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Peter W. Martin

*Cornell Law School*, [peter.martin@cornell.edu](mailto:peter.martin@cornell.edu)

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# 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.<sup>1</sup> Title and role reach all the way back to Arkansas’s 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.<sup>2</sup> Spanning legal topics from “abandonment” to “witnesses” and including all cited statutes, this editorial addition allowed a researcher to determine whether 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.<sup>3</sup>

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

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\*\* Jane M.G. Foster Professor of Law, Emeritus, Cornell Law School, Ithaca, New York, and cofounder, Legal Information Institute.

<sup>1</sup> 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 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).

<sup>2</sup> See 67 ARKANSAS REPORTS v-xiv, 611-20, 621-37 (1900).

<sup>3</sup> See *St. Louis, I. M. & S. R. Co. v. Landers*, 67 Ark. 514 (1900).

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 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.<sup>4</sup> 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 a regional rather than an in-state firm.<sup>5</sup> 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.<sup>6</sup>

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 ....” constitute the “official report”<sup>7</sup> With justifiable pride, the state supreme court proclaimed Arkansas to be the first jurisdiction in the nation to switch from law report publication to official legal data distribution. It will not be the last.

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 U.S. appellate courts (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,

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<sup>4</sup> See Ark. Code § 16-12-108(b) (2010).

<sup>5</sup> 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., Atlanta, Ga. Like the Christensen firm it published and distributed one or more other state reports during this period. For reasons discussed *infra* at pp. \_\_\_ - \_\_\_ these smaller law publishers have since 2000 been displaced by the two major legal information vendors, for whom print is simply an adjunct to electronic research products and services.

<sup>6</sup> See 340 Ark., 69 Ark. App. (2000).

<sup>7</sup> See *In re* Arkansas Supreme Court and Court of Appeals Rule 5-2, 2009 Ark. 330.

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 greater interest to Arkansas's lawyers and judges than those of others, for the supreme court 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*.<sup>8</sup> There was no straightforward match up. The cases reported in volume 67 of the *Arkansas Reports* were spread through volumes 50-55 of the *South Western Reporter*.<sup>9</sup> 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.<sup>10</sup> The *Arkansas Reports* had to acknowledge the West reporter in return, providing parallel citations to it. That began in 1938.<sup>11</sup> 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

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<sup>8</sup> See, e.g., *Phelps v. Wyler*, 67 Ark. 97, 101 (1899).

<sup>9</sup> *Magness v. State*, 67 Ark. 594 (1899) appears at 50 S.W. 554; *State v. McNally*, 67 Ark. 580 (1900), at 55 S.W. 1104.

<sup>10</sup> 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 633 (Ark. 1982).

<sup>11</sup> Parallel case citations to the *South Western Reporter* first appeared in volume 197 of the *Arkansas Reports* (1938-1939). They have continued since.

sets. However, neither the rules of the court at the time nor dominant practice required parallel pinpoint references.<sup>12</sup>

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 paper pound compilations commonly called “advance sheets” ahead of the final bound volumes. West offered advance sheets for the *South Western Reporter*; Arkansas, advance sheets for the *Arkansas Reports*.<sup>13</sup> Both contained the volume numbers and pagination of the final books. As a consequence, those producing the respective bound versions to 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, bound 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 case law, the company published federal reports and statutes,<sup>14</sup> practice guides, and treatises. West sales representatives were ready to assist potential purchasers with advice and financing.<sup>15</sup> 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 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.<sup>16</sup> At the point printing technology

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<sup>12</sup> Compare the official report with the West version of the embedded quotation in *Vaugh v. Herring*, 195 Ark. 639, 113 S.W.2d 512 (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 this practice, compare the two versions of *Haynes v. Clark*, 196 Ark. 1127, 121 S.W.2d 69 (1938).

<sup>13</sup> Indeed, West pioneered in the publication of advance sheets containing the same pagination as would appear in the final bound volumes. See Kendall F. Svengalis, *Meeting Patron Needs in a Technological Age*, 44 R.I. BAR J. 19 (1995).

<sup>14</sup> See, e.g., ARK. LAW., Oct. 1968, at 9 (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.”)

<sup>15</sup> See, e.g., ARK. LAW., Dec. 1967, at 21 (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.*”), ARK. LAW., March 1968, at 19 (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.”)

<sup>16</sup> See, e.g., ARK. LAW., July 1975, at 84 (West advertisement: “Consistency in case law headnoting ... yours with West’s Arkansas Cases.”), ARK. LAW., Oct. 1975, at 123 (West advertisement: West’s Arkansas

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*.<sup>17</sup>

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.<sup>18</sup> By 1973 none of Arkansas's immediate neighbors had a reporter of decisions or published their own law reports.<sup>19</sup> This left their lawyers, judges, and others working with case law with no choice but to do their research in and cite to the volumes of West's National Reporter System.<sup>20</sup>

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,<sup>21</sup> the *New Jersey Reports* in 1948.<sup>22</sup> Appellate rules in both states still refer to these reports as "official" and require citation to them,<sup>23</sup> 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

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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 the question."

<sup>17</sup> See, e.g., *About Lawyers*, ARK. LAW., Sept. 1967, at 13 (... "for sale 'South West Reporter, Arkansas Cases'"); ARK. LAW., Oct. 1977, at 185 (West ad: "Vital Arkansas Law Books ... Arkansas Cases"). See generally West Books & CD-ROMs, <http://west.thomson.com/products/books-cds/default.aspx>.

<sup>18</sup> During the period 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 Co. In the period since that U.S. legal publisher was acquired by Thomson (a deal completed in 1996), a company 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."

<sup>19</sup> *Louisiana Reports* ended in 1972; *Missouri Reports*, 1956; *Oklahoma Reports*, 1953; *Mississippi Reports*, 1966; *Tennessee Reports*, 1972; and *Texas Reports*, 1962. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION tbl. T1 (19th ed. 2010).

<sup>20</sup> As noted previously, with many states West offered single jurisdiction offprints so that lawyers didn't have to buy or devote shelf space to the full regional reporter. Being extracted directly, these carried the same pagination and case sequence as their parent volumes.

<sup>21</sup> See Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 VILL. L. REV. 1, 18 (2008).

<sup>22</sup> See 1 NEW JERSEY REPORTS (1949).

<sup>23</sup> See N.J. R. App. Prac. 2:6-2(a)(5); Pa. R. App. P. 2119(b).

