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RECONFIGURING LAW REPORTS AND THE CONCEPT OF PRECEDENT FOR A DIGITAL AGE*

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I. INTRODUCTION

ADHERENCE to the “rule of law” entails a strong commitment to consistency—a belief that throughout a jurisdiction and across time judges and other public officials should treat like cases alike.¹ Within American jurisprudence, explicit doctrines of precedent serve as important means to that end.² As expressed in standard formulations of the need to follow precedent or adhere to the rule of “stare decisis”³ this is not so much a consequence of resistance to legal change, but of a set of views

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1. The phrase “rule of law” has been used and abused to the point where it may carry little content. See David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK L. REV. 307, 308 (2003). Careful attempts to disaggregate the concept stress the importance of consistency, stability and knowability. See Joseph Raz, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 221 (Oxford Univ. Press 1979, 2002).

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

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

about the judicial role.⁴ Patently, new legislation, administrative regulations and court rules produce legal change to which judges must attend. Moreover, in America's layered legal system, determinations by federal courts on matters of national law can compel a shift in how state judges decide entire categories of cases. Judges of a jurisdiction's court of last resort will, on occasion, overrule past precedent. Barring such circumstances, however, judges are expected—indeed within limits they are obligated—to adhere to precedent.

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

4. It has even been argued that the constraint of precedent on judicial decision-making is implicit in the judicial function allocated to courts under Article III of the U.S. Constitution. In a decision by the late Judge Richard Arnold, subsequently vacated on grounds of mootness, the Eighth Circuit held unconstitutional its own rule denying "unpublished" decisions the effect of precedent. See *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated en banc as moot*, 235 F.3d 1054, 1054-55 (8th Cir. 2000). The rule, the decision said, purported "to confer on the federal courts a power that goes beyond the 'judicial.'" *Id.* Judge Arnold's position has not found support in the judiciary. See *Hart v. Massanari*, 266 F.3d 1155, 1175-76 (9th Cir. 2001). Furthermore, its historic basis has been criticized by scholars. See, e.g., R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in Anastasoff v. United States*, 3 J. APP. PRAC. & PROCESS 355, 383 (2001) ("These examples from the history of judging during the years of the early Republic show that not only the relative roles of judges and the legislature, but also the sources of law, and even the meaning of allowing judges the power to 'find' law, were all contested issues."); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 120 (2001) ("But although Judge Arnold's analysis points out a valuable new area of research, his conclusions about the history of stare decisis are contestable."); Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1266-71 (2007) ("It is simply not correct that in the late-eighteenth century, any previous case was binding authority in the way it is today."). But see Price, *supra* note 3, at 81 (explaining "consistent 'core idea' of precedent . . . even where there are varying ideas about the binding nature of that precedent").

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

This exploration of precedent, law reports and digital technology approaches the multiple-jurisdiction problem through the use of a single illustrative state: Kansas. This strategy has the advantage of anchoring the analysis, while allowing comparative references to other jurisdictions.⁶ Why Kansas? Initially, the selection was suggested by geography; Kansas is located at the geographic center of the forty-eight contiguous states. Other factors support this choice. In numerous, arguably more important dimensions, Kansas also lies toward the middle of the full fifty-state spectrum. Its population and number of practicing lawyers are neither unusually large nor unusually small.⁷ While the Kansas judicial structure has no idiosyncratic features,⁸ its appellate decisions command significant recognition and respect beyond the state's borders.⁹ Like many states, Kansas has taken steps to unify the administration and funding of courts throughout its jurisdiction, but like most, it has not completed the task. And critically, Kansas has not, to date, made significant adjustments in the dissemination or treatment of precedent in response to digital technology—also the case with most U.S. jurisdictions.

The Kansas judicial system rests on a layer of district courts—trial courts with general jurisdiction spread across the state. These are augmented by a set of municipal courts that are funded by and generate revenue for local units of government.¹⁰ Their jurisdiction is limited to traffic infractions and other ordinance violations occurring within the bounda-

one more U.S. judicial structure, albeit one to which all other courts must, on occasion, pay heed.

6. See, e.g., Robert S. Summers, *Precedent in the United States (New York State)*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 2, at 355-404. This classic comparative study of precedent adopts a similar approach, using New York as the representative U.S. jurisdiction.

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

8. See Kansas Judicial Branch, <http://www.kscourts.org> (last visited Dec. 7, 2007); David B. Rottman and Shauna M. Strickland, *State Court Organization*, 2004, U.S. Dept. of Justice, Bureau of Justice Statistics, Washington, D.C. USGPO, 2006, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf> [hereinafter *State Court Organization*]. See generally DANIEL JOHN MEADOR, *APPELLATE COURTS IN THE UNITED STATES* (2d ed. 2006).

9. See Jake Dear & Edward W. Jessen, "Followed Rates" and *Leading State Cases, 1940-2005*, 41 U.C. DAVIS L. REV. 683, 695 n.23 (2007).

10. Fines and costs imposed by Topeka's municipal court generate well over \$3 million a year for the city; the court costs total approximately \$1.7 million. See Topeka, Kansas, 2007 City Budget, available at http://www.topeka.org/2007_budget_adopted.shtml (follow Revenue Estimation and Department Budget Information, Municipal Court hyperlinks).

ries of 393 Kansas cities.¹¹ While the district courts operate within thirty-one judicial districts, each of the state's 105 counties is served by at least one district judge.¹² These counties range in population from Greeley County with approximately 1,500 residents to Sedgwick County with a population of nearly half a million.¹³ In addition to their trial jurisdiction, Kansas district courts also hear appeals from municipal court convictions¹⁴ and diverse administrative determinations.¹⁵

During fiscal year 2005, Kansas district courts disposed of approximately half a million cases. Slightly more than 40% involved traffic infractions.¹⁶ The balance included approximately 36,000 criminal cases (more than half of them felonies), a comparable number of domestic relations matters, and over 165,000 civil cases of other types; the majority of these other cases involved claims of \$25,000 or less and 10,000 fell within the "small claims" category, meaning they involved stakes of \$4,000 or less.¹⁷ Add the misdemeanor, traffic, building code, noise and other ordinance-based cases heard by Kansas municipal judges in a year, plus the worker's compensation, tax and other agency adjudications ultimately appealable to Kansas courts, and it should become clear that achieving consistent and accurate application of the law throughout this dispersed judicial system—the ultimate aim of precedent—is an enormous challenge.

While the numerous adjudications of the Kansas district courts are the ultimate target of precedent, this foundational layer of the Kansas judiciary, like trial courts in most other states, produces none.¹⁸ As doctrines

11. KAN. STAT. ANN. § 12-4104 (2006), *amended by* 2007 Kan. Sess. Laws 168. See Kansas Judicial Branch, Municipal Courts, <http://www.kscourts.org/kansas-courts/municipal-courts/default.asp> (last visited Dec. 7, 2007).

