled “Supreme Court and Court of Appeals Reports—Distribution”), 25-18-220 (Lexis 2008) (titled “Exchange of Books with Federal, State, and Foreign Entities”) (prior to amendment by 2009 Ark. Acts 221).

53. Ark. Code Ann. § 16-11-203 (repealed 2009).

54. Ark. Sup. Ct. and Ct. of App. R. 5-2(c) (prior to the 2009 amendment). See *In re Rule 5-2*, *supra* n. 7.

55. See Memo. from William B. Jones, Jr., Reporter, Ark. S. Ct., to Robert L. Brown, J., Ark. S. Ct., *Re: Arkansas Advance Reports and the Printing Contract* (Jan. 18, 1996; updated Feb. 16, 1996) (copy on file with author).

56. See *In re Publication of the Arkansas Reports*, 2003 Ark. LEXIS 208 (Apr. 17, 2003).

57. See *In re Publication of the Arkansas Reports*, 2006 Ark. LEXIS 428 (July 29, 2006).

bill, introduced in the Arkansas General Assembly, to remove the print-specifying provisions from the pertinent statute and replace them with language authorizing “publication and distribution of the decisions of the Supreme Court and the Court of Appeals in such format and medium as the Supreme Court may direct.”⁵⁸ In the ensuing hearings the proposed legislation was urged upon the House Judiciary Committee by a justice of the Arkansas Supreme Court. With cost savings as the justification and no opposition, the bill easily won passage.⁵⁹

In May 2009 the Arkansas Supreme Court acted on this new authority, announcing that print publication of the *Arkansas Reports* would end with volume 375 and that the “official report” of all decisions issued after the cut-off date for that final volume, February 14, 2009, would be the “electronic file created, authenticated, secured, and maintained by the Reporter of Decisions on the Arkansas Judiciary website.”⁶⁰ As required by the authorizing legislation, the Court directed the Reporter to create and maintain a free database of decisions on the Internet, holding open the possibility of “an advanced search engine with additional features” limited to fee-paying subscribers.⁶¹ Roughly a year later, the final bound volume of the *Arkansas Reports* was shipped to 100 or so paid subscribers and the approximately 200 public officials and institutions on the statutory list, and the new official case law database was brought online.⁶²

Arkansas’s budgetary framework for law report publication and method of contracting exposed the wastefulness of

58. Ark. H. 1033, 87th Gen. Assembly, Reg. Sess. (Jan. 12, 2009) (eventually enrolled as 2009 Ark. Acts 221 and then codified in Ark. Code Ann. §§ 16-11-202, 16-11-204, 16-11-205, 16-11-214, & 16-11-218 (Lexis 2011)).

59. See Charlie Frago, *Courts’ Web Files Are First in Nation, State Dumps Print Versions of Rulings*, Ark. Democrat-Gazette 15 (Little Rock) (Sept. 20, 2009).

60. Ark. Sup. Ct. & Ct. of App. R. 5–2(b)(1).

61. Ark. S. Ct. & Ct. of App. R. 5–2(a).

62. See *Final Bound Volume of Arkansas Reports and Arkansas Appellate Reports Issued*, Ark. Admin. Off. of the Cts. News Rel. (June 28, 2010), http://courts.arkansas.gov/Press_Releases/06292010_Arkansas_Reports.pdf (accessed June 14, 2011; copy on file with Journal of Appellate Practice and Process) [hereinafter “Arkansas Reports Press Release”]. The database of Supreme Court decisions is online at http://courts.state.ar.us/opinions/sc_opinions_list.cfm (accessed June 14, 2011; copy of main page on file with Journal of Appellate Practice & Process); that of Court of Appeals decisions at http://courts.state.ar.us/opinions/coa_opinions_list.cfm. (accessed June 14, 2011; copy of main page on file with Journal of Appellate Practice & Process).

continued reliance on print in an unusually stark way. As previously noted, in a majority of United States jurisdictions, state and federal, the publication of law reports is no longer a public function. For them, establishment of an official online source of case law data holds no prospect of direct cost savings. Their appellate decisions are simply turned over to commercial publishers, print and electronic, for redistribution. By law in some instances, by virtue of deeply embedded professional practice in others, the print volumes of a single series of commercially produced law reports contain the benchmark or archival version of opinions, even as judges and other state employees working with case law and other legal materials have shifted overwhelmingly to electronic sources. Under these circumstances, the added costs to the public purse and public interest more generally of clinging to a print-centric system are in all probability no less than those that led Arkansas to its reform, but they are diffuse and not a discrete budget item.

Over the fifteen-year period beginning in 1995, the cost per copy of producing a single volume of the *Arkansas Reports* rose from \$29.50 to \$84.00.⁶³ Between 2001 and 2005 it soared as high as \$134.90.⁶⁴ The price to lawyers, libraries, and other private purchasers, required by law to be set on a “cost recovery” basis, corresponded to those figures. Over this period, sales dropped from 263 for volume 319 to 52 for volume 375.⁶⁵ The number of copies printed for “free” distribution to the judiciary, other public offices, educational institutions, and entities specified by statute also declined over this period, although far less dramatically—from 375 in 1995 to 349 in 2010.⁶⁶ In order to cover possible back orders and replace lost volumes, the print runs ordered by the judicial branch consistently exceeded immediate demand. From 2003 on the number of copies contracted for remained fixed at 575 even as private sales dropped by two-thirds. As a consequence, the state’s inventory of recent volumes grew to exceed any foreseeable need (e.g., 195 copies of volume 374, 174 copies of

63. E-mail from Susan Williams, Rptr. Of Dec., S. Ct. of Ark., to author (Aug. 25, 2010, 2:51 p.m. EDT) (on file with author).

64. *Id.*

65. *Id.*

66. *Id.*

volume 375). As experienced by a state judiciary pressed for funds, law report publication was a relentlessly growing expenditure yielding a declining return.

For a total of approximately \$40,000.00 plus \$2,000.00 in shipping costs per volume, a sum approaching \$200,000.00 per year, the courts acquired a large inventory of unsold copies having little or no value and distribution of print law reports throughout a judiciary that had come to rely instead on commercial online services, another significant budget item. The arrangement also placed the judiciary in the position of procuring law report volumes for and distributing them to a diversity of other state-funded activities at a true cost of over \$100.00 per copy, all of that being borne by the judicial budget rather than those of the receiving agencies. No doubt when this pattern of internal public sector distribution was first legislated, it was seen as a cost-effective way of contracting for a key component of the legal information materials required by judges, legislators, legal offices of state and local government, and such other publicly funded activities as the University of Arkansas. But by 2009 that view had slim connection with reality.

While the Arkansas statute focused completely on the production and distribution of the final, bound volumes of the *Arkansas Reports*, the judiciary's publication contract also provided for interim advance sheets. Following a century-old pattern of American case law publication, the contract called for the publisher to print and distribute sets of "slip" opinions, compiled, edited, and head-noted by the Reporter's office, in paperbound volumes, each covering roughly one week. This series, denominated the *Arkansas Advance Reports*, anticipated the volume designation and pagination of the final bound volumes and thus furnished citation parameters for the cases it contained that would not change when they were later compiled in the larger bound volumes of the *Arkansas Reports* and *Arkansas Appellate Reports*. While the Arkansas official report contract required preparation of these interim volumes (approximately forty per year), called for delivery of fifty copies to the judiciary at no charge beyond payment for the final bound volumes, and set limits on the price charged others, it left the marketing, sale, and distribution of this interim publication to

others in the hands of the publisher. Online legal information sources including the judiciary's own website had long since undercut the importance of such a print "current awareness" service.⁶⁷ By 2009 elimination of the *Arkansas Advance Reports* appears to have become a matter of little concern to the state's judges and lawyers.

To summarize, by 2009 the Arkansas Supreme Court needed little or no prompting to view law report publication as a significant budget item that yielded scant benefit for the judiciary and other public officials working with state law or the lawyers and public of the state. Furthermore, it was not difficult for the court to see enhancement of its public access website, by then holding over a dozen years of past decisions, as a cost-effective substitute. Had it confronted the same fiscal challenge in the prior century, Arkansas could easily have been content, as so many other states then were, to leave "official" case law dissemination to West's National Reporter System. But with the vast majority of the state's judges and lawyers doing case law research on computers, that had become a far less defensible choice.

B. Other Favorable Factors

1. A Bench and Bar Comfortable with Computer-Based Case Law Research

The initial spread of computer-based case law research in the United States took place most rapidly in a segment of the legal profession barely represented in Arkansas. The state is, after all, sparsely populated and served by a relatively small number of lawyers. Moreover, very few of the lawyers it has practice in large firms. Nationwide over thirty percent of practicing lawyers work in firms having more than ten lawyers, more than twenty-four percent in firms having more than twenty lawyers.⁶⁸ The comparable percentages in California and New

67. A 1999 article in *The Arkansas Lawyer* advised readers that the court site rendered a subscription to the advance sheets a waste of money. Alisa Thorne Corke, *Web Appeal: Utilizing the Internet*, 34 Ark. Law. 8, 8 (Fall 1999).

68. Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in 2000* 29 (Am. B. Found. 2004).

York are higher.⁶⁹ In Arkansas they are twelve and six percent.⁷⁰ Over sixty-one percent of Arkansas attorneys practice alone.⁷¹ It follows that as a market for commercial legal information products and services Arkansas is and has always been highly sensitive to price. During the legal profession's dramatic take-up of computer-based research in the 1990s Arkansas lawyers were not drawn in large numbers to the comprehensive but costly fee-for-use services of Westlaw and Lexis, which dominated the large-firm market. From an early date, however, they had a first-rate, less costly, local alternative. The nation's first CD-ROM collection of state primary legal materials was produced by an Arkansas lawyer.⁷² *CaseBase—Arkansas*, released in January 1990,⁷³ became the model for a succession of disks covering other states created and marketed by Law Office Information Systems (LOIS) of Van Buren, Arkansas. In 1996 Loislaw moved to the web.⁷⁴ Thanks to LOIS and more recent legal information entrants offering collections and prices tailored to the needs and budgets of solo practitioners and small-firm lawyers, Arkansas attorneys have been not at all slow in turning from print reports to electronic media for case law research.⁷⁵ The steady drop in demand for the *Arkansas Reports* from the mid-1990s on was a direct result. Competition among smaller electronic publishers was encouraged by the court website, which began in 1996 to offer all "published" decisions as they were rendered in full text, complete with the headnotes prepared

69. *Id.* at 51, 163.

70. *Id.* at 47.

71. *Id.*

72. See Kendall F. Svengalis, *Legal Information Buyer's Guide and Reference Manual* 2005 149 (R.I. Lawpress 2005).

73. See Kyle D. Parker, *CASEBASE: A Long Time in the Making*, 24 Ark. Law. 19, 19 (Apr. 1990).

74. See Svengalis, *supra* n. 72, at 150.

75. The LOIS CD-ROM for the state included Arkansas Bar Association publications and was enthusiastically endorsed by its executive director. See William A. Martin, "Cyberspace" and the Law, 29 Ark. Law. 6, 6 (Fall 1995). By 1998 a membership survey by the Arkansas Bar Association found that seventy-eight percent of respondents used a CD-ROM legal research product; fifty-three percent, a commercial online service. *Membership Survey Results*, 34 Ark. Law. 20, 21 (Winter 1999). The LOIS disk forced a huge reduction in the price of a similar West compilation and together they cut dramatically into the demand for the *South Western Reporter* in print. Subscriptions dropped over twenty percent in two years. See John J. Oslund, *Which Direction for West?* Star-Tribune 1D (Minneapolis-St. Paul) (Nov. 13, 1995).

by the Reporter's office.⁷⁶ In 2003 when the Arkansas Supreme Court first floated the idea of ending print reports and invited comments, those it received were largely negative, but the total count, pro and con, was only nineteen.⁷⁷

2. Neither a Legislative Mandate nor an Entrenched Practice Requiring that Law Reports Be Copyrighted or that Their Redistribution Be Restricted by Other Means

For a limited period during the early part of the twentieth century, the *Arkansas Reports* carried a copyright notice. The practice ended with volume 172, published in 1927. Most states still publishing their own law reports continue to assert a copyright in them. Often that is directed by statute.⁷⁸ Even states that concede that their proprietary claim does not extend to the opinion texts or the page numbers necessary to cite portions of them persist in the practice, presumably to control the dissemination of headnotes and other editorial additions. Because of the difficulty of separating out such editorial additions, those claims, encouraged by West's aggressive use of copyright to protect its National Reporter System, increase both costs and risks for new entrants into the field of case law dissemination. Arkansas's unambiguous stance on the public domain status of its case law made the state a hospitable location for new forms of electronic publication during the 1990s. It also led the Reporter, early on, to release headnotes as well as decisions at the judicial website, and aligned perfectly with the

76. In providing the headnotes the Arkansas site was and continues to be unique. In all other states such editorial additions by a reporter's office are reserved for publication in the print reports to become part of the copyright-protected compilation. *See e.g.* West, *New York Official Reports Service*, <http://government.westlaw.com/nyofficial> (noting that "Copyrighted features of the Official Reports (e.g., headnotes, abstracts, summaries and points of counsel) are not included in this service") (accessed June 23, 2011; copy on file with Journal of Appellate Practice and Process).