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.<sup>24</sup> 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.<sup>25</sup> Two states, Oregon and Nevada, still publish their own reports; but no longer have reporters of decisions to prepare headnotes for 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, keynumbers 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 appeared in the West’s *Pacific Reporter*. State statute calls upon both appellate courts to publish their decisions.<sup>26</sup> 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 specifies a long list of state entities and officials to which those volumes should be distributed.<sup>27</sup> The Arizona rules of appellate procedure refer to the *Arizona Reports* as “official” and require citation to their volume and page numbers.<sup>28</sup> But for sixty years those reports have been a commercial publication, and the state has had no public

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<sup>24</sup> 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 REPORTS (1998).

<sup>25</sup> One such state is New Mexico. See *infra* pp. \_\_\_-\_\_.

<sup>26</sup> See ARIZ. REV. STAT. §§ 12-107, 12-120.07 (2008).

<sup>27</sup> See ARIZ. REV. STAT. § 12-108 (2008).

<sup>28</sup> Ariz. R. Civ. App. P. 13(a)(6).

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 U.S. 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.<sup>29</sup> 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 under the supervision by a public reporter of decisions and the count reaches sixteen.<sup>30</sup> 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 more than a decade ago.<sup>31</sup> 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.<sup>32</sup> 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.

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<sup>29</sup> 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. N.D. Century Code § 27-04-01 still provides that “the 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.” Although publication of the *North Dakota Reports* ceased in 1953, the state law librarian, is still formally also the supreme court reporter. In three states that no longer publish their own reports, Florida, Tennessee, and West Virginia, the attorney general is still, under the constitution, *ex officio*, the reporter. See Fla. Const. art. IV, § 22; Tenn. Const. art. 6, § 5; W. Va. Const. art. VII, Executive Department 1.

<sup>30</sup> California, New Hampshire, and Washington fall in this category.

<sup>31</sup> The decision archive at the Arkansas judicial web site begins with decisions released on January 16, 1996. See Arkansas Supreme Court Opinions for January – July, 1996, <http://courts.arkansas.gov/opinions/sc1996.htm>.

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

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.<sup>33</sup>
- Decision day for the Florida Supreme Court is Thursday. Thursday, June 10, the court posted a decision in a lawyer-discipline case, outlining the responsibility that real estate lawyers bear in overseeing access by others to escrow accounts.<sup>34</sup>
- The same day, June 10, the California Supreme Court, resolved a circuit split on an issue of bail forfeiture.<sup>35</sup> The decision was promptly uploaded to [www.courtinfo.ca.gov](http://www.courtinfo.ca.gov).

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 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 texts of the opinions of the Kansas Supreme Court and the Kansas Court of Appeals.”<sup>36</sup> For legal professionals, it need not add “and also for the volume and page number of any decision or passage within it.” The California warning is, if anything,

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<sup>33</sup> Chism v. Protective Life Insur. Co., Kan., No. 99,291, June 11, 2010, <http://www.kscourts.org/Cases-and-Opinions/Opinions/SupCt/2010/20100611/99291.pdf>.

<sup>34</sup> Florida Bar v. Hines, Fla., No. SC08-2297, June 10, 2010, <http://www.floridasupremecourt.org/decisions/2010/sc08-2297.pdf>.

<sup>35</sup> People v. Indiana Lumbermens Mutual Insur. Co., Cal., No. S175907, June 10, 2010, <http://www.courtinfo.ca.gov/opinions/documents/S175907.PDF>.

<sup>36</sup> Kansas Judicial Branch, <http://www.kscourts.org/Cases-and-Opinions/opinions/>. Similar language once appeared at the Arkansas site. See Timothy N. Holthoff, Finding Case Information on the Arkansas Judiciary Home Page, *The Arkansas Lawyer*, Winter 2000, at 8.

more emphatic, beginning with “This archive is **not** provided for purposes of legal research.”<sup>37</sup> 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.”<sup>38</sup> Furthermore, Florida’s rules of appellate procedure require citation using volume and page numbers drawn from that commercial reporter.<sup>39</sup>

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 which, prior to 2009, its site shared with the websites of California, Florida, Kansas, and most other U.S. jurisdictions.<sup>40</sup>

### **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 nor wait for publication in a set of books. In taking this step, Arkansas’s appellate courts joined the roster of those in the U.S. and elsewhere implementing medium and vendor neutral citation.<sup>41</sup> 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.<sup>42</sup> They and others led the Arkansas Bar Association to urge its adoption on the Arkansas Supreme Court over a decade ago.<sup>43</sup>

Since 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

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<sup>37</sup> California Courts: Opinions of the Supreme Court and Courts of Appeal: Archive, <http://www.courtinfo.ca.gov/opinions/opinarch.htm>.

<sup>38</sup> 2010 Supreme Court Opinions, <http://www.floridasupremecourt.org/decisions/opinions.shtml>.

<sup>39</sup> See Fla. R. App. P. 9.800.

<sup>40</sup> 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 Timothy N. Holthoff, *Finding Case Information on the Arkansas Judiciary Home Page*, ARK. LAW., Winter 2000, at 8.

<sup>41</sup> See generally Peter W. Martin, *Neutral Citation, Court Web Sites, and Access to Authoritative Case Law*, 90 L. LIBR. J. 329 (2006).

<sup>42</sup> See Lynn Foster, *Medium-Neutral Citation Form: It’s Here*, ARK. LAW., Winter 1997, at 6.

<sup>43</sup> *Id.* at 7.

Reporter shall replace the preliminary report with an ... electronic file containing the permanent and final report of the decision.<sup>44</sup>

## **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.<sup>45</sup> 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.<sup>46</sup> However, the Arkansas Judicial Branch took two further steps that mark it as a true path breaker. 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.”<sup>47</sup> 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. No other U.S. court system provides this level of assurance of the authoritativeness and quality of its online legal data.<sup>48</sup>

## **C. Eliminating the “Unpublished” Decision Category**

The Arkansas Supreme Court also took the jettisoning of print reports as furnishing sufficient rationale for it to accede to calls from both bar and state legislature that lawyers and judges be allowed to cite “unpublished” decisions.<sup>49</sup> The expense of print

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<sup>44</sup> Ark. Sup. Ct. & Ct. of Apps. Rule 5-2(b)(2).

<sup>45</sup> See Peter W. Martin, *Neutral Citation, Court Web Sites, and Access to Authoritative Case Law*, 90 L. LIBR. J. 329, 343 (2006).

<sup>46</sup> With the exception of Ohio, all other neutral citation jurisdictions in the U.S. fall in the group that abandoned public production of law reports in the latter half of the twentieth century.