12. KAN. STAT. ANN. §§ 20-301, 20-301b (2007).

13. Kansas Counties, <http://skyways.lib.ks.us/counties/> (last visited Dec. 7, 2007).

14. KAN. STAT. ANN. § 22-3609 (2007) (granting "the right to appeal to the district court of the county from any judgment of a municipal court which adjudges the defendant guilty of a violation of the ordinances of any municipality of Kansas or any findings of contempt").

15. KAN. STAT. ANN. § 77-609 (2007) (granting general judicial review with few exceptions).

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

17. See *id.*

18. To begin, there is no constitutional principle or general requirement in Kansas law that trial judges write out their reasons for specific legal rulings. See Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. (forthcoming 2007) (manuscript at 6, on file with author). The Kansas Supreme Court has indicated that when a trial judge decides on a sentence above the statutory minimum "it is the better practice for the sentencing court to place on the record a detailed statement of the facts and factors it considered." *State v. Bennett*, 731 P.2d 284, 286 (Kan. 1987). But that statement can be rendered orally, and a failure to state reasons does not by itself establish an abuse of discretion. See *id.* Judges deviating from the Kansas Child Support Guidelines must either support their decisions with written findings or make "specific findings on the

of precedent currently operate in Kansas, precedent can arise only when and if a trial court decision on some point or application of law is appealed, and then only under very limited conditions. To hear appeals from district court proceedings, Kansas has a two-tiered appellate structure, consisting of an intermediate court of appeals established in 1977 and a supreme court which can trace its origins back to a date prior to statehood.¹⁹

The primary responsibility of the Kansas Court of Appeals—a court comprised of thirteen²⁰ judges who normally hear and dispose of appeals in panels of three (with rotating membership)²¹—is to correct trial court errors, including but not limited to failures to adhere to precedent. Unlike the decisions it reviews, some, although far from all, of the decisions rendered by this front-line appellate court do operate as precedent. Under current Kansas law and court practice, roughly 12% of the cases decided by the Kansas Court of Appeals (143 out of 1156 during the 2005 fiscal year) have precedential weight or effect.²² With few exceptions, most decisions of the Court of Appeals, both those that count as precedent and those that do not, can be appealed to the Kansas Supreme Court.²³ The Kansas Supreme Court, the state's highest appellate court, can dis-

record.” *In re Marriage of Schletzbaum*, 809 P.2d 1251, 1254 (Kan. Ct. App. 1991). In these and other situations Kansas trial judges do, as they deem appropriate, issue written opinions. *See, e.g.*, *Ward v. Ward*, 30 P.3d 1001, 1005 (Kan. 2001); *State v. Wonders*, 952 P.2d 1351, 1356 (Kan. 1998). But when they do there is no public mechanism for bringing those opinions to the attention of others than those directly involved in the litigation, nor are judges or other public officials under any obligation to treat those opinions as precedent.

19. *See* Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of the Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 160-61 (1992). There was an earlier Kansas Court of Appeals, established in 1895. Its legislative charter expired at the beginning of 1901. *See id.* at 160 n.31. The precursor to the Kansas Supreme Court was the Territorial Supreme Court, which held its first session on July 30, 1855. *See* Kansas Judicial Branch, *History of the Kansas Appellate Courts*, available at <http://www.kscourts.org/kansas-courts/general-information/history.asp>.

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

21. *See* KAN. SUP. CT. R. 7.02 (explaining that hearings before Court of Appeals occur “before the judges of the court, sitting en banc, or in hearing panels designated by the Chief Judge of the court”); *State Court Organization*, *supra* note 8, Table 23 (listing typical panel as consisting of three judges). For a rare example of an en banc decision of the Kansas Court of Appeals (its most recent), *see Kansas Assoc. of Pub. Employees v. Pub. Employee Relations Bd.*, 778 P.2d 377, 378-80 (Kan. Ct. App. 1989).

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

23. KAN. SUP. CT. R. 8.03(a) (“Any party aggrieved by a decision of the Court of Appeals may petition the Supreme Court for discretionary review.”).

pose of appeals in several ways. With appeals as to which its review is discretionary (the case with most appeals), the Kansas Supreme Court can simply allow the decision of the Court of Appeals to stand.²⁴ Like the Court of Appeals, it can also dispose of cases it chooses to review, as well as those it must take, with decisions that are not precedential.²⁵ While 880 appeals were filed with the Kansas Supreme Court in the 2005 fiscal year,²⁶ it issued only 117 decisions that counted as precedent.²⁷

In sum, the right of appeal, first to the Kansas Court of Appeals, and subsequently to the Kansas Supreme Court, operates primarily as a direct means of correcting trial court errors. Standing alone, however, unassisted by doctrines of precedent, appeals would have to be far more numerous than they are to have much effect on district court operations. Doctrines of precedent extend the reach of a small subset of the decisions rendered by Kansas appellate courts each year to all future cases coming before Kansas courts (both trial and appellate) that raise issues on which precedent exists.

While the terminology used to draw the distinction varies, scholars regularly separate the operation of precedent into two categories likely to be useful here: horizontal and vertical.²⁸ “Horizontal” adherence to precedent occurs when a court follows *its own* earlier holdings in resolving the same issue in a current case.²⁹ An example of precedent applying in this

24. During the 2005 fiscal year, the Kansas Supreme Court received 880 filings of which 619 (70.3%) were “petitions for review.” Over the same period it denied review in 505 such cases and disposed of another 59 cases without opinion. See Annual Report of the Courts of Kansas, Fiscal Year 2005, Supreme Court and Court of Appeals Caseload Activity, *available at* [http://intra.kscourts.org:7780/stats/05/2005 Appellate Court.pdf](http://intra.kscourts.org:7780/stats/05/2005%20Appellate%20Court.pdf). The Court’s review of Court of Appeals decisions is, in general, discretionary. See KAN. STAT. ANN. § 20-3018(b) (2007) (stating that “the review of any [appeal] shall be at the discretion of the supreme court”). This is one of the many respects in which the Kansas judicial structure is typical. See MEADOR, *supra* note 8, at 17 (“[I]n three-tiered judicial systems it is generally provided that appeal may be taken as a matter of right to the intermediate court but that any further review in the supreme court is at the discretion of that court.”).

25. See KAN. STAT. ANN. § 60-2106(a) (“A memorandum opinion may be prepared in any case where no new question of law is decided or which is otherwise considered as having no value as a precedent.”); KAN. SUP. CT. R. 7.04(f)(2) (explaining that unpublished memorandum opinions are not binding precedents and are not favored for citation).