77. Frago, *supra* n. 59.

78. *See e.g.* Ga. Code Ann. § 50-18-34 (2011) ("The reports shall be copyrighted and the copyright shall belong to the state."); Mich. Comp. Laws § 26.6 (2011) (requiring that the contract with the person publishing the reports should provide "[t]hat he shall take out no copyright except to the secretary of state for the use and disposal of the state, upon any volume published under such contract"); Neb. Rev. Stat. § 24-212 (2010) (providing that "[t]he copyright of each volume shall be entered by the reporter for the benefit of the state").

step it took in 2009. Arkansas's official case law database will, like its print predecessor, be open to the public for any and all uses, including commercial redistribution.

3. A Publication Process Still Managed by a Reporter and Not Heavily Dependent on a Commercial Publisher for Post-Release Editorial Review

As previously explained, Arkansas was among the minority of United States jurisdictions that entered the digital age and the twenty-first century with a reporter, a public official responsible for distributing appellate decisions in final, official form. In a majority of states law report publication and with it the position of reporter disappeared at some point during the second half of the twentieth century.

During the nineteenth century and early twentieth, the office of reporter of decisions was so closely associated with the judicial function and dissemination of precedent that many state constitutions listed the office.⁷⁹ One of them was Michigan's. In 1881 the Justices of the Supreme Court of Michigan refused to comply with a legislative mandate that they viewed as encroaching on the Reporter's domain. Wrote the court:

Article vi., sec. 10 of the Constitution gives the Supreme Court power to appoint a Reporter of its decisions. At the time the Constitution was framed, and adopted by the people, the duties of Reporter of the decisions of a court were, and from time immemorial had been, well known. In providing in the Constitution for such an officer, the usual and customary duties were contemplated as belonging to

79. Twenty state constitutions, the vast majority of them written in the second half of the nineteenth century, provided for the appointment of a reporter of appellate decisions. To this day, reporter remains a "constitutional" office in nine of them. See John Joseph Wallis, *NBER/University of Maryland State Constitution Project*, <http://www.stateconstitutions.umd.edu> (click "Search Constitutions" and use search boxes that appear to search individual state constitutions for the word "reporter") (accessed June 23, 2011; copy of main page on file with Journal of Appellate Practice and Process). In addition to Arkansas, the current list includes Florida, Kansas, Minnesota, New Mexico, South Carolina, Tennessee, Washington, and West Virginia. In two of those states, the post is, under the constitution, held *ex officio* by the attorney general. See Tenn. Const. art. 6, § 5 (providing for an "Attorney General and Reporter for the State"); W. Va. Const. art. VII, § 1 (listing members of the executive department and noting that the attorney general "shall be ex officio reporter of the court of appeals").

the office and inseparably connected therewith: so well was this understood that they were neither pointed out in that instrument, nor were they, as in many other cases, left to be prescribed by the Legislature.⁸⁰

The legal question that forced the court to consider the duties of a reporter of decisions is suggested by the style of the opinion in the *Michigan Reports*: “In the Matter of Head Notes to the Opinions of the Supreme Court.” The Michigan Legislature had passed an act requiring supreme court justices to “prepare and file a syllabus to each and every opinion.” The court explained that it could not comply because a principal duty of the constitutional office of reporter was to prepare headnotes. Legislation shifting that responsibility to the court was tantamount to “the abolishment of the office, a power not within the province of the legislature.”⁸¹

A second ground for the court’s decision rested on the necessity of copyrighting the *Michigan Reports*. While a section of the state constitution placed the court’s decisions in the public domain “free for publication by any person,” legislation called for the *Michigan Reports* to be copyrighted in the name of the state so that the firm that contracted to print and sell the official reports would be protected against competition.⁸² Were the justices to prepare headnotes, reasoned the court, they too would be public domain. In the court’s view, the publication arrangements for the official reports depended critically on their including the copyrightable and copyrighted headnotes prepared by the Reporter.⁸³

While asserting that the role of a reporter of decisions had been established from time immemorial, the Michigan court did acknowledge that courts themselves had already, by evolving practice, removed duties from that office. For example, the court pointed out, it had become customary “for the Judges in preparing their opinions, to incorporate therein a statement of facts.” Remove both the preparation of that statement and headnote preparation from the Reporter and, wrote the court, “there . . . would be nothing of importance remaining of an

80. *In re Head Notes to Opinions*, 43 Mich. 641, 642–43 (1881).

81. *Id.* at 643.

82. *Id.* at 643–44.

83. *See id.*

intellectual character for a Reporter to perform, beyond the capacity of an ordinary proof-reader.”⁸⁴ Earlier judicial reforms had largely ended the practice of appellate judges delivering oral opinions that a reporter had to be present to note down and subsequently write out for publication.

As previously discussed, the number of United States jurisdictions in which headnote preparation remains with a public reporter of decisions has shrunk to a small number. Furthermore, as most caselaw research is done on commercial services that either limit themselves to the public domain judicial texts or substitute their own headnotes for those prepared by state officials, even in jurisdictions where a reporter remains responsible for their production, official report headnotes have become largely vestigial. That focuses attention on the editorial review function that the Michigan court deprecated so long ago. By one account the tasks it entails, at least in a large and complex judicial system, are substantial and the results vitally important. Writing in 1995, New York’s Reporter asserted:

My . . . office corrects several thousand errors of a substantive nature each year, and makes many thousands of corrections of a stylistic nature. Thus, the final edited text which is officially reported may be significantly different than the unedited slip opinions initially released by the courts.⁸⁵

The work flows of many appellate courts in this country have come to depend heavily on the editorial staff of West or, in a few cases, some other commercial publisher for this quality assurance work. These employees of the commercial publishers, not court staff, perform important forms of editorial review (subject, it always explained, to judicial approval) during the post-release period while decisions move from “slip opinion” form through advance sheets to final bound volumes. Where this dependence exists, breaking out of print necessarily requires either giving permanent status to decisions that have not been rigorously edited and cite-checked or building up editorial

84. *Id.* at 643.

85. Frederick A. Muller, *A Dissenting Opinion*, in Task Force on Citation Formats, Am. Assn. of Law Libraries, *Final Report* (1995), reprinted in 87 Law. Libr. J. 580, 624, 625–26 (1995).

capacity in house. Arkansas's pattern of print law report production retained full editorial responsibility within the judiciary in the Reporter's office, so the state could shift the medium of case law publication without drastic adjustment of work flow or internal editorial practices.⁸⁶

V. MIGHT OTHERS SOON FOLLOW ARKANSAS'S LEAD?

A. States Still Publishing Their Own Law Reports

1. Those with Larger Populations, More Judges and Lawyers

It might, at first, seem that the savings and other benefits that led Arkansas to replace print with electronic case law publication would be compounded in states with much larger judicial systems, more lawyers, law libraries, and people. Arkansas is not a populous state, ranking in the bottom two-fifths of the states in total population and population density.⁸⁷ Its median household income is among the very lowest in the country, as is its ratio of lawyers per capita. There are only about 5,500 lawyers in active practice throughout the entire state⁸⁸ and 324 full-time judges.⁸⁹ If the Arkansas judicial branch could realistically project budget relief of some \$200,000.00 a year by switching from print law reports to an official case law database

86. The authorizing legislation did add one position in the reporter's office, presumably in recognition that the dramatic increase in the number of Court of Appeals decisions that would count as precedent added substantially to the reporter's editorial burden. See Ark. Code Ann. § 16-11-204 (Lexis 2011) (authorizing the employment of "an assistant to aid the Reporter in the preparation of the headnotes for the published decisions of the Supreme Court and the Court of Appeals and in the supervision of the distribution and publication of the decisions of the Supreme Court and the Court of Appeals").

87. See e.g. U.S. Census Bureau, *American Fact Finder*, Geographic Comparison Table GCT-PH1: Population, Housing Units, Area, and Density: 2000, http://www.census.gov/statab/ccdb/cc07_tabA1.pdf (indicating that Arkansas had a population of 2,673,398 and a population density of 51.4 per square mile according to the 2000 census, while New York and California had populations of 18,976,821 and 33,871,653, respectively, and corresponding population densities of 402.4 and 218.1 per square mile).

88. See ABA, *Statistics on the Legal Profession, National Lawyer Population by State* (2011), http://www.americanbar.org/content/dam/aba/administrative/market_research/2011_national_lawyer_by_state.authcheckdam.pdf.

89. See National Center for State Courts, *Arkansas Court Structure as of Calendar Year 2008*, http://www.ncsconline.org/d_research/Ct_Struct/include/AR.pdf (accessed June 24, 2011; copy on file with Journal of Appellate Practice and Process).

could not states like New York and California save many multiples of that amount? Both are among the states with a reporter of decisions still responsible for publishing official law reports. Yet features of those states' judicial structures and the fiscal framework for publication of their respective law reports upset this reasonable assumption. Indeed, the very scale of the court systems and demand for case law in these jurisdictions can be seen as reducing the potential for direct gain to their judicial budgets from an Arkansas-like reform.

That is because New York and California have so far represented such important legal information markets to the major vendors that contracts for publication of those states' official law reports have, over time, become a means by which their judiciaries grant one publisher privileged access to the final, citable version of their case law and receive tangible budget relief in return. Both New York and California have "no cost" contracts. That is they pay nothing to the commercial publisher responsible for producing and distributing their print law reports. Valuable goods and services flow the other direction in the form of computer equipment, free subscriptions to advance sheets and bound volumes, access to the publisher's online version for all judges, and, in the case of California, the contractor's assuming much of the editorial work previously carried out by state staff. New York and California also secure maintenance of public databases of past decisions from their commercial publishers at no cost. Both allow their publishers to remove critical citation information from the decisions held at these outsourced sites and restrict use to personal, non-commercial purposes, resulting in services that reinforce rather than undercut the publishers' fee-based offerings.

In the case of those two states, at least, the publication contracts are only facially directed toward the production and distribution of books. In numerous ways they reflect the large publishers' willingness in major states to incur losses in the production and distribution of print law reports in order to secure the competitive advantage the contract affords their electronic publications. This reality is also reflected in the consolidation of law report publishing that has taken place during the digital era. Until recently Joe Christensen, Inc., of Lincoln, Nebraska, and the Darby Printing Company of Atlanta,

Georgia, competed successfully for state law report contracts. Christensen held the Arkansas contract before it was secured by West in 2007. Darby was the official publisher of the Georgia Reports until 2004 when it was underbid by LexisNexis. Four years later, West prevailed. Regional or local printers can no longer compete in this business because it is no longer really about printing. States that put law report production out for bids in recent years have ended up dealing with one of the two major legal information vendors, West or LexisNexis.⁹⁰

It is precisely because Arkansas constituted so small a market for the two major online vendors that the terms of its law report publishing contract were so unfavorable and the direct savings it could realize from ending print publication so conspicuous. On the other hand, the fiscal pressures that encouraged its action do exist in larger states. One of them, Illinois, announced in mid-2011 that it, too, would cease law report publication at the conclusion of its then-current contract with West. That contract, which ran through July 2011, committed the state to paying for a bulk purchase of both the advance sheets and bound volumes of the *Illinois Reports* and *Illinois Appellate Reports*.⁹¹ Although the Illinois judiciary received heavily discounted prices, amounting to a small fraction of the amounts others had to pay for the same volumes or the recent per-volume cost to Arkansas of printing and distributing its law reports,⁹² the total expenditure represented an appealing cost-savings target. In explaining its decision the Illinois Supreme Court spoke of its saving “Illinois taxpayers hundreds of thousands of dollars a year.”⁹³

90. See Peter W. Martin, “Official Report” *Contracts between State Courts and Law Report Publishers*, <http://www.access-to-law.com/elaw/contracts> (June 29, 2010) [hereinafter “*Access to Law—Contracts ([state])*”].

91. Contract between Supreme Court of Illinois and West Group (2004), available at *Access to Law—Contracts (Illinois)*, *supra* n. 90 (click on “2004” link in “Illinois” line entry to view text of contract).