<sup>47</sup> Ark. Sup. Ct. & Ct. of Apps. Rule 5-2(b)(2).

<sup>48</sup> The state coming closest is Ohio. The decisions at the site maintained by its reporter of decisions do contain a digital signature. See Office of the Reporter, <http://www.supremecourt.ohio.gov/Rod/>.

<sup>49</sup> 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. Since 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>. See generally Jillian R. Jones, Comment,

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.”<sup>50</sup>

In summary, while individual components of Arkansas’s new case law publication system can be found in other U.S. 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?
- Which other jurisdictions are most (or least) likely to follow?
- How useful a model does Arkansas provide other U.S. jurisdictions?
- What issues does its experience to date reveal?

### ***III. 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 (2.5 inches, an expanded width the judiciary achieved through legislative amendment in 1995),<sup>51</sup> 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 cost-recovery basis to others.<sup>52</sup> Decisions of the Arkansas Supreme Court “not of sufficient importance to justify the expense”

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*Bound by Precedent: Arkansas Practitioners Win the Debate over Unpublished Decisions*, 63 ARK. L. REV. 619 (2010).

<sup>50</sup> Ark. Sup. Ct. & Ct. of Apps. Rule 5-2(c).

<sup>51</sup> Prior to that amendment, the statute specified 2 inches. *See* Ark.Code. § 25-18-218 (1994). The increase in width achieved cost savings by reducing the number of volumes per year. *See* Memorandum from Marlo Bush to Justice Brown, Re: Printing Contract, May 27, 1994 (copy on file with author).

<sup>52</sup> Ark. Code §§ 25-18-210, 25-18-220 (2008) (prior to amendment by 2009 Ark. Acts 221).

could, upon the concurrence of the Chief Justice be withheld from publication. 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.”<sup>53</sup> General procurement statutes established the ground rules for letting the necessary printing contract.<sup>54</sup>

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 which 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 reporting.”<sup>55</sup> 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.<sup>56</sup> Finally, in late 2008, the court backed a 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.” 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.<sup>57</sup>

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.”<sup>58</sup> 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

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<sup>53</sup> Ark. Sup. Ct. and Court of Appeals R. 5-2(c) (prior to the 2009 amendment). *See In re Arkansas Supreme Court and Court of Appeals Rule 5-2*, 2009 Ark. 330.

<sup>54</sup> *See* Bill Jones, Memorandum to Justice Brown, Arkansas Advance Reports and the Printing Contract, Jan. 18, 1996, updated Feb. 16, 1996 (copy on file with author).

<sup>55</sup> *See In re* Publication of the Arkansas Reports, April 17, 2003, 2003 Ark. LEXIS 208.

<sup>56</sup> *See In re* Publication of the Arkansas Reports, July 29, 2006, 2006 Ark. LEXIS 428.

<sup>57</sup> 2009 Ark. Act 221. *See* Charlie Frago, *Courts’ Web Files Are First in Nation, State Dumps Print Versions of Rulings*, ARKANSAS DEMOCRAT-GAZETTE (LITTLE ROCK), Sept. 20, 2009 (LexisNexis).

<sup>58</sup> Arkansas Supreme Court and Court of Appeals Rule 5-2(b)(1).

advanced search engine with additional features” limited to fee-paying subscribers.<sup>59</sup> Roughly a year later the final bound volume of the Arkansas Reports was shipped to one 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.<sup>60</sup>

Arkansas’s budgetary framework for law report publication and method of contracting exposed the wastefulness of continued reliance on print in an unusually stark way. As previously noted, in a majority of U.S. 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 which 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. Between 2001 and 2005 it soared as high as \$134.90. 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. 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. 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 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 plus \$2,000 in shipping costs per volume, a sum approaching \$200,000 per year, the courts themselves 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 per copy, all of that being borne by the

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<sup>59</sup> *Id.* 5-2(a).

<sup>60</sup> See Ark. Administrative Office of the Courts, Final Bound Volume of Arkansas Reports and Arkansas Appellate Reports Issued, June 28, 2010. The database of Supreme Court decisions is online at [http://courts.state.ar.us/opinions/sc\\_opinions\\_list.cfm](http://courts.state.ar.us/opinions/sc_opinions_list.cfm); that of Court of Appeals decisions at [http://courts.state.ar.us/opinions/coa\\_opinions\\_list.cfm](http://courts.state.ar.us/opinions/coa_opinions_list.cfm).

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. 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, groups of "slip" opinions, compiled, edited, and headnoted 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 40 per year), called for delivery of 50 copies to 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.<sup>61</sup> 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-effect 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 U.S. took place most rapidly in a segment of the legal profession barely represented in Arkansas. The state is,

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<sup>61</sup> 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*, ARK. LAW., Fall 1999, at 8.

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.<sup>62</sup> The comparable percentages in California and New York are higher.<sup>63</sup> In Arkansas they are twelve and six percent.<sup>64</sup> Over sixty-one percent of Arkansas attorneys practice alone.<sup>65</sup> 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.<sup>66</sup> *CaseBase – Arkansas*, released in January 1990,<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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 by the Reporter's office.<sup>70</sup> In 2003 when the Arkansas Supreme Court first floated the idea of ending print reports and invited

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<sup>62</sup> Clara N. Carson, THE LAWYER STATISTICAL REPORT 29 (2004).

<sup>63</sup> *Id.* at 51, 163.

<sup>64</sup> *Id.* at 47.

<sup>65</sup> *Id.*

<sup>66</sup> See Kendall F. Svengalis, LEGAL INFORMATION BUYER'S GUIDE AND REFERENCE MANUAL 147-52 (2005).

<sup>67</sup> See Kyle D. Parker, *CASEBASE: A Long Time in the Making*, ARK. LAW., April 1990, at 19.

<sup>68</sup> *Id.*

<sup>69</sup> 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, ARK. LAW., Fall 1995, at 6. By 1998 a membership survey by the Arkansas Bar Association found that 78% of respondents used a CD-ROM legal research product; 53.5%, an online service. *Membership Survey Results*, ARK. LAW., Winter 1999, at 20, 21. 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 20% in two years. See John J. Oslund, *Which Direction for West?*, MINNEAPOLIS TRIBUNE, Nov. 13, 1995, at 1D.