26. See *supra* note 24.

27. This count is derived from the decision lists at <http://www.kscourts.org/Cases-and-Opinions/Date-of-Release-List/>. The same lists show another ninety-nine “unpublished decisions” of the court. The court’s statistical reports show a slightly larger number of decisions “with opinions” than the sum of these two figures.

28. See, e.g., Harrison, *supra* note 3, at 513 n.25 (“Vertical stare decisis refers to the rule that courts must follow the precedents of courts above them in the appellate hierarchy. . . . Horizontal stare decisis refers to the rule that a court must follow its own precedents.”).

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

fashion appears in *Kahm v. Arkansas River Gas Co.*³⁰ In *Kahm*, the Kansas Supreme Court wrote: “We have not failed to note the more or less analogous cases from other jurisdictions which the diligence of counsel has brought together for our perusal; but with due respect thereto we are bound to follow our own precedents”³¹ Operating horizontally, precedent works to achieve consistency across time, through changes in judicial personnel, and, with courts divided into panels or circuits, from one panel or circuit to another.³²

“Vertical” applications of precedent reflect and express the hierarchy in court structures.³³ When a lower court in Kansas adheres to prior holdings of a superior court (the Kansas Court of Appeals follows a decision of the Kansas Supreme Court or a Kansas district court follows an opinion of either the Court of Appeals or the Supreme Court), precedent is operating vertically. As explained by the Kansas Court of Appeals in *Noone v. Chalet of Wichita*:³⁴ “We are duty bound to follow Kansas Supreme Court precedent unless there is some indication that the court is departing from its previous position”³⁵

Judges, and occasionally scholars, use the term “precedent” in a third way. When a legal question arises and there is neither vertical nor horizontal precedent, a court may nonetheless speak of an opinion by another court—one that it has no obligation to follow—as “precedent.” When a court uses the word in this way, it means simply that the issue is not “unprecedented” and that a prior court ruling may offer a useful template for its consideration, possible adaptation and use. In *State v. Wyman*,³⁶ for example, the Kansas Supreme Court referred to decisions from two other states as potential “precedents” in this looser sense.³⁷ More often, under these circumstances, the Kansas Supreme Court and other courts will refer

30. 253 P. 563 (Kan. 1927).

31. *Id.* at 566.

32. The application of “horizontal precedent” within courts divided into panels, circuits or districts can and does take many shapes. It may well have changed over time with the federal circuit courts. See Harrison, *supra* note 3, at 516 (citing *Shreve v. Cheesman*, 69 F. 785 (8th Cir. 1895)) (explaining that while federal appellate courts are not currently bound by the decisions of other circuits, “the rule may have been the opposite a hundred years ago”). In Kansas, published decisions of one panel of the Court of Appeals are said to be binding on another panel, but not on the full court sitting en banc. See *In re L.D.B.*, 924 P.2d 642, 645 (Kan. Ct. App. 1996); *In re Cray*, 867 P.2d 291, 297 (Kan. Ct. App. 1994). That does not seem to prevent panels from disagreeing. See, e.g., *State v. Moody*, 144 P.3d 612 (Kan. 2006).

33. See generally Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (exploring concept of vertical precedent and justifications of doctrine).

34. 96 P.3d 674 (Kan. Ct. App. 2004).

35. *Id.* at 675.

36. 426 P.2d 26 (Kan. 1967).

37. *Id.* at 29.

to decisions from other jurisdictions as potentially “persuasive authority.”³⁸

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

In cases of prior litigation involving the same parties, several far narrower consistency doctrines operate. They bear such names as *res judicata*, collateral estoppel³⁹ and law of the case.⁴⁰ What is distinctive about notions of precedent is that they operate when the parties in the second case have no connection whatsoever with the parties in the earlier case and thus have no direct personal knowledge of the decision in it. The time separating these cases can be days or decades, yet for precedent to function, knowledge is essential. A judge cannot consider and apply prior opinions as precedent unless the judge and the lawyers arguing the case before the judge have some effective way to know of them. The same holds for those who would consider case law in shaping transactions or planning some other course of action. For this reason, the operation of precedent is dependent upon and therefore inescapably affected by the information dissemination, storage and retrieval systems available to

38. The persuasive force of such non-binding precedent can be very strong. Since the Kansas Corporation Code is based on the Delaware code, Delaware decisions interpreting its provisions carry significant weight in Kansas. *See, e.g., Vogel v. Mo. Valley Steel, Inc.*, 625 P.2d 1123, 1126 (Kan. 1981) (explaining that “Kansas Corporation Code was patterned after the Delaware Corporation Code and therefore, Delaware decisions interpreting its code are considered persuasive in [the] interpretation of the Kansas code”) (internal citation omitted). Similarly, federal court decisions applying the federal rules of civil procedure are “highly persuasive” on issues arising under the comparable Kansas rules. *See, e.g., Wood v. Groh*, 7 P.3d 1163, 1171 (Kan. 2000) (“Kansas courts often look to the case law on the federal rules as guidance for interpretation of our own rules, as the Kansas rules of civil procedure were patterned after the federal rules.”).

39. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980). The Supreme Court has explained that

Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Id. (internal citation omitted). For the use of a prior decision as the basis for collateral estoppel when court rules forbade its use as precedent, see *Edwards v. State*, 862 N.E.2d 1254, 1259-60 (Ind. Ct. App. 2007).

40. *See Arizona v. California*, 460 U.S. 605, 618 (1983) (“Unlike the more precise requirements of *res judicata*, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.”).

judges, lawyers and others who would seek to gather case law bearing on a particular issue.⁴¹ This article examines that connection.

In critical ways, current American ideas about precedent are the product of print law reports. The systematic publication of written decisions of America's appellate courts, which arose in the nineteenth century and flourished during the twentieth, was at least as much a source of this country's distinctive views of precedent as a consequence of them.⁴² Inherent limits of that mode of dissemination have influenced what counts as precedent and what does not in ways that have only become evident during the recent shift to electronic distribution. With unsettling rapidity, digital technology has dislodged print law reports, in practical fact, if not yet in the way lawyers and judges talk and think about case law. Even as courts continue to distinguish between published and unpublished decisions and cite precedent using volume and page numbers, federal courts at all levels operate under a statute calling upon them to place "the substance of all [their] written opinions" on the Internet.⁴³ State courts have begun doing the same without legislative mandate. Vast numbers of "unpublished" decisions of state and federal courts, decisions that have no volume and page numbers, are now collected and organized, linked and annotated in virtual law libraries. For judges, judicial clerks, lawyers and others searching for precedent, these online databases have supplanted library shelves filled with law report volumes in less than a decade.