92. *Id.* at 5 (setting out agreed-upon purchase prices).

93. *Illinois Supreme Court Announces New Public Domain Citation System, Ending Era of Printed Volumes*, Ill. S. Ct. News Rel. (May 31, 2011), <http://www.state.il.us/court/Media/PressRel/2011/053111.pdf> (noting that taxpayer savings will result from the elimination of book purchases for Illinois judges and court libraries).

2. States Closer to Arkansas in Scale and Market Importance

Being unable to leverage valuable market advantage for favorable terms, less populous states are more likely to experience the full fiscal pressure that led to Arkansas's decision. States falling in this category that still publish their own law reports include Kansas, New Hampshire, and Vermont. In each case, however, the institutional and contractual framework for publication differs in important respects from that in Arkansas. In Kansas no commercial party is involved in the publication process; the printing, sale, and distribution of its official law reports are all handled by state offices. The editorial work is carried out by the Reporter's office situated in the judicial branch.⁹⁴ The reports are printed by the state's director of printing, and they are distributed by the state law librarian.⁹⁵ As was the case in Arkansas, distribution to a lengthy list of judicial and other officials is prescribed by statute.⁹⁶ Copies are also available for sale to others.⁹⁷ By statute the price is to be set by the Supreme Court⁹⁸ with the proceeds going into a fund covering state law library costs.⁹⁹ This framework totally precludes using law report publication as a means of extracting benefits from one of the legal information vendors. As a consequence, the full costs of printing reports are borne by the state. On the other hand, the dispersal of the several functions across agencies and budgets renders those costs less obvious. It also gives rise to more potential sources of resistance to change. Currently, New Hampshire and Vermont contract with LexisNexis for the production and distribution of their reports. Both receive at least some value beyond the contracted-for law books through the relationship. For both, LexisNexis handles all sales to the public and assumes the entire risk of excessive inventory. New Hampshire's contract sets a bulk purchase price for a fixed number of advance sheets and bound volumes delivered to the state (400 bound volumes, eight of them

94. Kan. Stat. Ann. § 20-205 (2010).

95. Kan. Stat. Ann. §§ 20-205, 20-207 (2010).

96. Kan. Stat. Ann. § 20-208 (2010).

97. Kan. Stat. Ann. § 20-211(2010).

98. Kan. Stat. Ann. § 20-208 (2010).

99. See Kan. Stat. Ann. § 20-213 (2010).

covered in sheepskin). At no additional cost, LexisNexis provides enough copies of its CD-ROM of New Hampshire law for all the judges in the state. Perhaps of greater value, New Hampshire's contract also shifts the preparation of headnotes and related editorial matter onto the publisher's staff, subject to review by the state's Reporter.¹⁰⁰ As New Hampshire has a simpler appellate structure, with no intermediate appellate court, the annual net costs to the judiciary of this arrangement are significantly lower than those faced by Arkansas in 2009.¹⁰¹ Vermont's contract also provides for a block purchase of advance sheets and bound volumes for distribution to the state judiciary and sets a substantially discounted price for individual sales to other state officials.¹⁰² While Vermont's contract does not explicitly commit the publisher to furnishing the full set of additional benefits New Hampshire receives, Vermont headnotes are initially prepared by LexisNexis.¹⁰³

The judiciaries of all three states—Kansas, New Hampshire, and Vermont—face drastically curtailed budgets. Yet Kansas and New Hampshire maintain web archives of appellate decisions reaching back to the mid-1990s.¹⁰⁴ In Vermont a comparable online archive is maintained by the state

100. See *Contract for Editing, Printing, and Binding Volumes 144, 145, 146, 147, 148, 149 and 150 of the New Hampshire Reports, Access to Law—Contracts (New Hampshire)*, *supra* n. 90 (click on “2002” link in “New Hampshire” line entry to view text of contract).

101. In recent years the New Hampshire Supreme Court has filled volumes of the *New Hampshire Reports* at a rate of less than 1.5 a year and a cost measured in tens, not hundreds, of thousands of dollars. See *id.* at 5.

102. See *Contract for Editing, Printing, and Distributing the Advance Reports and Bound Volume of Volumes 184–186 of the Vermont Supreme Court Reports, Access to Law—Contracts (Vermont)*, *supra* n. 90 (click on “2009” link in “Vermont” line entry to view text of contract).

103. E-mail from Larry Abbott, Rptr. of Dec., S. Ct. of Vt., to author (Dec. 21, 2010, 11:35 a.m. EST) (on file with author).

104. Each is, as was the case in Arkansas prior to 2009, simply an accumulation of slip opinions, but they demonstrate an existing capacity to distribute caselaw on the web. See Kansas Judicial Branch, *Cases and Opinions*, <http://www.kscourts.org/cases-and-opinions> (accessed June 25, 2011; copy of main page on file with Journal of Appellate Practice and Process); New Hampshire Judicial Branch, *Supreme Court—Opinions*, <http://www.court.state.nh.us/supreme/opinions> (accessed June 25, 2011; copy of main page on file with Journal of Appellate Practice and Process).

library.¹⁰⁵ The logic of Arkansas's decision ought to appeal powerfully in circumstances like these.

*B. States No Longer Publishing Their Own Law Reports but
with Usable Online Archives*

Direct budgetary relief, which furnished a major incentive for Arkansas's switch to digital publication, has no purchase in the states that completely abandoned law report publication during the twentieth century. However, among the states no longer producing their own law reports are a few that still operate under statutory mandates requiring publication, which they satisfy by contracting with West for volume purchase of reports it has prepared and they designate "official." Arizona and New Mexico fall in this category. Both are reasonably positioned to follow the path charted by Arkansas and, by freeing themselves from the annual purchase of West's print reports, to save substantial sums.

By virtue of prior initiatives, several other states that lack such direct budget incentive would find it relatively straightforward and costless to do as Arkansas has done. Most obviously these include the state appellate courts that have already implemented some form of vendor- and medium-neutral citation and adopted the practice of archiving the final versions of their opinions at a public website. States in this category include Maine, North Dakota, and Oklahoma. None of them declares the electronic versions of opinions at the court's website to be "official" or provides specific and conspicuous technological assurance that they have not been altered. In fact, orders or rules of court in Maine and Oklahoma still refer to the relevant West regional reporter as the state's "official" reporter.¹⁰⁶ On the other hand, shifting that designation onto

105. See Vermont Department of Libraries, *Supreme Court Opinions (Vermont)*, <http://libraries.vermont.gov/law/supct> (accessed June 25, 2011; copy of main page on file with Journal of Appellate Practice and Process).

106. See Me. Or. SJC-216 (Aug. 20, 1996); Maine Judicial Branch, *Supreme Court—Most Recent Opinions, Historical Note*, http://www.courts.state.me.us/court_info/opinions/supreme/index.shtml ("The permanent official version of the Maine Supreme Judicial Court's opinions is that published in Atlantic Reporter, 2d Series, which has been Maine's Official Reporter since 1966.") (accessed June 26, 2011; copy on file with Journal of Appellate Practice and Process); Okla. S. Ct. R. 1.22(c) ("Opinions of the Supreme Court

their existing case law archives and putting effective authentication measures in place should, in both cases, be relatively straightforward. As neither Maine nor North Dakota has an intermediate appellate court issuing “unpublished” decisions, they would not have to address the further question Arkansas confronted, namely whether official electronic dissemination removes the principal rationale for limiting precedential weight to selected opinions. With its more complex appellate court structure Oklahoma might be led to, but that does not mean it would have to, resolve the question as Arkansas has. Because Oklahoma has detailed procedures for moving decisions from “unpublished” to “published” status, labels the decisions in both categories clearly, and explains the distinction at its website,¹⁰⁷ there is no reason this issue need stand in the way of its embracing electronic case reports more completely.

C. States Attempting to Sustain Fee-Based Systems

1. Alabama

Several courts in the United States began releasing electronic slip opinions before the web presented the obvious avenue. Those pre-web systems used dial-up bulletin boards. A number sought to recoup the incremental costs for technical staff and equipment by imposing a subscription fee for access on the lawyers and journalists who were imagined to be the predominant users.¹⁰⁸ Once a vast public appeared on the Internet searching for information of all kinds, expecting it to be there, and, in the case of public sources at least, expecting it to be free, nearly all abandoned this approach. However, at least one state court system remained stuck in the earlier paradigm as it brought appellate decisions to the web. Not even the most recent decisions of the Alabama Supreme Court or the state’s two intermediate appellate courts are available free to the public.

designated For Official Publication when adopted will be published . . . after mandate in the official reporter (Pacific Reporter 2d).”).

107. Okla. S. Ct. & Ct. of Civ. App. R. 1.200.

108. See e.g. Stuart M. Cohen, *New York Court of Appeals Offers Instant Access to New Decisions*, 63 N.Y. St. B.J. 50, 50 (July/Aug. 1991) (indicating that annual fee for access to New York decisions was then \$50.00).

Instead, for an annual fee of \$200.00 subscribers can log into Alalinc, a legal-information service of the Alabama Supreme Court and state law library. The content it offers for this price is no more extensive than that Arkansas and other states have long provided to the public for free.¹⁰⁹ While Alabama does have a court official with the title “Reporter,” the state ceased publishing its own print law reports years ago.¹¹⁰ The *Alabama Reporter* is produced and copyrighted by West. Its headnotes and pagination are drawn from the *Southern Reporter*. Because of the state’s relic of a fee service, which no doubt continues to draw modest revenue at least from commercial publishers, including those offering advertising-supported collections of Alabama law that the public can use for free,¹¹¹ Alabama is likely to find adopting the Arkansas model more difficult than would the many states that already run robust public-access sites.

2. New Mexico

The situation is similar, though far more complex, in New Mexico. In that state, a single agency, the New Mexico Compilation Commission, is authorized to publish both the state’s statutes and its case law in print and electronic format.¹¹² Since 2005, this body has offered subscribers a disk-based compilation of New Mexico primary law as an alternative to the

109. See Alabama Appellate Courts, *Frequently Asked Questions: “How can I access appellate opinions?”* (2011) (describing Alalinc’s contents as “Alabama Supreme Court Decisions beginning October 1994, with full-text search; Alabama Court of Criminal Appeals Decisions beginning October 1994, with full-text search; Alabama Court of Civil Appeals Decisions beginning October 1994, with full-text search; Eleventh Circuit Court of Appeals Decisions (Emory University website); U.S. Supreme Court Decisions (Cornell Law University website); Electronic Mail; and, access to the Internet”).

110. In 1916, Alabama contracted with West for the preparation of its reports including the case summaries and headnotes. See 200 *Alabama Reports* (1916), 16 *Alabama Appellate Courts Reports* (1916). In 1975, it ceased publishing its own reports altogether, ending with 295 *Alabama Reports* (1975) and 57 *Alabama Appellate Court Reports* (1975).

111. See e.g. FindLaw, *Supreme Court of Alabama Cases*, <http://caselaw.findlaw.com/court/al-supreme-court> (accessed June 26, 2011; copy on file with Journal of Appellate Practice and Process).

112. See N.M. Stat. §§ 12.1.3–12.1.3.1 (2010).

comparable print publications.¹¹³ The full electronic library, now available online as well, also includes state regulations, court rules, and forms, plus federal materials useful to New Mexico practitioners.¹¹⁴ Priced competitively, this electronic alternative has partially buffered New Mexico from the fiscal impact of the declining demand for print law reports.¹¹⁵ On the other hand, during its start-up years the commission has been unable to generate sufficient revenue to operate without at least limited support from general revenues.¹¹⁶ Moreover, the commission is charged by statute with contracting for the production of the *New Mexico Reports* in print, a responsibility it currently discharges by contracting with West for quantities that are comparable to the *Arkansas Reports* print run prior to 2009.

113. See New Mexico Compilation Commission, *Brief History of the Compilation and Publication of New Mexico Laws*, <http://www.nmcompcomm.us/history.htm> (accessed June 27, 2011; copy on file with Journal of Appellate Practice and Process).

114. See New Mexico Compilation Commission, *New Mexico OneSource of Law®—The Only Official, Authoritative Source of New Mexico Law*, <http://www.nmcompcomm.us/NMOneSource.htm> (accessed June 27, 2011; copy on file with Journal of Appellate Practice and Process). While the New Mexico Compilation Commission is charged by statute with publishing the state's compiled statutes and appellate decisions, the New Mexico State Records Administrator is responsible for publication of the state's administrative code. See N.M. Stat. § 14-4-7.2 (2011). Consequently, the official version of New Mexico's compiled regulations is that appearing on the website maintained by the New Mexico State Records Commission. See Commission of Public Records—New Mexico State Records Center and Archives, *New Mexico Administrative Code*, <http://www.nmcp.state.nm.us/nmac> (accessed June 27, 2011; copy on file with Journal of Appellate Practice and Process). The New Mexico Administrative Code included on and incorporated into the Compilation Commission's electronic publications is furnished by the same Commission of Public Records that maintains this site. Telephone Interview with Brenda Castello, Exec. Dir., N.M. Comp. Commn. (Jan. 13, 2011) (interview notes on file with author).