<sup>70</sup> 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., New York Official Reports Service, <http://government.westlaw.com/nyofficial/>.

comments, those they received were largely negative but the total count, pro and con, was only nineteen.<sup>71</sup>

## **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. Very often that is directed by statute.<sup>72</sup> 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, these 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 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 U.S. jurisdiction 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.<sup>73</sup> One of them was Michigan's. In 1881 the Justices

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<sup>71</sup> Charlie Frago, *Courts' Web Files Are First in Nation – State Dumps Print Versions of Rulings*, ARK. DEMOCRAT-GAZETTE, Sept. 20, 2009.

<sup>72</sup> See, e.g., Ga. Code § 50-18-34 (2010); Mich. Comp. Laws § 26.6 (2010); Neb. Rev. Stat. § 24-212 (2010).

<sup>73</sup> 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 The NBER/State Constitutions Project, <http://www.stateconstitutions.umd.edu/index.aspx> (results of search of individual states for the word "reporter"). In addition to Arkansas, the current list includes Florida, Kansas, Minnesota, New Mexico, South Carolina, Tennessee, Washington, and West Virginia. In three of those states, the post is, under the

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 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.

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."

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. 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.

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, it had become customary "for the Judges in preparing their opinions, to incorporate therein a statement of facts." Remove that and headnote preparation from the Reporter and, wrote the court, "there ... would be nothing of importance remaining of an intellectual character for a Reporter to perform, beyond the capacity of an ordinary proof-reader." 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 U.S. jurisdictions in which headnote preparation remains with a public reporter of decisions has shrunk to a small number. Furthermore, since most case law research is done on commercial services that either limit themselves to the public domain judicial texts or substitute their own headnotes, even in jurisdictions where a reporter remains responsible for their production, official report headnotes have

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constitution, held *ex officio* by the attorney general. See Fla. Const. art. iv, § 22; Tenn. Const. art. 6, § 5; W. Va. Const. amend. 62, Executive Department 1.

largely become vestigial. That focuses attention on the editorial review function which 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, 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.<sup>74</sup>

The work flows of many appellate courts in the U.S. 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. They rather than 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 a final bound volume. 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 capacity in house. Since Arkansas's pattern of print law report production retained full editorial responsibility within the judiciary, in the reporter's office, the state could shift the medium of case law publication without drastic adjustment of work flow or internal editorial practices.<sup>75</sup>

## ***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. Its median household income is among the very lowest in the U.S. as is its ratio of lawyers per capita. There are only 5,700 lawyers in active practice throughout the entire state<sup>76</sup> and 324 full-time judges.<sup>77</sup> If the Arkansas judicial branch could realistically project budget relief of some \$200,000 a year by switching from print law reports to an official case law database could not states like New York, California,

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<sup>74</sup> Frederick A. Muller, *Dissenting Opinion*, in TASK FORCE ON CITATION FORMATS, AM. ASS'N OF LAW LIBRARIES FINAL REPORT (1995), reprinted in 87 LAW. LIBR. J. 580, 625-26 (1995).

<sup>75</sup> 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.

<sup>76</sup> See American Bar Association, National Lawyer Population by State (2009), [http://new.abanet.org/marketresearch/PublicDocuments/2009\\_NATL\\_LAWYER\\_by\\_State.pdf](http://new.abanet.org/marketresearch/PublicDocuments/2009_NATL_LAWYER_by_State.pdf).

<sup>77</sup> 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](http://www.ncsconline.org/d_research/Ct_Struct/include/AR.pdf).

and Illinois save many multiples of that amount? All three 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, California, and Illinois represent such important legal information markets to the major vendors, that contracts for publication of those states' official law reports have, over time, become the means by which their judiciaries grant 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. Since both allow their publishers to remove critical citation information from the decisions held at these outsourced sites and also to restrict use to personal, non-commercial purposes, the resulting services reinforce rather than undercut the publishers' fee-based offerings.

The current contract between the Administrative Office of the Illinois Courts and West, which runs through 2011, does commit the state to paying for a bulk purchase of both the advance sheets and bound volumes of the *Illinois Reports* and *Illinois Appellate Reports*, but at heavily discounted prices. These represent a small fraction of the amounts others must pay for the same volumes and a small fraction of the recent per volume cost to Arkansas of printing and distributing its law reports. As is also true with the New York and California contracts the Illinois contract places all risk of declining market demand for print law reports on the commercial publisher. In the case of all three, 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 the Joe Christensen firm of Lincoln, Nebraska and the Darby Printing Co. 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.<sup>78</sup>

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<sup>78</sup> See "Official Report" Contracts between State Courts and Law Report Publishers, <http://www.access-to-law.com/elaw/contracts/>.

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.

## 2. States Closer to Arkansas in Scale and Market Importance

Because they, like Arkansas, are not able to leverage valuable market advantage for favorable terms, less populous states are more likely to experience the direct 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 is 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. The reports are printed by the state's director of printing, and they are distributed by the state law librarian.<sup>79</sup> As was the case in Arkansas, distribution to a lengthy list of judicial and other officials is prescribed by statute. Copies are also available for sale to others. By statute the price is to set by the Supreme Court<sup>80</sup> with the proceeds going into a fund covering state law library costs.<sup>81</sup> 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 born 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 all 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, 8 of them 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 it also shifts the preparation of headnotes and related editorial matter onto the publisher's staff, subject to review by the state's reporter.<sup>82</sup> Since 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.<sup>83</sup> 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

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<sup>79</sup> See Kan. Stat. §§ 20-205, 20-207, 20-208, 20-211, 20-213 (2010).

<sup>80</sup> See Kan. Stat. § 20-208 (2010).

<sup>81</sup> See Kan. Stat. § 20-213 (2010).

<sup>82</sup> See Contract for Editing, Printing, and Binding Volumes 144, 145, 146, 147, 148, 149 and 150 of the New Hampshire Reports, [http://www.access-to-law.com/elaw/contracts/NH\\_2002.pdf](http://www.access-to-law.com/elaw/contracts/NH_2002.pdf).

<sup>83</sup> 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.

sales to other state officials.<sup>84</sup> While it does not explicitly commit the publisher to furnishing all the additional benefits New Hampshire receives, all headnotes are initially prepared by LexisNexis.<sup>85</sup>

The judiciaries of all three states, Kansas, New Hampshire, and Vermont, face drastically curtailed budgets. Kansas and New Hampshire maintain web archives of appellate decisions reaching back to the mid-1990s. These are, as was the case in Arkansas prior to 2009, simply an accumulation of slip opinions. They do, however, demonstrate an existing capacity to distribute case law online. In Vermont a comparable online archive is maintained by the state library. The logic of Arkansas's decision may well appeal most 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 powerful 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 print reports from West 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, rules of court in Maine and Oklahoma still refer to the relevant West regional reporter as the state's "official" reporter. On the other hand, shifting that designation onto their existing case law archives and putting effective authentication measures in place should, in both cases, be relatively straightforward. Since neither Maine nor North Dakota have 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. Since Oklahoma has detailed

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<sup>84</sup> See Contract for Editing, Printing, and Distributing the Advance Reports and Bound Volume of Volumes 184-186 of the Vermont Supreme Court Reports.