Taking consistency and predictability of judicial decision-making as the ends toward which doctrines of precedent are simply a means, the ultimate question this article aims to explore is how ideas of precedent might be reshaped in consequence of this radically altered reality. En route to that zone of speculation, the article will, of necessity, pass by and

41. Michele Taruffo, *Institutional Factors Influencing Precedents*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 2, at 451-54 (explaining influence of reporting on precedent). Taruffo states:

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

Id. at 451. Grant Gilmore's survey of American law passes over the colonial period because of the absence of reports. Gilmore explains: "[T]here can hardly be a legal system until the decisions of the courts are regularly published and available to the bench and bar." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 9 (1977).

42. See generally Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEG. HIST. 28, 31-35 (1959) (exploring history and importance of reporting in England and United States).

43. E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913 (2002) (requiring that chief justices of different courts establish and maintain website containing information including "[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format").

observe how current concepts of precedent and limits inherent in print law reports are linked and identify problems that arise from the continued use of print-based ideas and practices now that case law flows along electronic channels.

II. PRECEDENT DISSEMINATION IN THE PRE-DIGITAL ERA

A. *Public Law Reports*

In judicial systems that function like those of Kansas and other U.S. jurisdictions, for past judicial opinions to guide future cases, it is essential that those opinions be readily accessible to both presiding judges and the lawyers presenting them with opposing legal arguments. In addition, unless all the participants are quite literally reading from the same page, there must be a system of citation enabling precise reference to those past opinions and the specific passages within them pertinent to the present controversy.⁴⁴ For over a century, the mode of information dissemination fulfilling these requirements and thereby providing infrastructure for the operation of precedent consisted of judge-written opinions, distributed in publicly sponsored print law reports.

Law reports produced in this fashion developed during the nineteenth century and set U.S. judicial practice apart from its historic antecedents.⁴⁵ Congress authorized appointment of the first "official reporter" of the U.S. Supreme Court decisions in 1817.⁴⁶ An order issued by the Court in 1834 marked the end of the practice of rendering oral opinions and regularized the flow of written decisions to the reporter.⁴⁷ Having official law reports was an established part of the statehood package for states admitted to the union after the Civil War.⁴⁸ By the end of

44. During the earlier years in Kansas when law books were still scarce, that was not unknown. See Robert A. Mead & Michael H. Hoefflich, *Lawyers and Law Books in Nineteenth-Century Kansas*, 50 U. KAN. L. REV. 1051, 1072 (2002).

45. See generally Denis P. Duffey, Jr., *Genre and Authority: The Rise of Case Reporting in the Early United States*, 74 CHI.-KENT L. REV. 263 (1998).

46. See ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 63 (1990) ("In 1817, the Supreme Court was authorized to appoint a reporter at an annual salary of \$1,000, with the requirement that he deliver to the Secretary of State fifty copies of his volumes.").

47. See *id.* at 64 (detailing end of Supreme Court oral opinions).

48. See generally *id.* at 28-33 (discussing progress made in legal publishing after Civil War). Between 1863 and 1900, West Virginia, Nevada, Nebraska, Colorado, North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming and Utah were granted statehood. In all cases, the jurisdiction's law reports date from the first year of statehood or before. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION tbl.T.1, at 202, 207, 217, 218, 226, 232, 236, 237, 238, 239 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005) [hereinafter BLUEBOOK]. For an account of the origins of law reporting in one of those states, see Tim Fuller, "The Most Accurate and Useful Law Books Possible," *Wash. Terr., Wash., Wn. 2d, and Wn. App.: Milestones of Official Case Reporting in Washington*, WASH. ST. BAR NEWS, Nov. 2005, at 22, available at <http://www.wsba.org/media/publications/barnews/fuller-nov05.htm>. The troubled early history of Kansas delayed the appearance of its first law reports. See

the century, nearly all states in the U.S. had established publicly sponsored law reports that disseminated opinions of at least their highest court.⁴⁹ These opinions were written by the judges themselves, rather than a reporter's reconstructions of remarks delivered *ex tempore* from the bench.⁵⁰

Key elements of the public law report system can still be seen etched in the statutes of a number of states where it continues to operate.⁵¹ Included in this group is the state of Kansas, which still produces the *Kansas Reports* and the *Kansas Court of Appeals Reports*.⁵² The first step is timely delivery of written appellate opinions to a public official, the reporter of decisions.⁵³ In many states, including Kansas, the statutory framework recognizes that not all decisions made by an appellate court warrant full opinions articulating reasons⁵⁴ and that not even all written opinions warrant publication.⁵⁵ The reporter's job is to organize all publishable opinions

Mead & Hoeflich, *supra* note 44, at 1063 (explaining effect of Quantrill's Raid on first volume of Kansas reporter).

49. See Edward W. Jessen, *Official Law Reporting in the United States*, in PROCEEDINGS OF THE SECOND INTERNATIONAL SYMPOSIUM ON OFFICIAL LAW REPORTING, at 28, 31 (2004). Jessen explains that "by the end of the 19th century all reporters were on salary, and all reports were printed at the expense of the states." *Id.* at 31.

50. See *id.* at 32 (explaining trend in late eighteenth century "requiring that judges write their opinions rather than merely state them orally, and leave it to reporters to transcribe and enhance the oral opinions"). The insistence that judges—or at least appellate judges—write out their decisions was also a mid-to late nineteenth century reform, often combined with the establishment of the office of law reporter. An 1841 Georgia statute mandated written opinions. See *id.*; SURRENCY, *supra* note 46, at 41-42 (describing Georgia statute requiring "trial judges to write out their decisions 'in a fair and legible hand' and place them in the minutes of the court"). A Pennsylvania statute did the same in 1845 as it authorized the appointment of an official court reporter. See Joel Fishman, *The Reports of the Supreme Court of Pennsylvania*, 87 LAW LIBR. J. 643, 644-45 (1995).

51. See, e.g., CAL. GOV'T CODE §§ 68900-05 (2007); 705 ILL. COMP. STAT. 65/1-7 (2007); OH. REV. CODE ANN. §§ 2503.19 to 2503.25 (2007).

52. KAN. STAT. ANN. §§ 20-201 to 20-208 (2007).

53. See, e.g., 705 ILL. COMP. STAT. 65/7 (2007) (requiring clerks of supreme and appellate courts to furnish state reporter with decision of those courts within ten days of decisions becoming final); KAN. STAT. ANN. § 20-202 (2007) (requiring justices of Kansas Supreme Court to prepare and deliver to state reporter full notes related to all publishable decisions within sixty days after close of term in which decisions were rendered). In a number of states, including Kansas, the office of reporter is established by the constitution. See, e.g., KAN. CONST. art. 3, § 4.