115. Access to the Commission's digital collection costs \$595.00 per year for an individual. See *New Mexico OneSource of Law*, *supra* n. 114. That is less expensive than either of the commercially produced disks or a single-user subscription to either of the major online services. See Kendal F. Svengalis, *Legal Information Buyer's Guide & Reference Manual* 28, 605 (R.I. LawPress 2010). The continuing strong demand for the print version of the *New Mexico Statutes Annotated* has been another important buffer. Telephone interview with Brenda Castello, Exec. Dir., N.M. Comp. Commn. (Nov. 19, 2010) (interview notes on file with author).

116. See *e.g.* New Mexico Department of Finance and Administration State Budget Division, *Operating Budget—Fiscal Year 2008*, at 3, <http://budget.nmdfa.state.nm.us/cms/kunde/rts/budgetnmdfastatenmus/docs/817153690-07-23-2008-14-09-41.pdf> (Jan. 2007); New Mexico Department of Finance and Administration State Budget Division, *Executive Budget—Fiscal Year 2011* (Jan. 2010), at 2, 4, <http://budget.nmdfa.state.nm.us/cms/kunde/rts/budgetnmdfastatenmus/docs/677050477-01-26-2010-15-34-19.pdf>.

Consequently, substitution of the electronic version of New Mexico case law, which the commission already publishes, for the “official” print volumes might well save the commission, and through it New Mexico, substantial sums. As an established electronic publisher, it has already had to put in place systems designed to provide adequate assurance of data authenticity and permanence.¹¹⁷ In addition, the New Mexico courts have been applying non-print dependent citations to appellate decisions since 1997.¹¹⁸ For these reasons following Arkansas’s lead would, in all likelihood, entail fewer system and work-process challenges than Arkansas itself has had to face.

On the other hand, a desire to protect its fee-supported dissemination from both wider commercial competition and loss of traffic to a free public site will in all probability deter the New Mexico commission from implementing the broad public access elements of the Arkansas model. Currently, its open-access site retains only decisions from the current year and the ten years immediately prior; older decisions are systematically removed.¹¹⁹ Moreover, the commission has asserted copyright control over its electronic publications and otherwise sought to protect its franchise as “official publisher” of New Mexico law.¹²⁰

117. In 2011, for example, the Commission began attaching digital signatures to final versions of published appellate decisions. See New Mexico Compilation Commission, *New Mexico Supreme Court—Current Year Opinions*, <http://www.nmcompcomm.us/nmcases/NMSCurrent.aspx> (click on any listed case to see status of digital signature) (accessed June 27, 2011; copy on file with Journal of Appellate Practice and Process).

118. See Martin, *supra* n. 41, at 347.

119. See New Mexico Compilation Commission, *New Mexico Appellate Opinions*, <http://www.nmcompcomm.us/nmcases/NMCases.aspx> (click “Prior Year Opinions” to see notice indicating that the archive extends back only ten years) (accessed June 27, 2011; copy on file with Journal of Appellate Practice and Process). The public-access statutory compilation is explicitly subordinated to the one offered fee-paying subscribers and lacks its annotations. See New Mexico Compilation Commission, *New Mexico Statutes and Court Rules Unannotated, New Mexico Judicial Decisions (2000–2011)*, <http://search.nmcompcomm.us/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0> (noting that the material available on the site is “not intended to replace the official version found in New Mexico Statutes Annotated 1978”) (accessed June 27, 2011; copy on file with Journal of Appellate Practice and Process).

120. See e.g. Memo. from New Mexico Compilation Commission to Attorney’s of the State of New Mexico, *Official New Mexico Cases, Statutes, Rules and Forms* (Apr. 1, 2008), http://www.hyperlaw.com/docs/2008/08-04-01-new_mexico_compilation_comm.pdf (accessed June 27, 2011; copy on file with Journal of Appellate Practice and Process).

New Mexico's approach, like Alabama's as well as those patterns of dissemination that attempt to preserve a revenue stream or other tangible benefits to courts by granting privileged access to a particular commercial publisher, assumes a sharp dichotomy between the information needs of lawyers and those of the broader public. The large commercial legal-information systems encourage the view that case law is a matter of serious and continuing interest to lawyers and high-level government employees and of only episodic curiosity to lay individuals. So it may have been with print, but the explosion of open-access law collections on the web has been driven by the interest in and need for primary legal materials among educators and health care workers, those employed in the financial-services industry and high-tech endeavors, and individuals running small businesses, as well as public-sector employees from police officers to agency officials responsible for distributing public benefits or regulating pollution and worker safety. Improving access to primary legal materials supports the work of government agencies at all levels and private-sector activity of all types. Dissemination models that place fee barriers in front of such critical information forgo a wide range of public benefits.

Reducing the cost and improving the quality of the legal research tools available to lawyers—the goal of New Mexico's Compilation Commission—is clearly also in the public interest, but the commission's fundamentally proprietary approach bears a stronger resemblance to the public/commercial partnerships that produce and market "official" law reports in California and New York than to the model chosen by Arkansas. The twin underlying premises of the latter are first, that important benefits flow from free public access to a fully functional case law archive and second, that providing unrestricted access to redistributors, commercial and non-profit, is, in the current era, a more effective way to reduce the cost and improve the quality of the legal research tools available to legal professionals and government officials than is favoring a particular publisher, whether public or private. The Arkansas statute authorizing digital case reports does authorize the Administrative Office of

the Courts to launch a fee-based service on top of the open access public site, but not at its expense.¹²¹

VI. SOME IMMEDIATE CONSEQUENCES OF ARKANSAS'S REFORM ON THE QUALITY AND SCOPE OF COMMERCIAL LEGAL INFORMATION SOURCES

The benefits of the new medium- and vendor-neutral citation scheme rippled through most of the commercial services immediately. It is easy to see why: The citation “2011 Ark. 180,” for example, retrieves the Arkansas Supreme Court’s decision in *Conway v. Hi-Tech Engineering, Inc.*, on Bloomberg Law, Casemaker, Fastcase, Google Scholar, LexisNexis, Loislaw, and Westlaw, and did so from the day the document was first loaded on those systems (no need to rely on a proprietary citation system prior to assignment of volume and page numbers to the case). Bloomberg Law, Fastcase, Lexis, and Loislaw include the internal pagination drawn from the preliminary version of the opinion posted at the court website, permitting pinpoint references without delay. Westlaw does not initially, but, oddly, adds them to decisions it decides to publish in the pages of the *South Western Reporter*.¹²²

The change that appears to have posed a much greater challenge to the commercial publishers is Arkansas’s decision to treat all decisions of its appellate courts as precedent, erasing the

121. The amended act provides:

(b) (1) The reports shall be made publicly available for viewing at no charge via the Internet or other medium that is readily accessible by the public.

(2) However, the Administrative Office of the Courts may establish:

(A) A system of subscription-based access to additional features; and

(B) Reasonable charges for provision of reports on disc or other physical medium.

Ark. Code Ann. § 25-18-218 (2011).

122. See e.g. *Lee v. State*, 2009 Ark. 255, 308 S.W.3d 596 (as presented by Westlaw and in the *South Western Reporter*). This is odd on several counts: first, because Westlaw does show the pagination of older decisions appearing in the *Arkansas Reports*; second, because the *South Western* print reports never did; and third, because the “official” page breaks shown in the West versions do not correspond precisely to those in the file held by the court database. Possibly this last discrepancy is a transition phenomenon and will not persist. On the other hand, the same lack of tight correspondence between the page breaks shown in original opinions and West’s versions of them is seen in the case of Louisiana, which has used slip opinion pagination as part of a neutral citation scheme since late 1993.

historic separation of opinions into two categories: published decisions, which counted as precedent, and unpublished decisions, a much larger group, which did not. For nearly a decade prior to the 2009 reform, however, both categories had been posted and stored at the judicial department's website. Accessibility and subscriber interest led Bloomberg Law, Fastcase, Google Scholar, LexisNexis, and Westlaw to gather all decisions, including those designated "not for publication," and include them in their Arkansas databases with appropriate warnings about those that could not be cited. West's regional reporter, mirroring the contents of the *Arkansas Reports* and *Arkansas Appellate Reports*, republished only those designated for publication. Loislaw and Casemaker, deriving their contents from the official reports and West's regional reporter respectively, did the same.

Because only about a quarter of Arkansas Court of Appeals decisions were, in recent years, designated for publication, abolishing the distinction vastly expanded the volume of precedential decisions. That in turn posed a challenge to publications and services that had previously limited themselves to the smaller number. The online services, Casemaker and Loislaw, responded by loading all available Arkansas decisions.¹²³ However, for West's print edition of the *South Western Reporter*, the cost of an increase in coverage of Arkansas case law was prohibitive.

Other states that preceded Arkansas in erasing the published/unpublished distinction—Ohio, Utah, and Louisiana—shielded West from the full dilemma. Officials in those states continue to select only a limited number of their intermediate appellate court decisions for print publication.

In Ohio, where the twelve district courts of appeals release well over 5,000 "merits decisions" in a year's time, the selections are made in the office of the Reporter of Decisions. Although all merits decisions are transmitted to the Reporter for web publication and all count as precedent, only eight to nine percent are selected for publication in *Ohio Appellate Reports*,

123. Among the cases used to test the post-July 1, 2009, coverage of the several online services were *Stigger v. State*, 2009 Ark. App. 596, and *Honeysuckle v. Curtis H. Stout, Inc.*, 2009 Ark. App. 696, vacated 2010 Ark. 328.

the state's "official" print reports.¹²⁴ West publishes only these cases in its regional, *North Eastern Reporter*, loading the rest into Westlaw, where they are designated "Slip Copies."¹²⁵

Utah ceased print law report publication in 1974, prior to establishment of the state's intermediate appellate court. From its inception that court has designated only some of its decisions for publication. Those it selects appear in the *Pacific Reporter* and also in *Utah Advance Reports*, a local commercial publication. Nonetheless, under the Utah Rules of Appellate Procedure, unpublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent.¹²⁶

A 2006 amendment to Louisiana's Code of Civil Procedure reversed a prior court rule forbidding citation of unpublished decisions.¹²⁷ The state's intermediate appellate courts continue, however, to designate some decisions and not others "for publication"¹²⁸ and West adheres to the distinction.¹²⁹

Confronted with Arkansas's change, West initially sought, without success, to have a state official (the Reporter or the courts themselves) indicate which out of all the decisions now being issued without "published"/"unpublished" labels should be printed in its *South Western Reporter*.¹³⁰ Being unwilling to print the entire lot, the publisher was compelled to take on the selection task unaided. Initially, at least, it appears the West editors are selecting substantially fewer decisions of the Arkansas Supreme Court than were previously published for its

124. See The Supreme Court of Ohio & The Ohio Judicial System, Office of the Reporter, *Rules for the Reporting of Opinions*, <http://www.sconet.state.oh.us/rod> (accessed June 27, 2011) (click on link for "Rules for the Reporting of Opinions" to see their text) (copy on file with Journal of Appellate Practice and Process).

125. See e.g. *First Horizon Home Loans v. Fanous*, 2011-Ohio-4237, 2011 WL 3759687 (Ohio App., 8th Dist. 2011).

126. See Utah R. App. P. 30(f) (also providing that "[o]ther unpublished decisions may also be cited, so long as all parties and the court are supplied with accurate copies at the time all such decisions are first cited").

127. La. Code Civ. Proc. Ann. art. 2168 (2011) (requiring courts to post their unpublished opinions on the Internet and making those opinions citeable).

128. See La. Unif. Ct. App. R. 2-16.3 (providing for "formal" opinions, which are generally to be published, and "memorandum" opinions or "summary dispositions," which are generally not to be published).