<sup>85</sup> E-mail from Larry Abbott, Reporter of Decisions, Supreme Court of Vermont, to author (Dec. 21, 2011) (on file with author).

procedures for moving decisions from “unpublished” to “published” status, labels decisions in both categories clearly, and explains the distinction at its website, there is no reason why this issue need stand in the way its embracing electronic case reports more completely.

## C. States Attempting to Sustain Fee-Based Systems

### 1. The Alabama Model

Several U.S. courts 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.<sup>86</sup> 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. Instead, for an annual fee of \$200 subscribers can log into Alalinc, a legal information service of the Alabama Supreme Court and state law library. The content it offers for that price is no more extensive than Arkansas and other states have long provided to the public for free.<sup>87</sup> While Alabama does have a court official with the title “reporter,” the state ceased publishing its own print law reports years ago.<sup>88</sup> 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,<sup>89</sup> Alabama is likely to find adopting the Arkansas model more difficult than 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 caselaw in print and electronic format.<sup>90</sup> Since 2005, this body has

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<sup>86</sup> See Stuart M. Cohen, *New York Court of Appeals Offers Instant Access to New Decisions*, 63 N.Y. St. B.J. 50 (July/Aug. 1991).

<sup>87</sup> See What is on ALALINC, [http://www.alalinc.net/alalinc\\_faqs.cfm#2](http://www.alalinc.net/alalinc_faqs.cfm#2).

<sup>88</sup> 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).

<sup>89</sup> See, e.g., Alabama Supreme Court Cases, <http://caselaw.findlaw.com/court/al-supreme-court/>.

<sup>90</sup> See N.M. Stat. §§ 12.1.3–12.1.3.1 (2010).

offered subscribers a disk-based compilation of New Mexico primary law as an alternative to the comparable print publications.<sup>91</sup> 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.<sup>92</sup> Priced competitively this electronic alternative has partially buffered New Mexico from the fiscal impact of the declining demand for print law reports.<sup>93</sup> 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.<sup>94</sup> 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. 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. In addition, the New Mexico courts have been applying non-print dependent citations to appellate decisions since 1997.<sup>95</sup> 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.

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<sup>91</sup> See New Mexico Compilation Commission – History, <http://www.nmcompcomm.us/history.htm>.

<sup>92</sup> See New Mexico Compilation Commission – CD/DVD, <http://www.nmcompcomm.us/NMOneSource.htm>. 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 (2010). Consequently, the official version of New Mexico’s compiled regulations is that appearing on the website maintained by the New Mexico State Records Commission. New Mexico Administrative Code, <http://www.nmcp.state.nm.us/nmac/>. The New Mexico Administrative Code included on and incorporated into the Compilation Commission’s electronic publications is furnished to it by this other state agency. Telephone Interview with Brenda Castello, Executive Director, New Mexico Compilation Commission, Jan. 13, 2011 (copy on file with author).

<sup>93</sup> Access to commission’s digital collection costs \$595.00 per year for an individual. That is less expensive than either of the commercially produced the 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 (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, Executive Director, New Mexico Compilation Commission, Nov. 19, 2010 (copy on file with author).

<sup>94</sup> See State of New Mexico 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>; State of New Mexico Executive Budget, Fiscal Year 2011, at 2, 4, <http://budget.nmdfa.state.nm.us/cms/kunde/rts/budgetnmdfastatenmus/docs/677050477-01-26-2010-15-34-19.pdf>. According to the commission’s executive director, it is an enterprise unit that must achieve self-sufficiency (which includes transfers from both the legislature and the judiciary for services). While general revenue support was necessary to launch the commission’s ambitious publication program it is understood that that support will not continue indefinitely. Telephone Interview with Brenda Castello, Executive Director, New Mexico Compilation Commission, Jan. 13, 2011 (copy on file with author).

<sup>95</sup> See Peter W. Martin, *Neutral Citation, Court Web Sites, and Access to Authoritative Case Law*, 90 L. LIBR. J. 329, 347 (2006).

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 public access site retains only decisions from the current year and the ten years immediately prior; older decisions are systematically removed.<sup>96</sup> 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.<sup>97</sup>

New Mexico’s approach, like Alabama’s as well as those patterns of dissemination that attempt to preserve a revenue stream or other visible benefits to courts by granting privileged access to a particular commercial publisher, assumes a sharp dichotomy between the information needs of lawyers and the public. The large commercial legal information systems encourage the view that case law is a matter of serious interest to lawyers and government and 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, 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. Dissemination models that place fee barriers in front of such critical information forego 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 benefits flow from free public access to a fully functional case law archive and second, that unrestricted access to redistributors, commercial and non-profit, is, in the current era, a more effective path to reducing the cost and improving the quality of the legal research tools available to legal professionals and government officials than favoring a particular publisher, whether public or private. The Arkansas statute authorizing digital case reports does authorize the Administrative

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<sup>96</sup> See Mexico Appellate Opinions, <http://www.nmcompcomm.us/nmcases/NMCases.aspx>. The public access statutory compilation is explicitly subordinated to the one offered fee-paying subscribers and lacks its annotations. See New Mexico Compilation Commission – Search Statutes, Rules and Decisions, <http://search.nmcompcomm.us/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0> (“not intended to replace the official version found in New Mexico Statutes Annotated 1978”).

<sup>97</sup> See New Mexico Compilation Commission, Memorandum to Attorney’s of the State of New Mexico, April 1, 2008, available at [http://www.hyperlaw.com/docs/2008/08-04-01-new\\_mexico\\_compilation\\_comm.pdf](http://www.hyperlaw.com/docs/2008/08-04-01-new_mexico_compilation_comm.pdf).