54. See, e.g., MASS. GEN. LAWS 221, § 64 (2007) (describing role of state reporter in choosing cases for publication "according to their relative importance"). The Kansas Supreme Court's decisions not to consider cases, like decisions of the U.S. Supreme Court denying certiorari, are made without any statement of reasons. See KAN. STAT. ANN. 20-112 (2007) (requiring court to reduce to writing only those cases in which it renders opinion). Some appellate courts also deal with appeals judged to be totally without merit by summarily affirming the decision below. In many states, not even all written appellate decisions are published. It is not surprising then that only a handful of states have ever made provision for publication of trial court decisions. See *infra* note 87.

55. See, e.g., GA. CODE ANN. § 15-4-3 (2007) (describing power of justices or judges to direct reporter to omit full publication of cases that may be understood by synopsis). The Kansas code calls for publication only of those supreme court

into volumes, adding such editorial elements as syllabi and the names of attorneys, along with tables of contents and topical indices.⁵⁶

The reporter or a comparable public official is also responsible for overseeing law report production and distribution.⁵⁷ Typically, this occurs in two waves: softcover advance sheets, followed months later by hardbound volumes.⁵⁸ Both are distributed at public expense to the jurisdiction's judges at all levels and sold, often at a controlled price, to lawyers and libraries.⁵⁹ The typical statute also contemplates an exchange of reports with other states, a form of barter aimed at securing resources for the state law library.⁶⁰

Details vary from state to state. Kansas is, today, unusual in having its reports printed and distributed by units of state government, rather than under contract by a commercial publisher.⁶¹ It is also one of a small number of states in which summaries of the key points of law in an opinion (the syllabus or set of headnotes) are prepared by the court itself, rather than added by the reporter or a private contractor.⁶² The fundamental

opinions "which the court deem of sufficient importance to be published" and those opinions of the court of appeals "which are to be published pursuant to rule of the supreme court." KAN. STAT. ANN. § 20-205 (2007).

56. See, e.g., KAN. STAT. ANN. § 20-204 (2007) (describing required contents of published opinion). In some states, the statute specifically contemplates the outsourcing of some of these editorial functions. See, e.g., 705 ILL. COMP. STAT. 65/3 (2007) (requiring reporter of decisions to supervise publication and distribution of text of decisions under contracts approved by Supreme Court).

57. See, e.g., 705 ILL. COMP. STAT. 65/2, 65/6 (2007); KAN. STAT. ANN. §§ 2-205, 2-208 (2007) (requiring reporter to coordinate production of law reports and their distribution to public officials and others).

58. See 705 ILL. COMP. STAT. 65/2 (describing process for publication of reports of supreme and appellate court decisions).

59. See, e.g., *id.* at 65/6 (2007) (mandating distribution of published reports to various state and federal officials); KAN. STAT. ANN. § 20-208(a)(6) (2007) (mandating distribution of published reports to each district court judge). A similar distribution list for the *Georgia Reports* and *Georgia Appeals Reports* is set forth at GA. CODE ANN. § 50-18-31 (2006).

60. See KAN. STAT. ANN. § 20-208 (2007) (providing for distribution of published reports for exchange purposes); see also GA. CODE ANN. §§ 50-11-6, 50-18-31 (2006). The Kansas Supreme Court Law Library once participated in fifty-eight exchanges of the state's law reports for reports of other states and law reviews. Today, the number is nineteen. E-mail from Claire King, Assistant Director, Kansas Supreme Court Law Library, to author (Feb. 26, 2007) (on file with author) (adding that over years exchanges have dwindled to nineteen at present due to states ceasing publication of official state reporters or states no longer desiring to collect reports of other states).

61. See KAN. STAT. ANN. §§ 20-205, 20-208 (2007) (describing role of reporter in supervising printing and distribution of published decisions).

62. See KAN. STAT. ANN. § 20-203 (2007) (requiring judge writing opinion to also write syllabus that appears in reports). Since the syllabus originates with the court, Kansas decisions will often cite to syllabus paragraphs. See, e.g., *Yount v. Deibert*, 147 P.3d 1065, 1070 (Kan. 2006) (citing syllabus paragraph (e.g., Syl. ¶ 2) of precedential case in order to establish standard of review). Ohio, Minnesota and West Virginia appellate decisions also include court-endorsed syllabi. See MINN. STAT. § 480.06 (2007) (requiring decisions with headnotes, "briefly stating

policy premise underlying these various arrangements is clear: The effective and timely dissemination of precedent is a public responsibility. It is to discharge that responsibility that statutes authorize the production and distribution of volumes containing current appellate decisions to judges and public officials throughout the state, establish measures designed to assure that they also have access to a full retrospective case law collection, and provide for the sale of the same law reports at reasonable prices to individual lawyers, law firms and law libraries.

B. *Public Law Libraries*

Public involvement in the creation and support of law libraries developed in rough parallel with the establishment of public law reports, but far less rapidly or completely.⁶³ Individual nineteenth century lawyers did have their own libraries, but most lawyers required access to larger collections than their practice could reasonably support. Judges needed to consult more than the published statutes and case law of their own jurisdiction. Law reports were swiftly followed by case digests and related finding aids, treatises and other essential references. The earliest response to this collective need took the form of subscription or membership law libraries. The first of these was the Philadelphia Social Law Library, established in 1802.⁶⁴ These soon spread to other eastern metropolitan centers and followed settlement to the West.⁶⁵ The Leavenworth Law Library Association of Kansas was established in 1866 with thirty-three founding members.⁶⁶ While such libraries, where established, met the needs of their members, the desire to provide a core collection for the use of judges and other public officials, as well as lawyers not served by a subscription library, led to the creation of public law libraries. By the early twentieth century many states had at least authorized systems of state and

the points decided"); OHIO REV. CODE ANN. § 2503.20 (West 2007) ("Whenever a case is reported for publication, the syllabus of such case shall be prepared by the judge delivering the opinion, and approved by a majority of the members of the court."); W. VA. CONST. art. VIII, § 4 (stating that "it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case in which an opinion is written and in which a majority of the justices thereof concurred . . .").

63. See generally Christine A. Brock, *Law Libraries and Librarians: A Revisionist History; or More than you ever wanted to know*, 67 LAW LIBR. J. 325, 329-32 (1974) (discussing development of private and public large-scale law libraries in eighteenth and nineteenth centuries).