129. See e.g. *Markovich v. Prudential Gardner Realtors*, 2010-1886 (La. App. 1 Cir. 7/1/11), 2011 WL 2601442.

130. Telephone interview with Susan Williams, Rptr. of Dec., S. Ct. of Ark. (May 18, 2011) (interview notes on file with author).

regional reporter but a higher percentage of those rendered by the state's court of appeals.¹³¹

The second challenge confronting those electronic services that now include both pre- and post-July 1, 2009, decisions not appearing in print reports is how to note the shifting status of "unpublished opinions" that users might retrieve in a single database search. Arkansas Court of Appeals decisions dating from the *Arkansas Appellate Reports* era that were not published in its pages may still not be cited. The same holds for Court of Appeals decisions released between February 14 and July 1, 2009, to which the court attached the notation "Not Designated for Publication." Although those opinions carry citations that are indistinguishable from those on decisions that count as precedent, they may not be used. Finally, all decisions dating from and after July 1, 2009, may be cited as precedent.¹³²

LexisNexis addresses the notice problem by placing a warning on all Arkansas decisions not designated for publication, including those released between February 14 and July 1, 2009, but none on the rest. The warning reads: "NOT DESIGNATED FOR PUBLICATION. PLEASE REFER TO THE ARKANSAS RULES OF COURT."¹³³ Confusingly, Westlaw places a uniform notice on all Arkansas decisions not published in its *South Western Reporter*, including those dating from the current period during which West editors make the selection and exclusion has no bearing on a decision's precedential weight. It reads: "NOTICE: THIS DECISION WILL NOT APPEAR IN THE SOUTH WESTERN REPORTER. SEE REVISED SUPREME COURT RULE 5-2 FOR THE PRECEDENTIAL VALUE OF OPINIONS."¹³⁴

131. A Westlaw search in May 2011 revealed only 236 Arkansas Supreme Court decisions for 2009 that had appeared or were destined to appear in the *South Western Reporter*, down by over 100 from the two preceding years. The count for 2010 was lower still, 142. On the other hand, one in three of the Court of Appeals decisions released during the second half of 2009 were chosen by West to be published in the *South Western Reporter* rather than the fewer than one in four selected for official print publication in 2007 and 2008. This new higher ratio held during 2010 and the first four months of 2011.

132. Ark. S. Ct. & Ct. of App. R. 5-2.

133. See e.g. *Williams v. State*, 2009 Ark. App. 509, 2009 Ark. App. LEXIS 566.

134. See e.g. *Billingsley v. Planit Dirt Excavation & Concrete, Inc.*, 2011 Ark. App. 449, 2011 WL 2529989.

VII. ISSUES FOR OTHER JURISDICTIONS HIGHLIGHTED BY ARKANSAS'S EXAMPLE AND ITS EXPERIENCE TO DATE

A. Copyright

During the mid-1990s articles and advocacy groups made extensive use of the provocative question “Who owns the law?” Most often it was raised as a challenge to the copyright claims that the West Publishing Company had used to wound and slow Lexis and subsequent digital competitors.¹³⁵ As noted previously, the Arkansas judiciary’s answer to that question has long been that its law reports in their entirety belong in the public domain so that their content can be used and redistributed without permission or fee by citizens and publishers alike.¹³⁶ Absence of copyright notices in and the lack of copyright registration of the law reports of three other states suggest a similar stance.¹³⁷ Leaving the matter of headnotes and similar editorial additions for separate consideration, this position appears a foundational component of any state’s move into official electronic dissemination. Without clarity on this point by the issuing jurisdiction, copyright claims to case law, by West or the state, are likely to stand in the way of realizing the full gains of an official case law database. Despite telling losses at the hands of a Second Circuit panel in 1998,¹³⁸ the validity and

135. See e.g. Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 Fordham Intell. Prop. Media & Ent. L.J. 173, 174 (1998) (noting that “West Publishing Company, the dominant American publisher, was particularly aggressive in its attempts to protect its long-established print products against inroads by new electronic products”).

136. See pp. 48–49, *supra*.

137. These are the *Massachusetts Reports*, *North Carolina Reports*, and *Virginia Reports*. See e.g. 436 *Massachusetts Reports* (2002); 360 *North Carolina Reports* (2007); 273 *Virginia Reports* (2007). The interested can compare a search of the copyright records on those titles with one on *Kansas Reports*, as Copyright Office records dating back to 1978 can be searched on line. See <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First> (accessed June 28, 2011; copy on file with Journal of Appellate Practice and Process)).

138. See *Matthew Bender & Co. v. West Publ. Co.*, 158 F.3d 693 (2d Cir. 1998); *Matthew Bender & Co. v. West Publ. Co.*, 158 F.3d 674 (2d Cir. 1998).

scope of copyright claims to law reports still await definitive resolution by the Supreme Court¹³⁹ or Congress.¹⁴⁰

This is a particular problem for those states that have relinquished case law publication to West. Consider Arizona for example. Volume 215 of the “official” *Arizona Reports* carries the notice: “Reprinted from Pacific Reporter, Third Series, Volumes 156 No. 2 through 161 No. 3, Copyright © 2007 Thomson/West, All rights reserved.” Arizona’s “ownership” of decisions in this and all other volumes it has allowed West to publish on such terms is unclear.

On the other hand, whatever rights West holds to the contents of this and similar volumes that it has produced for Arizona, it holds as the result of acquiescence by the state’s judiciary rather than legal mandate. Consequently, while copyright may cloud some of that state’s future options with respect to electronic publication of past decisions, proprietary claims by West should not hinder Arizona and others like it from taking a firm position going forward that the official versions of their appellate decisions are in the public domain and from delivering on that policy by making the official versions of those decisions available in digital format.

In some jurisdictions, however, following Arkansas’s lead would require a statutory amendment, not simply a change in practice. Volume 279 of the *Kansas Reports* states: “Copyright 2007 by Richard D. Ross, Official Reporter, For the use and

139. West continues to view the matter as settled in but one circuit, as the 2007 exchange of letters between Public.Resource.Org, Inc., and Thomson/West officials indicates. See Ltr. from Carl Malamud, Pres. & C.E.O., Public.Resource.Org, Inc., to Peter Warwick, Pres. & C.E.O., Thomson North American Legal (Aug. 14, 2007) (available at http://bulk.resource.org/courts.gov/letter_to_west.pdf) (accessed June 28, 2011; copy on file with Journal of Appellate Practice and Process); Ltr. from Edward A. Friedland, Vice Pres. & Deputy Gen. Counsel, Thomson Corp., to Carl Malamud, Pres. & C.E.O., Public.Resource.Org, Inc. (Aug. 28, 2007) (indicating a cc to Peter Warwick and noting on page 2 that the only relevant decision had been issued by the Second Circuit in a case involving only the *Federal Reporter* and the *Supreme Court Reporter*) (available at http://bulk.resource.org/courts.gov/letter_to_west_response.pdf) (accessed June 28, 2011; copy on file with Journal of Appellate Practice and Process).

140. In 1992 Thomson, at that point not yet owner of West, supported a bill introduced in Congress that would specifically have excluded copyright coverage of the names, numbers, and citations of state and federal statutes, regulations, and law reports. See H.R. 4426, 102d Cong. (1992). Fiercely opposed by West, the bill got no further than committee hearings. See Francine Biscardi, *The Historical Development of the Law Concerning Judicial Report Publication*, 85 Law Libr. J. 531, 541–44 (1993).

benefit of the State of Kansas.” In inserting this notice and registering volumes of the *Kansas Reports* with the Copyright Office, Mr. Ross is obeying a legislative command that dates from 1889.¹⁴¹ In 1981 he sought and obtained an attorney general’s opinion on the scope of the resulting copyright.¹⁴² That opinion, pre-dating all the excitement generated by West’s aggressive copyright claims against Lexis and other electronic competitors, drew a sharp distinction between the “the opinions or other material prepared by the judges in the discharge of their judicial duties” and parts of the reports “which represent the reporter’s or publisher’s own work and labor.”¹⁴³ It concluded on the basis of longstanding Supreme Court authority that only the latter are protected by copyright.¹⁴⁴ Nonetheless, the statute remains, and the practice of copyrighting the *Kansas Reports* continues.¹⁴⁵ For Kansas and the eight or so other states that continue to assert copyright in their law reports, shifting to electronic case law will require amending that practice and where necessary the underlying statute.¹⁴⁶ A principal reason to provide open access to authoritative opinion texts in electronic

141. See Kan. Stat. Ann. § 20-206 (2010).

142. Kan. Atty. Gen. Op. no. 81-48, 1981 Kan. AG LEXIS 245 (Feb. 17, 1981). Of the several copyright claims aggressively advanced by West Publishing during the 1990s (and ironically, resisted by Thomson prior to its acquisition of West), one is largely uncontested: that the substantive summaries and headnotes and analytic indices included in its reports are protected. Presumably it follows, as the Attorney General of Kansas opined in 1981, that similar material prepared by state reporters of decisions can be copyrighted as well, at least if the state takes the steps to protect them. See *id.*

143. *Id.*

144. *Id.*; see *Callaghan v. Myers*, 128 U.S. 617 (1888); *Banks v. Manchester*, 128 U.S. 244 (1888); *Wheaton v. Peters*, 33 U.S. 591 (1834); see also L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719, 731–39 (1989) (discussing *Wheaton*, *Banks*, and *Callaghan*). Things are different for the Reporter of Decisions of the Supreme Court of the United States. The Copyright Act explicitly denies copyright coverage to works of federal employees. See 17 U.S.C. § 105 (available at <http://uscode.house.gov>).

145. While Illinois continues to assert copyright in the state law reports, its copyright notice explains that it does not claim copyright in “the filed opinions of the court.” See 214 *Illinois Reports 2d* (2007). To similar effect, the copyright notice in the Washington Reports is limited to their “Headnotes, indexes, tables, and editorial matter.” See 163 *Washington Reports 2d* (2008).

146. For other state reports that still contain a copyright notice in the name of the state or state official, see 273 *Connecticut Reports* (2007), 280 *Georgia Reports* (2007), 214 *Illinois Reports* (2007), 478 *Michigan Reports* (2007), 269 *Nebraska Reports* (2007), 153 *New Hampshire Reports* (2007), 9 *New York Reports* (2008), 112 *Ohio Reports 3d* (2008).

format is to facilitate their accurate and unimpeded redistribution by third parties. While it is generally conceded that federal copyright law does extend to headnotes and other forms of editorial gloss added to opinions by public reporters, in the current environment restricting redistribution of that material by copyright confines it to books that fewer and fewer consult. Therefore, even states that copyright their reports but are clear in excluding the opinion texts and citation information they contain from that proprietary claim have strong reason to reconsider their policy.

B. Medium-Neutral Citation

1. Pagination

Like most other states adopting vendor- and medium-neutral citation schemes, Arkansas essentially followed the recommendations of the American Bar Association and the American Association of Law Libraries on how to designate individual opinions: The fifth decision of the Arkansas Supreme Court released in 2010 is designated 2010 Ark. 5, the tenth decision of the Arkansas Court of Appeals, 2010 Ark. App. 10.¹⁴⁷ But Arkansas's decision to cling to page numbers for use in citations to particular passages within decisions reflects the continuing grip of print practices and runs against the collective judgment of those advocating neutral citation that paragraph numbers are a better choice. Paragraph numbering connects directly to the logical structure of the document, provides greater precision (most opinions having more than one paragraph per page as well as paragraphs that straddle pages), and transfers easily to diverse media, from print to online database and disk. Bound to the text, paragraph numbers travel seamlessly with it. All redistributors of decisions from jurisdictions such as Maine

147. Actually, Arkansas has deviated slightly from the ABA/AALL model because its scheme employs the traditional abbreviations long used to designate its reports and periods, rather than the state's postal code (AR) without periods. See American Association of Law Libraries, Committee on Citation Formats, *AALL Universal Citation Guide* § 103 (ver. 2.1), <http://www.library.illinois.edu/archives/e-records/aall/8501490a/citation2.pdf> ("Use the standard two-letter postal code to identify a state or territorial court.") (accessed June 28, 2011; copy of relevant page on file with Journal of Appellate Practice and Process).

and North Dakota that employ paragraph numbering incorporate that citation information.

The new Arkansas citation rule calls for pinpoint citations to “refer to the page of the electronic file where the matter cited appears.” Problems with this choice have already emerged. First, since most researchers—including judges—will retrieve Arkansas cases using one of the commercial online services, the system depends on those systems extracting the page-break points from the official report PDF files and accurately inserting them within the flow of the online text. As noted previously, not all of the commercial sites have done that, at least from the time of initial release. To date Westlaw has declined to show the official Arkansas pagination within decisions not published in the *South Western Reporter* and has held off inclusion for those it does publish until their appearance in print. As the time between initial release and West publication has been running well over a year, Westlaw subscribers are without official means for pinpoint citation to most Arkansas decisions rendered since the change. As noted previously, Bloomberg Law, Casemaker, Fastcase, LexisNexis, and Loislaw all provide pagination drawn from the preliminary version of each opinion from day of release. Google Scholar does not.