Office of the Courts to launch a fee based service on top of the open access public site, but not at its expense.<sup>98</sup>

## **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. The citation “2010 Ark. 328” retrieves the Arkansas Supreme Court’s decision in *Honeysuckle v. Curtis H. Stout, Inc.* on Fastcase, 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). Fastcase, Lexis, and Loislaw included the internal pagination drawn from the preliminary version of the opinion posted at the court website, permitting pinpoint references without delay. Westlaw did not. Oddly, however, West does show the pagination in Arkansas opinions when published in the pages of the *South Western Reporter*.<sup>99</sup> As a consequence only Westlaw users whose subscriptions include access to the regional reporter’s image files can access that information. Casemaker, which draws its collection of Arkansas cases from the West regional reports, does not include Arkansas’s internal pagination. It provides only the pagination in volumes of *South Western Reporter* and awaits the appearance of decisions in those volumes before loading them.

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 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 LexisNexis, Westlaw, and the newcomer Fastcase 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

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<sup>98</sup> 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 § 25-18-218 (2010).

<sup>99</sup> 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 two counts: first, because Westlaw does show the pagination of older decisions appearing in the *Arkansas Reports* and second, because the *South Western* print reports never did. Quite possibly the anomaly is a transition phenomenon and will not persist.

their contents from the official reports and West's regional reporter respectively, did the same.

Since only about a quarter of the 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 those publications and services that had previously limited themselves to the smaller number, particularly West's print edition of the *South Western Reporter*.

Two states preceded Arkansas in erasing the published/unpublished distinction – Ohio and Utah – but without presenting republishers with the full dilemma. That is because officials in those states continue to select only a limited number of their intermediate appellate court decisions for print publication. In the case of Ohio, the selections are made in the office of the reporter of decisions. Ohio's numbers are large. In a year's time, its 12 district courts of appeals release well over 5,000 "merits decisions." They are transmitted to the reporter's office for web publication and all count as precedent. However, only eight to nine percent are selected for publication in Ohio's "official" print reports. West publishes only those appearing in *Ohio Appellate Reports* in its regional, *North Eastern Reporter*. It loads the rest into Westlaw where they are designated "Slip Copies."

Utah ceased print law report publication in 1974 prior to establishment of the state's intermediate appellate court. From its inception that court 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.<sup>100</sup>

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*. 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 the regional reporter but a higher percentage of those rendered by the state's court of appeals.<sup>101</sup>

For those online services that previously loaded all the Arkansas appellate decisions they could retrieve, whether or not designated for publication, the only issue posed by the state's expansion of the pool of precedent was how to alter the notice warning researchers about the non-precedential status of unpublished decisions issued prior to July 1, 2009. Those that previously keyed their online collections to print reports, Loislaw and

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<sup>100</sup> See Utah R. App. P. 30(f).

<sup>101</sup> A Westlaw search reveals only 236 Arkansas Supreme Court decisions for 2009 that have appeared or are destined to appear in the *South Western Reporter*, down by over 100 from the two preceding years. 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.

Casemaker, have gone different directions. Loislaw, which drew its Arkansas database from the official reports, has since July 1, 2009 loaded all appellate decisions available from the now official website. Casemaker, continuing to limit its contents to decisions in the regional reports, has not.<sup>102</sup>

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” users may 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 those of Court of Appeals decisions released between February 14 and July 1, 2009 to which the court attached the notation “Not Designated for Publication.” While these opinions carry citation designations 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.

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.”

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: “NOTICE: THIS DECISION WILL NOT APPEAR IN THE SOUTH WESTERN REPORTER. SEE REVISED SUPREME COURT RULE 5-2 FOR THE PRECEDENTIAL VALUE OF OPINIONS.”

## ***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.<sup>103</sup> 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.<sup>104</sup> Absence of copyright notices in and the lack of

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<sup>102</sup> 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.

<sup>103</sup> See, e.g., Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173 (1998).

<sup>104</sup> See *supra* pp. \_\_\_-\_\_\_.

copyright registration of the law reports of three other states suggest a similar stance.<sup>105</sup> 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,<sup>106</sup> the validity and scope of copyright claims to law reports still await definitive resolution by the Supreme Court<sup>107</sup> or Congress.<sup>108</sup>

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 benefit of the State of Kansas." In inserting this notice and registering volumes of the *Kansas Reports* with the U.S. Copyright Office, Mr. Ross is obeying a legislative command that dates

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<sup>105</sup> 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). Compare a search of the Copyright Office records on those titles with one on *Kansas Reports*. See <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First>.

<sup>106</sup> See *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674 (2d Cir. 1998), cert. denied 522 U.S. 3732 (1999); *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693 (2d Cir. 1998), cert. denied 522 U.S. 3732 (1999).

<sup>107</sup> West continues to view the matter as settled in but one circuit. See the 2007 exchange of letters between Carl Malamud, President & CEO of Public.Resource.Org, Inc. and Thomson officials. See [http://bulk.resource.org/courts.gov/letter\\_to\\_west.pdf](http://bulk.resource.org/courts.gov/letter_to_west.pdf); [http://bulk.resource.org/courts.gov/letter\\_to\\_west\\_response.pdf](http://bulk.resource.org/courts.gov/letter_to_west_response.pdf).

<sup>108</sup> 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, it got no further than committee hearings. See Francine Biscardi, *The Historical Development of the Law Concerning Judicial Report Publication*, 85 LAW LIBR. J. 531, 541-544 (1993).

from 1889.<sup>109</sup> In 1981 he sought and obtained an attorney general’s opinion on the scope of the resulting copyright.<sup>110</sup> 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.”<sup>111</sup> It concluded on the basis of longstanding Supreme Court authority that only the latter are protected by copyright.<sup>112</sup> Nonetheless, the statute remains, and the practice of copyrighting the *Kansas Reports* continues.<sup>113</sup> 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.<sup>114</sup> A principal reason to provide open access to authoritative opinion texts in electronic 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.

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<sup>109</sup> See Kan. Stat. § 20-206 (2010).

<sup>110</sup> Kan. Att. Gen. Opinion No. 81-48 (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 – namely that the substantive summaries and headnotes and analytic indices included in its reports are protected. Presumably it follows, as the Attorney General of Kansas ruled 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.

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

<sup>112</sup> *Id.* See *Callaghan v. Myers*, 128 U.S. 617 (1888); *Banks v. Manchester*, 128 U.S. 244 (1888); and *Wheaton v. Peters*, 33 U.S. 591 (1888). See generally 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). 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 U.S. government employees. See 17 U.S.C. § 105 (2008).

<sup>113</sup> 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).

<sup>114</sup> 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* (2007), 9 *New York Reports* (2008), 112 *Ohio Reports 3d* (2008),

## 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.<sup>115</sup> 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 have 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.).