64. See *id.* at 330 (describing evolution of private law libraries in eastern cities).

65. See *id.* at 330-32 (describing openings of private libraries in cities such as St. Louis and Los Angeles).

66. See Mead & Hoefflich, *supra* note 44, at 1070 (recounting that members were required to pay initial fee of twenty dollars and that library was open only to members).

county law libraries.⁶⁷ By 1972 there were over 1,000 of these libraries, including several in Kansas.⁶⁸

While public law libraries were appealing in concept, with some conspicuous, largely urban exceptions, they never achieved the reach or quality to which their supporters aspired.⁶⁹ As a means of assuring that front-line judges and those appearing before them had adequate legal information, this patchwork system was never a great success. As a method of providing the public with direct access to law, it was an utter failure. Most public law libraries were neither designed nor intended for that; they served the public by serving lawyers and judges.⁷⁰ Chronic funding difficulties plagued their effectiveness long before online legal information threatened their viability. As legal publications proliferated and their cost grew in the second half of the twentieth century, public law libraries in the areas with the greatest need—thinly resourced and sparsely populated rural areas—faced crisis conditions.⁷¹

C. *Commercial Law Reports: The National Reporter System*

Public law reports faced funding difficulties too, but a greater threat came from the private sector in the form of the parallel, commercially produced case reports that emerged toward the close of the nineteenth century.⁷² For a brief period there was fierce local and regional competition among commercial rivals, but by the early twentieth century, there

67. See, e.g., Act to Establish Law Libraries, ch. 225, 1891 Cal. Stat. 430. California's legislation establishing county law libraries was passed in 1891. COUNCIL OF CALIFORNIA COUNTY LAW LIBRARIANS, COUNTY LAW LIBRARY TASK FORCE REPORT 5-6 (May 2005), available at <http://www.cccll.org/CLLTaskForceReport.pdf> (explaining that bill allowed creation of law libraries statewide, funded through government contributions and portion of civil filing fees). See generally Gail H. Fruchtmann, *The History of the Los Angeles County Law Library*, 84 LAW LIBR. J. 687 (1992); Benjamin Watson, *Origins of California's County Law Library System*, 81 LAW LIBR. J. 241 (1989).

68. See Bethany J. Ochal, *County Law Libraries*, 67 LAW LIBR. J. 177, 180-81 (1974) (illustrating growth of county law libraries nationwide). The present count in Kansas is eighty-three. See County Law Libraries in Kansas, <http://www.law.ku.edu/library/research/kslawlibs.shtml> (last visited Dec. 7, 2007). The Kansas statute passed in 1967 requires approval by a majority of the lawyers in the county before a county law library can be established. KAN. STAT. ANN. § 20-3126(b) (2007). The requirement is understandable since the core funding source is an annual registration fee paid by local lawyers. See *id.* § 20-3126(c).

69. See Brock, *supra* note 63, at 335, 338 (describing failure of many state and county governments to establish law libraries appealing to nongovernment attorneys and the public at large).

70. Cf. at 334-37 (describing role, development and difficulties of public county and state law libraries).

71. See, e.g., Peter W. Martin, *Neutral Citation, Court Web Sites, and Access to Authoritative Case Law*, 99 LAW LIBR. J. 329, ¶ 17 (2007) (describing county law library crisis and ensuing debate in Oklahoma over creation of public legal database, which eventually came into being in 1997).

72. See Jessen, *supra* note 49, at 34 (describing beginning of private law report publication).

had emerged a single, powerfully attractive alternative to public law reports: West Publishing Company's National Reporter System. This series of regionally compiled state reports initially pushed public law reporters to expand and improve their editorial additions, to move decisions to print with greater speed, to publish advance sheets if they had not before and to conform advance sheet pagination to the pagination that would ultimately appear in the bound volume.⁷³ The public entities responsible for law report production and distribution were, however, all too often prevented from matching West's performance because of limited funds, insufficient and often less competent staff, inferior printing technology and general legal constraints on public contracts and sales.⁷⁴ Typically, they had no pricing flexibility.⁷⁵

Importantly, most states were unable to reprint back volumes during periods when a growing legal profession and judiciary created demand for complete retrospective sets.⁷⁶ Supreme Court copyright decisions effectively blocked state efforts to reserve or grant exclusive publication rights.⁷⁷ As a result, West Publishing Company traveled an unimpeded path in producing its comprehensive national series of reports. Courts commonly insisted that those citing precedent to them refer to the volume and page numbers in the state's "official reports," but West was free to insert those citation parameters in its volumes when they were available before the West reports went to press and to provide cross-reference tables when they were not.⁷⁸ This enabled users of the National Reporter System to cite to official reports without acquiring or otherwise securing access to them.

73. See *id.* at 34-37 (describing innovations made in West's National Reporter System between 1876 and 1900).

74. See *id.* at 34 (observing that increased volume of decisions toward end of nineteenth century, not matched by corresponding growth in public funding for law reports, caused publicly produced reports to fall further and further behind). At the time West launched its Northwestern Reporter in 1879, all seven of the states it covered were "several years tardy in publishing opinions." *Id.* at 35.

75. See KENDALL F. SVENGALIS, LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL 68 (2006) [hereinafter SVENGALIS 2006] (noting that legal constraints under which state agencies operate created particular problems for pricing of back volumes which inevitably compete with used books).

76. See Jessen, *supra* note 49, at 36-37 (describing increased demand for retrospective publication and various private sector solutions to meet it).

77. See *Callaghan v. Myers*, 128 U.S. 617 (1888) (validating copyrights of headnotes, statements of fact and other matter not prepared by judge); *Banks v. Manchester*, 128 U.S. 244 (1888) (invalidating copyright of judicial opinions by state reporter on ground that opinions are public property); *Wheaton v. Peters*, 33 U.S. 591 (1834) (rejecting reporter's claim to copyright in Supreme Court decisions). 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) (summarizing early Supreme Court cases and copyright doctrines developed in each).