There is a second, less visible problem posed by Arkansas’s use of page numbers. Because paragraph numbers are bound to the passages they designate, their use does not require that close attention be paid to how a full document is rendered in successive versions. In contrast, preserving the exact location of page breaks through even minor editorial revision requires special effort. Inattention to this challenge led to shifting page breaks in the course of converting the earliest Arkansas decisions from preliminary to final form. In other words, the page breaks in the final versions of decisions fall in different locations than they did in the preliminary ones because of minor changes in content and formatting. This has led to inconsistent pagination information across commercial research services. No doubt the Reporter’s office work process can ultimately be adjusted so as to maintain consistent pagination through revision. This was, after all, accomplished with the advance sheets and bound volumes during the print era. But the Reporter’s task would have been far simpler had the Arkansas

Supreme Court followed the advice of the ABA and the American Association of Law Libraries and the lead of most other neutral-citation states and adopted paragraph numbers.

On the other hand, compared to the gains from Arkansas's new system of designating all decisions by year, court, and sequence number, its failure to embrace paragraph numbering is a relatively small matter. This is especially true because, despite the statement in the new Arkansas rule that "citations to specific pages are strongly encouraged," the actual practice of the Arkansas courts and those appearing before them is to the contrary. Neither the Arkansas Supreme Court nor the Arkansas Court of Appeals provides pinpoint citations in its opinions with any consistency.

2. *Parallel Print Citation*

A more serious failure to break free of longstanding print practice is manifest in the Arkansas citation rule's requirement of a parallel citation to "the regional reporter, if available." On this point, the state's two appellate courts largely follow the prescription and that gives rise to additional delay and editorial effort in moving decisions to final form. Decisions that cite to other recent cases must, under current policy, wait for West to assign the cited cases their volume and page numbers in the *South Western Reporter* and for the Reporter's office to fill in the empty parallel citations before the final version of the citing decisions can be released.¹⁴⁸

For those using electronic case law research tools, parallel references are unnecessary; the official cite alone will retrieve a case from any of the major systems. Having an opinion's parallel citation in the *South Western Reporter* does speed finding it in the pages of that print publication, but only slightly. For those still working exclusively in West's print reports, the straightforward solution is distribution of a lookup table similar to those West publishes for state print reports. It would also be a simple matter for the Arkansas judicial website to provide the regional reporter citation, once assigned, for each case in its database. The regional reporter shows the official pagination within decisions, so furnishing a parallel pinpoint citation, as the

148. Williams Interview, *supra* n. 130.

rule also suggests be done, provides absolutely no functional benefit. Moreover, to the extent the parallel-citation rule forces other legal-information vendors to secure and include the West pagination in their collections of Arkansas decisions and forces researchers to find an information source with that data, it imposes significant costs.¹⁴⁹

C. Lead Time

The Arkansas Supreme Court gave its Reporter, the administrative office, and the state's appellate judges themselves far too little time to work through the details of so large a change. As a consequence some components of the new system have been much slower in appearing than the Supreme Court envisioned in 2009. Volume 375 of the *Arkansas Reports*, with a cutoff date of February 14, 2009, did not emerge until June of 2010.¹⁵⁰ Meanwhile slip opinions continued to flow from the Supreme Court and Court of Appeals. They were initially uploaded into the simple web structure that had served since 1996. Selection and installation of an adequate document management system took time. The RFP was issued in April 2009,¹⁵¹ but the new database did not come online until the end of the Supreme Court's 2010 spring term.

Without the print-publication process to impose a common format on decisions written by different judges and emanating from different courts, there was a need to develop templates to bring a reasonable level of conformity to the now-official electronic files, even in their preliminary form. That too took time. With the tempo imposed by the print-publication cycle broken and uncertainties surrounding how to provide

149. The Association of American Legal Publishers, a group of small publishers active during the citation debates of the 1990s, explained the added costs to all publishers other than Thomson/West of any rule requiring parallel citation in a statement submitted to the Judicial Conference of the United States in 1997. See Ltr. from Eleanor J. Lewis, Exec. Dir., Assn. of Am. Leg. Publishers, to Members of the Technology and Automation Committee of the Judicial Conference, *ABA Citation Resolution* (Mar. 14, 1997) (available at <http://www.hyperlaw.com/jccite/348.txt>) (accessed June 28, 2011; copy on file with Journal of Appellate Practice and Process).

150. See *Arkansas Reports Press Release*, *supra* n. 62.

151. See Arkansas Supreme Court, *Request for Proposals* (Apr. 1, 2009), http://courts.arkansas.gov/reporter_decisions/documents/rfpwebsite.pdf?num=112 (accessed Aug. 29, 2011; copy on file with Journal of Appellate Practice and Process).

authentication of the final-version files, the conversion of opinions from preliminary to final form proceeded very slowly. At the beginning of 2011, decisions dating as far back as March 2009 remained in preliminary form.¹⁵² This delay slowed publication in West's *South Western Reporter*. That in turn compounded the delay because of the editorial policy that parallel citations to the *South Western Reporter* had to be filled in before editorial revision of decisions into final form could be completed. Last and far from least was the added burden on the Reporter's staff imposed by the expansion of the set of opinions requiring full post-release processing—including editorial attention—from the 400 or so historically selected for publication in the print reports to the more than 1,200 handed down by Arkansas's two appellate courts in a typical year.¹⁵³

D. Assuring Authenticity

The Arkansas court rule establishing the new form of case law publication specified that the electronic file holding the final version of a decision be both “authenticated and secure.” The prospect of electronic primary legal materials has brought fresh attention to questions of reliability and trust—matters largely obscured by the comfortable familiarity of print sources. The publication of decisions in *Arkansas Reports* and *Arkansas Appellate Reports* placed their texts in hundreds of copies spread around the state and archived in the publicly funded collection of the Arkansas Supreme Court Law Library. The technology of print encouraged the assumption that all copies of a particular volume would be consistent with one another, that there would be no officially sanctioned changes of the texts in a volume once printed, and that any unauthorized alterations would be apparent to the eye. Furthermore, while those involved in a matter might

152. This was true, for example, of all the Arkansas Supreme Court decisions for March 19, 2009, all those for March 5, 2009, and most of the per curiam decisions for March 12, 2009. Court of Appeals decisions were no further along.

153. These counts are based on the opinion designations for opinions of the Arkansas Supreme Court and Arkansas Court of Appeals during the Spring and Fall Terms of 2008. See Decisions of the Arkansas Supreme Court & Arkansas Court of Appeals, <http://courts.arkansas.gov/opinions/opmain.htm> (click on link to 2008 terms for each court, then click on link to each month's opinions) (accessed June 28, 2011; copy of main page on file with Journal of Appellate Practice and Process).

well be drawing the critical passages from different sources, print or electronic, the “official” reports provided an authoritative means of resolving any discrepancies among them. These features led the Association of Reporters of Judicial Decisions to argue as recently as 2008:

Print publication, because of its reliability, is the preferred medium for government documents at present. . . . [O]fficial court reports are relied upon as authoritative and definitive guidance in conducting legal dealings and affairs because of the reports’ undoubted and demonstrable authenticity and their existence in a permanent, published form.¹⁵⁴

The stability of print, in this context, can be overstated or idealized. Most official law reports, including the *Arkansas Reports* and, it should be noted, the *United States Reports*, issue “corrections” of already published opinions. These take the form of “Errata” notices inserted in later volumes. Most often they address mis-cited cases or statutes. However, some errata make changes in the texts of opinions years after their publication. For example, a notice on page II of 549 U.S. (Oct. Term 2006) specifies a word change in *Conrad v. Pender*, 289 U.S. 472, 478 (1933).¹⁵⁵ A notice in volume 321 of the *Arkansas Reports* corrects the word “sufficient” to “insufficient” in an opinion released fifteen years before.¹⁵⁶

Electronic media make it far easier to bring later, officially authorized, corrections to the attention of those relying on the affected text and also make it possible to provide clearer notice

154. Association of Reporters of Judicial Decisions, *Statement of Principles: “Official” Online Documents* (Revised May 2008), http://arjd.washlaw.edu/ARJD_Statement%20of%20Principles_May2008.pdf (accessed June 27, 2011; copy on file with Journal of Appellate Practice and Process) [hereinafter “*Statement of Principles*”].

155. The original language in the official report in that case (“enabling counsel”) misquoted an earlier decision. Over thirty years later the phrase was changed to “employing counsel.” The editors of West’s *Supreme Court Reporter* apparently caught the misquotation, for the error does not appear in that version of the case. See *Conrad v. Pender*, 53 S. Ct. 703, 705 (1933).

156. Context completely supports the change. See the first line of the first full paragraph on page 274 of *Parris v. State*, 270 Ark. 269, 274 (Ark. App. 1980) (“Appellant finally argues there is sufficient evidence to support the jury verdict.”). The error does not appear in the “unofficial” version of the case in the *South Western Reporter*. See *Parris v. State*, 604 S.W.2d 582, 585 (Ark. App. 1980) (“Appellant finally argues there is insufficient evidence to support the jury verdict.”).

and an audit trail of revisions of all kinds if and when they occur. For that very reason, it is conceivable that electronic media may lead to more frequent post-release revision. The traditional process of producing print law reports lays down a date beyond which further direct revision, as distinguished from a separately published errata statement, is no longer feasible. Electronic files, of themselves, impose no such discipline. One can imagine that courts will have much greater difficulty resisting the temptation to “correct” official decisions held in electronic form despite their being designated “final” or “permanent.” To the extent that proves true, case law authentication systems, like Arkansas’s, will need to provide authentication not only of the “corrected” version of a decision but also of the change.

The priority of official printed reports over other versions is rarely called upon. Most legal research and law writing is done without checking key passages drawn from unofficial sources against the version designated as “official.” In those rare cases where discrepancies appear and where they bear directly on the resolution of a critical issue, courts generally do not take the literal text of the official publication as dispositive. They weigh other evidence, looking to the context of the contested word, phrase or passage, its consistency with other decisions,¹⁵⁷ and whether a typographical error seems probable.¹⁵⁸

The proliferation of alternative electronic sources over the past two decades has increased the importance of having a benchmark or authoritative version, but also the disutility of having that version reside in print. The difficulty is magnified

157. See e.g. *Deutsch v. Circa Bistro LLC*, No. 3:04CV1253(CFD), 2005 U.S. Dist. LEXIS 20176 at *10 (D. Conn., Sept. 13, 2005) (noting that “the Court has discovered a disparity in the language of the Connecticut Supreme Court in *Ostrowski* as it appears in different reporters,” analyzing the discrepancy’s potential impact, discussing the proper way in which to proceed, and further indicating that the discrepancy had been brought to the attention of both the office of the state reporter and the publishers of the bound law reports).

158. See e.g. *People v. Beverly*, 364 Ill. App. 3d 361, 371 n. 1, 845 N.E.2d 962, 971 n. 1 (2006) (recognizing existence of typographical error in advance sheets for official reporter and in unofficial reporter, and announcing that “the phrase will appear correctly in the bound volume of the Official Reports”); *People v. Sales*, 357 Ill. App. 3d 863, 866, 830 N.E.2d 846, 849 (2005) (“[J]ustice requires us to determine which version is correct. We do not believe that we are bound by the language printed in the official reporter if it contains a typographical error.”).

where, as is true in so many United States jurisdictions, that authoritative version is contained in a proprietary publication. As noted previously, by 2009 Arkansas was exceptional in producing its own benchmark edition of print reports. The dominant practice, including that in all courts in the federal system below the Supreme Court, is to rely on a commercial concern to disseminate the authoritative texts written by judges deciding cases. Some courts have designated a specific commercial print publication as “official.” With others, importantly the federal courts of appeals, that is not the case and while there may be widespread reliance on a particular set of reports, it is not at all clear how disputes about whether a critical phrase was dropped, a statutory citation mistyped, or a comma misplaced in the commercial publication process should be resolved.

Forced to choose between building their permanent case law collections from preliminary versions of decisions that can be freely harvested from court websites and paying the substantial costs of digitizing final print reports that a jurisdiction has designated “official,” some, probably most, electronic publishers adopt the less costly course. This is particularly true when that “official” version is published and copyrighted by a competitor. To the extent that revision of any consequence occurs during publication, that poses a risk for the researcher. The public dissemination of official, final texts in electronic format at once makes it more economic for publishers to replace preliminary versions with final ones and provides a ready means for researchers to verify the accuracy of key passages they have drawn from any one of the numerous unofficial sources.