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, Westlaw, LexisNexis, Loislaw, Fastcase and the rest, the system depends on those systems extracting the page-break points from the official report PDF files and 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 point of release. To date Westlaw has resisted showing the official Arkansas pagination. Oddly, West does include those breaks in the print edition of the South Western Reporter. Since West has waited for decisions to be posted in final, authenticated form before printing them and Arkansas's delays in posting decisions in final form have been severe this has left Westlaw subscribers without official means for pinpoint citation to most decisions rendered since the change. As noted previously, LexisNexis, Loislaw, and Fastcase all provide pagination drawn from the preliminary version of each opinion from day of release.

West's policy of awaiting Arkansas's release of the final version of opinions before publishing them in print highlights a second potential problem with the use of page numbers. Since 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 version of decisions fell in different locations than they did in the preliminary. This led to inconsistent pagination information across commercial research services. No doubt the

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<sup>115</sup> Actually, Arkansas has deviated slightly from the (ABA/AALL) model since 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 AALL UNIVERSAL CITATION GUIDE § 103 (ver. 2.1 2002).

reporter's office work process can and will 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, set against the gains of Arkansas's new system of designating all decisions by year, court, and sequence number, the failure to embrace paragraph numbering is a 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 their 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 do consistently follow the prescription and that gives rise to delay 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* before the final version of the citing decisions can be released.

For those using capable 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. Since the regional reporter shows the official pagination within decisions, furnishing a parallel pinpoint citation, as the 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.<sup>116</sup>

## C. Lead Time

The Arkansas Supreme Court gave its reporter, the administrative office, and the state's appellate judges themselves very little time to work through the details of so large a

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<sup>116</sup> 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 U.S. in 1997. See Letter from Eleanor J. Lewis to Members of the Technology and Automation Committee of the Judicial Conference, March 14, 1997, available at <http://www.hyperlaw.com/jccite/348.txt>.

change. As a consequence some components of the new system have been 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.<sup>117</sup> 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, 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 print publication cycle broken and uncertainties surrounding how to provide authentication of the final version files, the conversion of opinions from preliminary to final form proceeded slowly. At the beginning of 2011, decisions dating as far back as March 2009 remained in preliminary form.<sup>118</sup> 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 that reporter had to be filled in before editorial revision 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 processing, including editorial attention, from the 400 or so selected for publication in the print reports to the more than 1,200 handed down by Arkansas's two appellate courts in a year.<sup>119</sup>

#### **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 well

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<sup>117</sup> See Administrative Office of the Courts, Supreme Court of Arkansas, Final Bound Volume of Arkansas Reports and Arkansas Appellate Reports Issued, June 28, 2010, [http://courts.arkansas.gov/Press\\_Releases/06292010\\_Arkansas\\_Reports.pdf](http://courts.arkansas.gov/Press_Releases/06292010_Arkansas_Reports.pdf).

<sup>118</sup> 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.

<sup>119</sup> 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>.

be drawing the critical passages from difference 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.<sup>120</sup>

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 *U.S. Reports*, issue “corrections” of already published opinions. These take the form of “Errata” notices inserted in later volumes. Most often they address miscited cases or statutes. However, some errata make changes in the texts of opinions years after their publication. For example, a notice in 549 U.S. (Oct. Term 2006) specifies a word change in *Conrad v. Pender*, 289 U.S. 472 (1933).<sup>121</sup> A notice in volume 321 of the *Arkansas Reports* corrects the word “sufficient” to “insufficient” in an opinion released fifteen years before.<sup>122</sup>

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 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

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<sup>120</sup> Association of Reporters of Judicial Decisions, Statement of Principles: “Official” Online Documents (Revised May 2008).

<sup>121</sup> 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).

<sup>122</sup> 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). 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. Ct. App. 1980).

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<sup>123</sup> and whether a typographical error seems probable.<sup>124</sup>

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 where, as is true in so many U.S. 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 U.S. 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.<sup>125</sup>

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 the prevailing print practice, the underlying concerns are legitimate and solutions,

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<sup>123</sup> See *Deutsch v. Circa Bistro LLC*, No. 3:04CV1253(CFD), 2005 U.S. Dist. LEXIS 20176 (D. Conn., Sept. 13, 2005).

<sup>124</sup> See *People v. Beverly*, 364 Ill. App. 3d 361, 845 N.E.2d 962 (2006); *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...”).

<sup>125</sup> See Association of Reporters of Judicial Decisions, Statement of Principles: “Official” Online Documents (Revised May 2008); AALL State Working Groups to Ensure Access to Electronic Legal Information (Revised June 2010).

demonstrably feasible. Under the current draft of a proposed Uniform Authentication and Preservation of State Electronic Legal Materials Act what is essential is that there be certification by an appropriate public official that a document has not been altered and that there be suitable means for users to determine that the official's certification is valid.<sup>126</sup> A system implemented by the U.S. Government Printing Office<sup>127</sup> and several prior initiatives by other states<sup>128</sup> 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 is likely to furnish a standard for others.

## 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.”<sup>129</sup> The second requirement speaks not only to the initial file format in which decisions are stored but also later ones into they may have to be converted in order to “ensure continuing usability.” U.S. Supreme Court opinions were for a time during the 1980s prepared using a mainframe-based word-processing program 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,

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<sup>126</sup> See Authentication and Preservation of State Electronic Legal Materials Act § 4 (Discussion draft July 2010).

<sup>127</sup> See 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.

<sup>128</sup> Decisions at the Ohio judiciary web site 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*, LEGAL INFORMATION MANAGEMENT, 8, at 35, 40-41 (2008), available at <http://journals.cambridge.org/action/displayAbstract?aid=1814212>. The Utah Administrative Code, the state's equivalent to the Code of Federal Regulations is, online at <http://www.rules.utah.gov/main/>. That online publication is designated official. (State-sponsored print publication of the code ceased for want of funding several years ago.) 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 web site. The Delaware Administrative Code, available online, is authenticated using an approach closer to that adopted by the Arkansas reporter of decisions. See Delaware's Administrative Code, <http://regulations.delaware.gov/AdminCode/>.

<sup>129</sup> *Id* § 6.

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. The proposed uniform law provides that the official responsible for the official law data “provide for back-up and disaster recovery.”<sup>130</sup>

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 level<sup>131</sup> and elsewhere,<sup>132</sup> constitute, at best, current recognition of inevitable future challenges coupled with a declaration of resolve to address them.