78. See Jessen, *supra* note 49, at 35. There is anecdotal evidence to suggest that some commentators preferred citation to the National Reporter System, as it was more widely available than a state's official reports. See *id.*

D. *Unpublished Appellate Decisions*

With the exception of West's reports covering the lower federal courts, the National Reporter System did not compete by publishing opinions that those producing public law reports had not themselves selected for publication. For most states, at the turn of the twentieth century, that simply entailed publishing all decisions rendered with full opinions by the jurisdiction's highest court. As noted earlier, these were not necessarily all decisions.⁷⁹ Some appeals were disposed of summarily, with little or no explanation. Lacking detailed explication, these summary dispositions were, even when noted in law reports, of no value as precedent. And in some states, Kansas being one, public law reports were not required to include all supreme court opinions, but instead only those the court "deemed important."⁸⁰

During the formative years of public law reports, only the federal judiciary and a handful of states had multi-level appellate structures, with an intermediate appellate court placed between the jurisdiction's trial courts and its court of last resort. During the latter half of the twentieth century, however, growing caseloads led more and more states to adopt this model.⁸¹ Kansas did so in 1977. By the dawn of the digital age, approximately three-quarters of the states had intermediate appellate courts.⁸² Decisions of these intermediate courts were fed into the law report systems (state and commercial), but only a fraction of them. Most states setting up intermediate appellate courts specified that only selected decisions from this judicial layer should be published.⁸³ Within the federal judicial structure, the move to selective publication of U.S. Court of Appeals decisions also began, or at least became a significant and acknowledged practice, in the latter half of the twentieth century.⁸⁴ Decisions withheld from public

79. See *supra* note 55-57 and accompanying text.

80. KAN. STAT. ANN. § 20-205 (2007) (describing criteria to be considered by state reporter in selecting cases for publication).

81. See MEADOR, *supra* note 8, at 5, 11-12 (explaining that while multi-level appellate systems first appeared at end of nineteenth century, they did not become widespread in states until second half of twentieth century).

82. See *State Court Organization*, *supra* note 8, Table 1, at 9-11 (summarizing appellate court structures in all fifty states).

83. See MEADOR, *supra* note 8, at 59 (describing strong trend towards nonpublication of appellate decisions). The creation of intermediate appellate courts and selective publication were viewed as complementary measures for dealing with an appellate caseload crisis. See I THE ADVISORY COUNCIL FOR APPELLATE JUSTICE, APPELLATE JUSTICE: 1975, at 6-7, 10-11 (1975). In 1973 the Advisory Council for Appellate Justice circulated a model rule setting forth strict standards for publication of appellate decisions that proved influential. See V THE ADVISORY COUNCIL FOR APPELLATE JUSTICE, APPELLATE JUSTICE: 1975, at 128-29 (1975); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 122-25 (1994) (restating findings of Advisory Council report regarding limited publication).

84. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 761 (1995) (explaining that within several

law reports under such policies were listed in West's National Reporter System (as so-called "table cases"), but not printed in full. The decision not to publish an opinion effectively kept it out of both the official and commercial precedent distribution channels. Being invisible, it could not operate as precedent.

With few exceptions, invisibility was the fate of all trial court decisions.⁸⁵ In those few jurisdictions where some were published, the criteria for publication were stringent and the allotted space severely limited.⁸⁶ Here too, West Publishing Company's National Reporter System simply tracked the official reports. West's decision to publish selected decisions of the U.S. District Courts in a *Federal Supplement* reporter and the more focused *Federal Rules Decisions* demonstrated that trial court decisions had value for bench and bar.⁸⁷ That value was also reflected in sustained local publication of trial court decisions in a few states.⁸⁸ But jurisdiction-wide publication of even selected trial court opinions was a rarity.

E. *The Disappearance of Independent State-Published Reports*

In time, competition from West's National Reporter System led many states to cease publishing their own reports.⁸⁹ As federal law and decisions climbed in importance, and national commerce and interstate activity of

years of the 1964 Judicial Conference of United States, all federal circuit courts had adopted rules on unpublished opinions); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1442-44 (2004) (describing late twentieth century efforts to increase proportion of unpublished opinions, largely justified by claims of increased efficiency).

85. Three states that publish selected trial court decisions are Connecticut, New York and Ohio. See, e.g., BLUEBOOK, *supra* note 48, tbl.T.1, at 203, 221, 226.

86. See New York State Law Reporting Bureau, *Selection of Opinions for Publication*, <http://www.courts.state.ny.us/reporter/Selection.htm> (last visited Dec. 7, 2007). Under New York Judiciary Law § 431, the New York Law Reporting Bureau is authorized to publish any lower court decision it "considers worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest." *Id.* (quoting N.Y. JUD. LAW § 431 (McKinney 2007)). Currently, the Bureau selects approximately 600 decisions in this category each year (roughly one in six submitted). See *id.* A good number of those not selected for print publication are now placed online by the Bureau. See *id.*

87. When West Publishing Co. launched the Federal Reporter in 1880, both U.S. District Courts and Circuit Courts were trial courts. With the creation of the U.S. Courts of Appeals in 1891, volumes of the Federal Reporter included the new courts' decisions together with those of the U.S. District Courts; West also offered its opinions in a separate series: *The Circuit Courts of Appeals Reports*. See SURRENCY, *supra* note 46, at 70-71. It was only in 1932 that federal trial court decisions were diverted to the separate *Federal Supplement*. See *id.* at 71.

88. See, e.g., BLUEBOOK, *supra* note 48, tbl.T.1, at 229. Pennsylvania's county law reports and legal journals such as the *Bucks County Law Reporter* are an example. A commercial series entitled *Pennsylvania District & County Reports* has been in continuous publication since 1921. See *id.*

89. See SURRENCY, *supra* note 46, at 57-58 (describing trend, since World War II, of states ceasing publication of reports due to success of West's National Reporter System).

all kinds expanded through the first half of the twentieth century, judges and lawyers increasingly needed access to the multi-jurisdiction coverage of the West reports. Public reports seemed a costly redundancy, even when they were timely and well done. West had a strong reputation for accuracy and offered a full information package with which few states could compete: advance sheets, bound reports and digests that were in many cases far swifter to arrive, a system of summarizing and headnoting that strung decisions on the same issue together, not only within a jurisdiction, but beyond. Where the market warranted, the company was more than ready to produce a single state offprint from its regional reporter so that courts, lawyers and the libraries serving them did not have to acquire case law of other jurisdictions along with each full set of local precedent.

Beginning with Florida in 1948,⁹⁰ a parade of states, including three-quarters of those immediately adjoining Kansas, joined the lower federal courts in ceding all law report publication to West.⁹¹ The step reduced public payrolls and moved states out of the business of storing and distributing law books. It also shifted the judiciary as well as all other units of state government into a totally dependent posture: buyer of the state's own precedent from a single source.