Nonetheless, uncertainty about and—in some cases—hostility to electronic sources of legal data have generated the demand that where there is no benchmark print text, any “official” electronic document be delivered with strong technical assurance that it is what it purports to be.¹⁵⁹

159. See *Statement of Principles*, *supra* n. 154; American Association of Law Libraries, *AALL State Working Groups to Ensure Access to Electronic Legal Information* (Jan. 2010, rev. June 2010) (available at <http://www.aallnet.org/Documents/Government-Relations/Advocacy-Toolkit/stateworkinggroups.pdf>) (exhorting law librarians to “take action to oppose any plan in [their] state[s] to eliminate an official print legal resource in favor of

While the insistence that legal materials stored in electronic format be designated “official” only when they are surrounded by strong measures to assure authenticity, security, and permanence can be viewed as holding new media to a higher standard than is applied to the prevailing print practice, the underlying concerns are legitimate and their solutions demonstrably feasible. Under the current draft of a proposed Uniform Authentication and Preservation of State Electronic Legal Materials Act, the essential features are certification by an appropriate public official that a document has not been altered and suitable means for users to determine that the official’s certification is valid.¹⁶⁰ A system implemented by the federal government¹⁶¹ and several prior initiatives by other states¹⁶²

online-only *unless* the electronic version is digitally authenticated” (emphasis in original)) (accessed June 29, 2011; copy on file with Journal of Appellate Practice and Process).

160. See National Conference of Commissioners on Uniform State Laws, *Authentication and Preservation of State Electronic Legal Materials Act* (discussion draft, Feb. 2011) (providing, in sections 4, 5, 7, and 8, for official certification and means of user validation (available at http://www.law.upenn.edu/bll/archives/ulc/apselm/2011feb_proposals.pdf) (accessed June 29, 2011; copy on file with Journal of Appellate Practice and Process) [hereinafter “*Authentication Act*”].

161. See United States Government Printing Office, GPO Access, *Authentication*, <http://www.gpoaccess.gov/authentication>. Beginning with the 110th Congress, the PDF files of public and private laws available from the GPO’s public access site have been digitally signed and certified “to assure users that the online documents are official and authentic.” *Id.* at *Public & Private Laws: Main Page*. (The reader should note that the GPO Access site now operates on an archive-only basis; it has been superseded by the GPO’s new Federal Digital System site at <http://www.gpo.gov/fdsys>.)

162. Decisions at the Ohio judiciary website maintained by that state’s reporter of decisions have carried digital signatures for several years. See Richard J. Matthews, *Why Authentication Procedures Matter for US and UK Public Legal Resources on the Web*, 8 Leg. Info. Mgt. 35, 40–41 (2008). The official version of the Utah Administrative Code, the state’s equivalent to the Code of Federal Regulations, is also online, state-sponsored print publication of the code having ceased for want of funding several years ago. See Utah Department of Administrative Services, Division of Administrative Rules, *Utah Administrative Rule Publications—Utah Administrative Code*, <http://www.rules.utah.gov/publications.htm> (indicating that “[t]he Utah Administrative Code is an electronic publication”) (accessed June 30, 2011; copy on file with Journal of Appellate Practice and Process). As the Utah Department of Administrative Services explains, users can verify that texts they are working from, including files downloaded directly from its site, are authentic and unaltered by means of a digital signature or hash: Using one of several software tools, the cautious researcher can generate the digital signature for his or her copy of a section and compare that with the signature posted at the official website. See Utah Department of Administrative Services, Division of Administrative Rules, *Utah Administrative Code—Authentication*, <http://www.rules.utah.gov/publicat/code.htm> (accessed June 30, 2011; copy on file with Journal of Appellate Practice and Process). The Delaware Administrative Code, also available online, is authenticated using an approach

provided Arkansas with functioning examples that satisfy these criteria. Building on those examples, Arkansas has created an electronic storage and delivery system that should be their equal and meet the requirements in its own authorizing legislation and court rule. It has already set a standard for others. The site of New Mexico's Compilation Commission began providing authentication for published decisions of that state's Supreme Court and Court of Appeals in 2011.¹⁶³

E. A Commitment to Permanence

The permanence of print law reports also tends to be overstated by those concerned over the prospect of their abandonment. It is a challenge, though not an impossible one, to find a copy of the first volume of the *Arkansas Law Reports* or even volume 94, published one hundred years ago, in the original printing. However, the brief history of electronic media provides numerous cautionary examples of old files that are no longer readable because of their obsolete format or storage medium and data collections that have not been sustained by the agency that created them. The proposed uniform legislation discussed in the previous section would require that there be adequate measures for "back-up and disaster recovery" and assurance of continuing usability through "periodic updating into new electronic formats as necessary."¹⁶⁴ The second requirement speaks not only to the initial file format in which decisions are stored but also later ones into which they may have to be converted in order to "ensure continuing usability." United States Supreme Court opinions were for a time during the 1980s prepared using a mainframe-based word-processing program

closer to that adopted by the Arkansas reporter of decisions. See State of Delaware, *Delaware's Administrative Code*, <http://regulations.delaware.gov/AdminCode>. The PDF version of the Delaware Register of Regulations is "certified as authenticated" when it bears the Registrar of Regulations' emblem as a seal. See State of Delaware, *Register of Regulations*, <http://regulations.delaware.gov/services/register.shtml> (accessed June 30, 2011; copy on file with Journal of Appellate Practice and Process).

163. See *New Mexico Appellate Decisions*, *supra* n. 119 (Click on "Current Year Opinions" and then click on any case name to see authentication notation appended to its text; click on "Prior Year Opinions" and then click on any case name to see text without authentication notation.).

164. See *Authentication Act*, *supra* n. 160, at § 6.

called ATEX. In 1991, the Court adopted WordPerfect 5.1. Its earliest release of files in electronic format occurred in that year and included some that were with imperfect success converted from ATEX to XyWrite, followed by others created in WordPerfect. Keeping those files “usable” for present-day researchers requires conversion. Combining this possible future need with the concern about authentication calls for any conversion to be carried out by a trusted party, for that party to assure the accuracy of the conversion, and there to be technical assurance that the new version has not subsequently been altered.

Hurricane Katrina provided a painful reminder of another challenge to the permanence of electronic data, but also powerful demonstrations of the value of having data in this form so long as it is protected through off-site backup and well-thought-out disaster-recovery plans. Paper and electronic records alike were lost in the storm, but banks, health-care providers, and lawyers that had effective remote backup of their electronic files were able to resume functioning with little delay. Recognizing this reality, the proposed uniform law provides that the office responsible for the official law data “provide for back-up and disaster recovery.”¹⁶⁵

The Arkansas Supreme Court rule addresses these concerns and the technology it has chosen to implement the new case law reporting system will facilitate compliance. On the other hand, these measures, like their analogs at the federal level¹⁶⁶ and elsewhere,¹⁶⁷ constitute, at best, current recognition of inevitable future challenges coupled with a declaration of resolve to address them when and as they arise.

165. *Id.*

166. The Federal Digital System includes a commitment to preservation. See U.S. Government Printing Office, *Digital Preservation at the U.S. Government Printing Office: White Paper*, http://www.gpo.gov/pdfs/fdsys-info/documents/perservation-white-paper_20080709.pdf (July 9, 2008); U.S. Government Printing Office, *FDsysProgram Review 6*, http://www.gpo.gov/pdfs/fdsys-info/documents/FDsys_Program_Review.pdf (Apr. 7, 2010) (both accessed Aug. 29, 2011; copies on file with Journal of Appellate Practice and Process).

167. A 2006 Utah statute, for example, places responsibility for archiving past versions of that state’s online-only administrative code on the state library. See Utah Code § 9-7-208 (2010).

F. File Format

The PDF file format chosen by Arkansas for electronic presentation and storage of its case law, properly implemented, is capable of addressing the need for “continuing usability” through future changes in computer hardware and software. But for true hardware and system independence, PDF must be generated to a standard not found in the files offered by Arkansas or other judicial sites using that format.¹⁶⁸ Furthermore, as noted by the Library of Congress, PDF serves best as an archival format with “page-oriented textual . . . documents when layout and visual characteristics are more significant than logical structure.”¹⁶⁹ Widely recognized as the better format for use with textual material for which preserving the logical structure has higher priority than appearance is XML.¹⁷⁰ Arkansas’s choice of the PDF format, like its continued use of pagination as the means of pinpoint citation, illustrates how difficult it can be for courts to break loose from print-based conceptions of the judicial opinion. PDF was initially designed to deliver consistent rendering of documents across computers, operating systems, monitors, and printers.¹⁷¹ The format has since been extended so as to be capable of preserving the logical structure of documents. However, for it to do so the documents must “incorporate structural tagging” prior to conversion to PDF.¹⁷² The Arkansas files released to date do not meet this test,

168. For the steps necessary to create PDF files that are of archival quality, consult the information provided by the Library of Congress’s Digital Preservation initiative. See Library of Congress, Digital Preservation, *Sustainability of Digital Formats—Planning for Library of Congress Collections: PDF A-1, PDF for Long-term Preservation, Use of PDF 1.4*, <http://www.digitalpreservation.gov/formats/fdd/fdd000125.shtml> (accessed June 30, 2011; copy on file with Journal of Appellate Practice and Process) [hereinafter “*Sustainability of Digital Formats—PDF*”].

169. *Id.*

170. See Library of Congress, Digital Preservation, *Sustainability of Digital Formats—Planning for Library of Congress Collections: XML (Extensible Markup Language)*, <http://www.digitalpreservation.gov/formats/fdd/fdd000075.shtml> (accessed June 30, 2011; copy on file with Journal of Appellate Practice and Process).

171. See Adobe Systems, Inc., *PDF as a Standard for Archiving 4* (Adobe 2003), <http://www.adobe.com/enterprise/pdfs/pdfarchiving.pdf> (accessed June 30, 2011; copy on file with Journal of Appellate Practice and Process).

172. See *Sustainability of Digital Formats—PDF*, *supra* n. 168.

nor do those generated by other United States courts employing this format.¹⁷³

Structural tagging is important not only to the long-term preservation of digital legal documents but to their effective and efficient transfer into other data systems where value is added to the original, including importantly those commercial systems on which most judges and lawyers depend. None of those systems retain the appearance of the original document. All sacrifice that in order to provide users the ability to scroll through material and search their collections on such data elements as opinion author and date and to follow links to cited authority.

The site govpulse.us offers a dramatic example of how the release of legal data, in this instance the *Federal Register*, in structured XML can unleash totally new levels of creative value addition.¹⁷⁴ As yet one is forced to imagine the possibilities with judicial opinions.

*G. Whether Searchable Electronic Reports Need Headnotes,
Catchlines, and the Like*

The historic approach of the National Reporter System in print, followed by Westlaw online, has always been to substitute proprietary editorial matter (synopsis, headnotes, catchlines) for any included in a jurisdiction's official reports. The syllabi to United States Supreme Court decisions are an exception. During

173. Since appearance is PDF's priority, one has to export a file from PDF to XML to inspect it for structural markup. With court decisions, a basic test for the existence of structural tagging is whether the opinion text is separated from the preliminary matter identifying parties, attorneys, docket number, date of release, and the like, and also whether the divisions within an opinion's text are tagged as such rather than simply preceded by headings in a different size or style of font. Opinions at the Arkansas site, along with those released by the U.S. Supreme Court, and such other state sites as California's and New Mexico's, fail this test, although they print handsomely and appear on the screen exactly as they will print. This of course may change. Beginning in 2011 the Arkansas Reporter's office did start tagging all page breaks by bookmarking them in the PDF files of new decisions.

174. See govpulse.us, *The Federal Register at Your Fingertips*, <http://govpulse.us> (accessed June 30, 2011; copy on file with Journal of Appellate Practice and Process). The U.S. Government Printing Office now offers the *Federal Register* (back to 2000) and the *Code of Federal Regulations* (annual compilations back to 1996) in XML, with documentation on its tagging. See U.S. Government Printing Office, FDsys—Bulk Data, <http://www.gpo.gov/fdsys/bulkdata> (accessed June 30, 2011; copy on file with Journal of Appellate Practice and Process) [hereinafter "*GPO Bulk Data*"].

its early days, Lexis argued that with full-text search such editorial additions were unnecessary; however, it now like West engages in the same practice. Because of difficulties of access and copyright issues, the other commercial services also omit reporter-prepared syllabi, headnotes, and catchlines, but without replacing them.¹⁷⁵ Remaining stuck in the original print volumes, those publicly produced editorial features serve fewer and fewer researchers.