## 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.<sup>133</sup> 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.”<sup>134</sup> Widely recognized as a better format for use with textual material for which preserving the logical structure has higher priority than appearance is XML.<sup>135</sup> 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

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<sup>130</sup> *Id.*

<sup>131</sup> The Federal Digital System includes a commitment to preservation – ensuring “public access to government information even as technology changes.” See <http://www.gpo.gov/projects/fdsys.htm>

<sup>132</sup> As previously noted, Utah publishes its administrative code exclusively online. A 2006 statute places responsibility for archiving past versions on the state library. See Utah Code § 9-7-208 (2010).

<sup>133</sup> For the steps necessary to create PDF files that are of archival quality, see PDF/A-1, PDF for Long-term Preservation, Use of PDF 1.4, Sustainability of Digital Formats – Planning for Library of Congress Collections, <http://www.digitalpreservation.gov/formats/fdd/fdd000125.shtml>.

<sup>134</sup> *Id.*

<sup>135</sup> See XML (Extensible Markup Language), Sustainability of Digital Formats – Planning for Library of Congress Collections, <http://www.digitalpreservation.gov/formats/fdd/fdd000075.shtml>.

deliver consistent rendering of documents across computers, operating systems, monitors, and printers.<sup>136</sup> 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.<sup>137</sup> The Arkansas files released to date do not meet this test nor do those generated by other U.S. courts employing this format.<sup>138</sup>

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 scroll through material and provide the ability to search their collections on such data elements as opinion author and date and to follow links to cited authority.

The site [lawpulse.us](http://lawpulse.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.<sup>139</sup> As yet one is forced to imagine the possibilities with judicial opinions.

## **G. Whether Searchable Electronic Reports Need Headnotes, Catchlines, etc.**

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 U.S. Supreme Court decisions are an exception. During 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,

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<sup>136</sup> See Adobe, PDF as a Standard for Archiving 4 (2003), <http://www.adobe.com/enterprise/pdfs/pdfarchiving.pdf>.

<sup>137</sup> See PDF/A-1, PDF for Long-term Preservation, Use of PDF 1.4, Sustainability of Digital Formats – Planning for Library of Congress Collections, <http://www.digitalpreservation.gov/formats/fdd/fdd000125.shtml>.

<sup>138</sup> 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.

<sup>139</sup> See [govpulse.us](http://govpulse.us). 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 US Government Printing Office – FDsys – Bulk Data, <http://www.gpo.gov/fdsys/bulkdata>.

but without replacing them.<sup>140</sup> Remaining stuck in the original print volumes those publicly produced editorial features serve fewer and fewer researchers.

Because Arkansas's web site 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, like the U.S. Supreme Court, an exception to the general pattern.<sup>141</sup> But while the 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, 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.<sup>142</sup>

## 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

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<sup>140</sup> 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.

<sup>141</sup> 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." Publication Contract for the California Official Reports 8 (2003) ("Intellectual property rights; copyright and licenses"). 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 Publishing Services Contract PCH07-134 Between State of Washington, Office of Reporter of Decisions and Matthew Bender & Company, Inc. §§ 3.7, 3.9 (2007) ("Copyright", "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." Contract for the Editing, Printing and Binding, Volumes 144, 145, 146, 147, 148, 149 and 150 of the New Hampshire Reports § 12 (2002).

<sup>142</sup> See Keyword Search, <http://opinions.aoc.arkansas.gov/WebLink8/CustomSearch.aspx?SearchName=KeywordSearch>.

republishers, 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. Since case law builds incrementally the need for affirmative measures enabling bulk data acquisition<sup>143</sup> are far less critical than they are with statutory or administrative code compilations, where requiring third-party republishers to gather re-generated content, section by section, imposes serious costs. On the other hand, the post-release revision cycle for all opinions and 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 early 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. Long term, however, Arkansas reporter’s office hopes itself to create a full electronic reproduction of the entire run of the Arkansas Reports and Arkansas Appellate Reports. Courts in at least two other states have extended their electronic case law collections retrospectively. The public access opinion database of the North Dakota Supreme Court reaches back to 1965.<sup>144</sup>

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<sup>143</sup> Among the principles set forth by the law.gov initiative is one calling for bulk data release: “Primary legal materials should be made available using bulk access mechanisms so they may be downloaded by anyone.” See Law.Gov: America’s Operating System, Open Source, <http://resource.org/law.gov/>. The U.S. Government Printing Office has led by example in this area. See US Government Printing Office – FDsys – Bulk Data, <http://www.gpo.gov/fdsys/bulkdata>. The fruits have included third-party innovations from which the public data source can subsequently draw elements. See, e.g., govpulse, <http://govpulse.us/>; Ray Mosley, Director, Office of the Federal Register. Law.Gov Workshop, June 15, 2010, <http://www.archive.org/details/gov.law.final.11.04>.

<sup>144</sup> See North Dakota Supreme Court, N.W.2d Citations, <http://www.ndcourts.com/opinions/cite/NWcite.htm>.

The Oklahoma State Courts Network offers a complete case law collection, beginning with 1890.<sup>145</sup>

### **VIII. Conclusion**

The New Mexico venture in electronic publishing, described in a previous section,<sup>146</sup> 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 U.S. 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.

Since 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 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 U.S. 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 issue<sup>147</sup> and that agency has, in effect, done so in the manner of a commercial service, albeit one that need not

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<sup>145</sup> See OSCN: The Oklahoma State Courts Network, <http://www.oscn.net/>.

<sup>146</sup> See *supra* pp. \_\_\_- \_\_\_.

<sup>147</sup> 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. Statutes § 51-216a (2010). Nor has it moved aggressively into electronic publication. See Publications and Services of the Commission on Legal Publications, <http://www.jud.ct.gov/colp/publicat.htm>.

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.<sup>148</sup> Each of these document categories is cross-linked. Primary law references appearing in appellate decisions are linked to the cited authority, whether they are other decisions, court rules, or statutory sections.<sup>149</sup> The texts of statutory sections are followed by links to all decisions and attorney general opinions containing references to them.<sup>150</sup> 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 understand the 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 republishers, 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 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.

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<sup>148</sup> See The Oklahoma State Courts Network, <http://www.oscn.net>. While the site's Electronic Library for Oklahoma also includes the 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>.

<sup>149</sup> See, e.g., the OSCN version of *Cossey v. Cherokee Nation Enterprises, LLC*, 2009 OK 6.

<sup>150</sup> See, e.g., the OSCN version of Okla. Stat. tit. 12, § 93 (2010).