Because Arkansas's website has long included this material and because the state asserts no copyright in it, those services drawing their case law from the state's official reports rather than West's regional reporter have included it, making Arkansas's appellate system, like the United States Supreme Court, an exception to the general pattern.¹⁷⁶ But while the

175. An example: In the official volume, the Michigan Supreme Court's decision in *Barnett v. Hidalgo*, 478 Mich. 151, decided in May 2007, is accompanied by extensive headnotes. LexisNexis and Westlaw supplant them with their own. Loislaw, Versuslaw, Fastcase, Casemaker, and the rest simply omit them.

176. Copyright claims to reporters' editorial contributions to decisions pose serious impediments to placing that material at open online sites. Most obvious is the difficulty for states whose reports depend on the summaries, headnotes, tables, and indices prepared by Thomson/West for the National Reporter System. It is difficult to imagine Thomson's agreeing to a reporter's incorporation of that material into a public online site, let alone its use by a competitor.

Two states that have contracted with LexisNexis for headnote writing and other editorial work authorize the publisher to secure copyright. While they take a license back to the state sufficient to allow them to enter into a subsequent official-report contract with another entity, they provide for quite limited state use during the current contract term. The California contract with LexisNexis states: "Unless this contract is terminated, the State will limit use of the Publisher Licensed Materials to reasonable, noncommercial purposes. The State will reasonably limit portions of the Publisher Licensed Materials selected for use, and the State will provide Matthew Bender with reasonable advance notice of each intended use." See *Access to Law—Contracts (California)*, *supra* n. 90, at 10 (2010) ("Intellectual property rights; copyright and licenses") (click on "2010" link in California line entry to see text of contract). The most recent contract between Washington and LexisNexis provides for the headnotes and related matter to be copyrighted by the publisher in the name of the state, but very specifically agrees that that editorial content will not be made available at the public-access site maintained by the state's Statute Law Committee, the only party to which the state may license the data during the term of the contract. See *Access to Law—Contracts (Washington)*, *supra* n. 90, at §§ 3.7, 3.9 (2007) ("Copyright" and "Licensing Database"). The New Hampshire contract with LexisNexis also provides for copyright to be taken in the name of the state, but grants the publisher the exclusive right to sell the covered volumes "in any form." It notes, however, "that the opinions themselves, without the Company's editing, headnoting and digesting are in the public domain, and the Reporter cannot control their publication in other forms." See *Access to Law—Contracts (New Hampshire)*, *supra* n. 90, at § 12 (2002) (click on "2002" link in New Hampshire line entry to see text of contract).

legislation authorizing Arkansas's new mode of case law publication apparently envisioned that the Reporter of Decisions would continue to prepare a syllabus and headnotes for every opinion,¹⁷⁷ the search capabilities of the new medium combined with the dramatically increased volume of cases requiring the Reporter's editorial review have led to a very different practice. In place of these familiar and more extensive additions, the Reporter's database is designed simply to allow the attachment of key words to all decisions.¹⁷⁸

H. Distinguishing Individual Use from Bulk Data Downloads

Important though direct public access to an official database of contemporary case law may be, the principal impact of a system like Arkansas has established will be on the quality and costs of unofficial collections of legal data. For that reason, it is important that the system be designed to facilitate rather than frustrate data harvesting by re-publishers, large and small, commercial and non-profit. Issues of both policy and data architecture are implicated.

Some government data sources seek to separate individual users from large-scale data gatherers in order to secure revenue from the latter or provide competitive advantage to a preferred publisher. This is sometimes done by license provisions. It can also be achieved by technical measures that interfere with programmatic data gathering. The Arkansas database contains neither. Because case law builds incrementally, the need for affirmative measures enabling bulk-data acquisition¹⁷⁹ are far

177. See Ark. Code Ann. § 16-11-202 (2011).

178. See Arkansas Judiciary, *Keyword Search*, <http://opinions.aoc.arkansas.gov/WebLink8/CustomSearch.aspx?SearchName=KeywordSearch> (click drop-down arrow to see choice of keywords) (accessed June 30, 2011; copy on file with Journal of Appellate Practice and Process).

179. Among the principles set forth by the law.gov initiative is one calling for bulk data release: "[T]he primary legal materials of the United States should be readily available to all, and that governmental institutions should make these materials available in bulk as distributed, authenticated, well-formatted data." Law.Gov: A Proposed Distributed Repository of All Primary Legal Materials of the United States, <http://law.resource.org> (accessed June 30, 2011; copy on file with Journal of Appellate Practice and Process). The U.S. Government Printing Office has led by example in this area. See *GPO Bulk Data*, *supra* n. 174. The fruits have included third-party innovations from which the public data source can subsequently draw elements. See *e.g.* *govpulse*, *supra* n. 174; Ray Mosley, Dir.,

less critical than they are with statutory or administrative code compilations, where requiring third-party re-publishers to gather re-generated content, section by section, imposes serious costs. On the other hand, the post-release revision cycle for all opinions, with its possibility of subsequent “corrections” of errors, calls for a mechanism that will flag changed documents so that third-party publishers are able to identify and harvest revised versions of previously released documents as well as those being released for the first time. It appears that the Arkansas public site offers a means for accomplishing this, for it allows the database to be searched by file modification date as well as file creation date. In addition, the Reporter’s office has worked individually with the principal commercial publishers to facilitate their receipt of the most recent versions of decisions. A regular posting of a list of new and changed files, perhaps at a site used only by publishers and other bulk-data gatherers, would further simplify the work and improve the accuracy of third-party case law redistributors.

I. Bringing Past Case Law into Digital Format

By virtue of the Arkansas reform, that state’s official case reports are now bifurcated. Researchers wanting to work directly from the official versions of opinions dealing with a particular topic can use an open online database for cases decided after February 14, 2009, but must travel to a set of volumes of the *Arkansas Law Reports* to inspect any relevant earlier ones. Most professional researchers will, of course, be working out of third-party case law collections that have in one way or another acquired a deep, in some cases complete, retrospective collection of Arkansas case law. However, within the near future, the Arkansas Reporter’s office plans to erase this media divide by creating an electronic reproduction of the entire run of the *Arkansas Reports* and *Arkansas Appellate Reports*. By May 2011, it had added scanned and indexed copies of 39 volumes to the state’s online case law archive. The balance should be online within the year. Courts in at least two other states have extended

Off. of the Fed. Register, Presentation (Law.Gov Workshop June 15, 2010), video available at <http://www.archive.org/details/gov.law.final.11.04> (accessed June 30, 2011; copy of main page on file with Journal of Appellate Practice and Process).

their electronic case law collections retrospectively. The public-access opinion database of the North Dakota Supreme Court reaches back to 1965.¹⁸⁰ The Oklahoma State Courts Network offers a complete case law collection, beginning with 1890.¹⁸¹

VIII. CONCLUSION

The New Mexico venture in electronic publishing¹⁸² illuminates a major limiting aspect of the Arkansas reform. It is one shared by nearly all judicially sponsored case law archives on the web. With rare exception, they stand apart from and therefore without useful connection to the rest of the jurisdiction's law, critically, statutes and administrative regulations. Reflecting the dominant pattern of government in this country, which distributes legal authority across three branches, primary law publication in the United States has typically been handled separately by the judiciary, legislature, and executive. Separately has often meant pursuant to quite different policies and publication practices. Arkansas is a case in point. The Arkansas legislature's arrangements for publication of the state's compiled statutes include an assertion of copyright in the state and an exclusive contract with LexisNexis for both print and electronic access. As to regulations, legislation enacted in 2001 requires the Arkansas Secretary of State to maintain a website furnishing public access to all administrative rules. No copyright or other control over redistribution is asserted at that site, but publishers and other major redistributors must pay a fee to secure the data in bulk. With the addition of this new judicial case law database, Arkansas now has in place three separate and quite different models of primary law dissemination.

Because legal research so often requires reading relevant cases, regulations, and statutory provisions together, the value of cross linkages has historically been a source of great opportunity

180. See North Dakota Supreme Court, *Opinions—N.W.2d Citations*, <http://www.ndcourts.com/opinions/cite/NWcite.htm> (click on "139" for access to 1965 opinions) (accessed July 1, 2011; copy on file with Journal of Appellate Practice and Process).

181. See OSCN: The Oklahoma State Courts Network, *The Electronic Law Library for Oklahoma, Oklahoma Cases*, <http://www.oscn.net/applications/oscn/index.asp?ftdb=STOKCS&level=1> (accessed July 1, 2011; copy on file with Journal of Appellate Practice and Process).

182. See *supra* § V(C)(2).

for commercial publishers. In the print era, annotated statutes widely prevailed over compilations that forced researchers to find the principal decisions interpreting a statutory provision by means of the indices bundled with law reports. That value was subsequently enhanced in those electronic collections that brought cases, statutes, and regulations together in an integrated and linked search environment. Those working in digital collections have come to expect that case and statutory citations in decisions will be linked to the provisions cited, that the statutory authority cited for a regulation will be equally accessible, and finally that statutory annotations will have this same functionality. The Arkansas case law archive, like those mounted by the courts in most other United States jurisdictions, cannot offer this degree of integration. As a consequence, even with an enhanced search engine and a deeper historical collection, this path-breaking public site will have a hard time competing with the commercial services that bring statutes and case law together. By placing responsibility for publication of both statutes and case law in a single agency, New Mexico has addressed this issue¹⁸³ and that agency has, in effect, done so in the manner of a commercial service, albeit one that need not generate a profit. In view of its scope, ambition, and need to generate subscription revenue, New Mexico's Compilation Commission must compete with the commercial online services for market share. Its record to date is encouraging.

Operating without a statutory mandate but also without responsibility for print publication, the Oklahoma Supreme Court has created and maintained a fully integrated online collection of that state's case law, court rules, attorney general opinions, and compiled statutes.¹⁸⁴ Each of these document

183. Connecticut has a judicial branch entity called the Commission on Official Legal Publications, but this body has no responsibility for publication of the state's statutes. See Conn. Gen. Stat. § 51-216a (Lexis 2011). Nor has it moved aggressively into electronic publication. See Commission on Official Legal Publications, *Publications Available for Purchase*, <http://www.jud.ct.gov/colp/publicat.htm> (accessed July 1, 2011; copy on file with Journal of Appellate Practice and Process).

184. See OSCN: The Oklahoma State Courts Network, *supra* n. 181. While the site's Electronic Library for Oklahoma also includes Oklahoma's administrative regulations, they are not stored in its integrated database but added by way of a link to the Secretary of State's site. See OSCN: Legal Research Start, <http://www.oscn.net/applications/oscn/start.asp?viewType=LIBRARY> (accessed July 1, 2011; copy on file with Journal of Appellate Practice and Process).

categories is cross-linked. Primary law references appearing in appellate decisions are linked to the cited authorities, whether they are other decisions, court rules, or statutory sections.¹⁸⁵ The texts of statutory sections are followed by links to all decisions and attorney general opinions containing references to them.¹⁸⁶ Rather than attempting to compete with commercial vendors for revenue, the Oklahoma Supreme Court has built and maintained a comprehensive, though basic, primary law resource that is available without charge to those who must understand the state's law, whether in the context of litigation before its courts or in order to foresee the legal consequences of a planned course of action.

If institutional factors make it difficult for other jurisdictions to follow Arkansas's example, the barriers confronting the creation and maintenance of a public compilation like those created and maintained by New Mexico and Oklahoma are greater by an order of magnitude. In the short term, at least, the best one can hope for is that the separate branches of individual states and perhaps, some distant day, the federal government, each provide the public with their legal data with its accuracy assured by technological means and its permanence a matter of official commitment. So long as that is done in a manner that does not place legal or logistical barriers in front of re-publishers, non-profits and commercial alike, they can be counted on to produce integrated jurisdictional collections. The underlying free public resources will at once provide a no-fee option to anyone doing legal research, encourage competition among those redistributing primary law, and provide authenticated copies of critical legal texts against which the accuracy of versions drawn from other sources, print or electronic, can be checked.

While Arkansas's reform in case law publication remains a work in progress, it is one that should command respect and close attention from other jurisdictions. In implementing this

185. See e.g. *Cossey v. Cherokee Nation Enters., LLC*, 2009 OK 6 (OSCN version) (Enter citation into "Quick Case" at the left margin of the OSCN: Legal Research Start page.).

186. See e.g. Okla. Stat. tit. 12, § 93 (2010) (OSCN version) (Click "Oklahoma Statutes Citationized" on the OSCN: Legal Research Start page; click "expand" next to line entry for title 12; scroll down to Chapter 3; click section 93.).

bold initiative in electronic case law dissemination and storage that state's judicial branch is constructing a model that should inform the plans of all judiciaries that will, sooner or later, be persuaded or forced to venture down this same path.