By the mid-1990s, nearly half the states openly relied on West for their law reports. Others quit law report publication less conspicuously and in some cases less completely. The *Pennsylvania State Reports*, prepared by a state reporter, reach back in an unbroken sequence of volumes to 1845.⁹² For over thirty years, however, they have been prepared and published by West (now Thomson). Volume 458 was prepared by Joseph W. Marshall, State Reporter, and published under his supervision. Marshall retired in 1974. Volume 459 was published by West and included the summaries and headnotes prepared by its editors for the *Atlantic Reporter*. The pattern continues to this day. Similar shifts to what might be called officially sanctioned commercial publication took place in other states, which, viewed from a distance, would appear to have maintained independent production of their own reports.⁹³

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

91. See BLUEBOOK, *supra* note 48, tbl.T.1, at 202, 216, 227 (listing reporters for Colorado, Missouri and Oklahoma, respectively). The *Oklahoma Reports* ended in 1953, the *Missouri Reports* in 1956 and the *Colorado Reports* in 1980. See *id.*

92. See BLUEBOOK, *supra* note 48, tbl.T.1, at 229.

93. See Telephone Interview with Marcia Koslov, Library Director, Los Angeles County Law Library and Wisconsin State Law Librarian, 1974-2000 (Oct. 8, 2006). Wisconsin stopped contracting for production of the *Wisconsin Reports* in 1975, but Callaghan, later Lawyer's Coop, and still later Thomson / West, continued the

Even in those states that have continued to supervise production of their own law reports, less and less of the work is performed inhouse. Today, Kansas is unusual in handling the editorial, production and distribution process from start to finish. The prevailing approach is to contract out the latter functions, while retaining ultimate editorial control. Faced with budget cutbacks, state law reporters have cut back on staff and outsourced editorial functions they once carried out themselves.⁹⁴

To conclude, by the end of the twentieth century, public control over and responsibility for the distribution of precedent had been severely compromised by the effectiveness and market dominance of a single system of commercial law reports. And, in part as a consequence, the judiciary's need for law reports had in most jurisdictions led to a deep level of dependence on the proprietary methods and format of that system of reports. West was not reluctant to remind states of their dependency, and did so as it deemed necessary.⁹⁵

III. THE ARRIVAL OF VIRTUAL LAW REPORTS AND VIRTUAL LAW LIBRARIES

A. *Lexis and Westlaw*

It was only a decade ago that a serious alternative to libraries of print law reports became available to judges, lawyers and others in the United States.⁹⁶ Although the two major online services (LexisNexis and Westlaw) date back to the 1970s, they served as case-finding tools for most of their history. They supplemented but did not substitute for print reports. In their infancy, both were costly proof-of-concept services with serious scope limitations.⁹⁷ Launched in 1969, Lexis was, by 1976, offering federal case law reaching back fifty-one years for the Supreme Court, thirty-one years for the U.S. Courts of Appeals and sixteen years for the

series without interruption as *Callaghan's Wisconsin Reports*. At the point when Callaghan no longer had a contract with the state, West asked that its *Northwestern Reporter* be designated the "official reports" of state decisions. Rather than make a choice between Callaghan and West, the state supreme court labeled both of them as "official." *Id.* The rule doing so imposed and still imposes the condition that the Wisconsin Reports be entitled "Callaghan's Wisconsin Reports," no doubt to signal their proprietary nature. See WIS. SUP. CT. R. 80.03. The rules also speak of *Wisconsin Reports* as a publication of Lawyers Cooperative Publishing. See WISC. SUP. CT. R. 80.01. Neither Callaghan nor Lawyers Cooperative Publishing exists today. Thomson acquired both publishing entities prior to its purchase of the West Publishing Company. That acquisition brought both sets of Wisconsin "official reports" into the hands of a single publisher, Thomson / West.

94. See, e.g., Fuller, *supra* note 48 (describing recent changes to publication of Washington state appellate decisions).

95. During the early 1990s, West reportedly threatened state courts considering citation schemes to which it was opposed that it might omit elements on which those plans depended from its reports.

96. See generally William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 LAW LIBR. J. 543 (1985) (describing how Lexis and Westlaw came into being, their capabilities and their limitations).

97. See *id.* (same).

District Courts.⁹⁸ But its state materials were meager—comprehensive but chronologically thin collections for nine states, plus a selection of Delaware corporate law decisions.⁹⁹ At roughly \$125 per hour, this package drew few subscribers.¹⁰⁰ Westlaw in these early days avoided any risk of displacing West's print publications by offering only headnotes.¹⁰¹ Its depth was eight years for the states and fifteen years for federal cases.¹⁰²

By the mid-1980s, a Lexis threat to add star pagination to its case data, keyed to West's National Reporter System, raised the prospect of researchers working mostly, if not totally, from electronic versions of the print volumes. That provoked a West copyright suit.¹⁰³ By the time the parties settled their litigation in 1988 with a cross-licensing agreement—allowing Lexis (at a heavy price) to insert West pagination in its database—Westlaw had itself added pagination. In the meantime, access to both systems had moved from large terminal and printer installations in libraries, first to desktop terminals and then to PCs with modems.¹⁰⁴ The scope of their collections had been expanded; both held reported cases from all fifty states. Limited historic depth, however, still forced researchers to the books for older cases. Lexis reached back at least to 1965 for all states, further for some like New York (1940), California (1945) and its home state of Ohio (1921).¹⁰⁵ Westlaw's retrospective coverage was comparable.¹⁰⁶ By 1989 both Lexis and Westlaw featured online cite-checking.¹⁰⁷ Around the same time, both companies declared their intent to provide full fifty-state statutory coverage.¹⁰⁸

98. JAMES A. SPROWL, A MANUAL FOR COMPUTER-ASSISTED LEGAL RESEARCH 11 (1976).

99. *Id.* at 11-12.

100. *See id.* at 8-9 n.22 (reporting "close to 200 subscribers" in 1976).

101. *Cf. id.* at 55 (explaining that Westlaw established online research tool "as a by-product of its publishing activities").

102. *See id.* at 57; Harrington, *supra* note 96, at 553 (describing comprehensive, but limited coverage of Westlaw in 1976).

103. *See* West Publ'g Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1221-22 (8th Cir. 1986) (affirming grant of preliminary injunction halting Lexis's use of star pagination).

104. *See* JOHN E. KINSOCK, LEGAL DATABASES ONLINE: LEXIS & WESTLAW 2, 4, 77-78 (1985) (describing procedures for use of Lexis and Westlaw terminals and predicting eventual adoption of software for use on personal computers).

105. *See id.* at 81-89 (listing statutes, cases and other materials accessible through Lexis by 1985).

106. *See id.* at 90-99 (listing statutes, cases and other materials accessible through Westlaw by 1985).

107. With Lexis this feature was called "Auto-Cite" and was licensed from Lawyer's Coop. *See* KATHLEEN M. CARRICK, LEXIS: A LEGAL RESEARCH MANUAL 101-03 (1989) (explaining Lexis's auto-cite feature). Westlaw's cite-checker was named "Insta-Cite."

108. *See* FRED R. SHAPIRO, LEXIS: THE COMPLETE USER'S GUIDE 164 (1989) (indicating that at date of publication Lexis was in process of compiling "'fifty-state statute build' [comprised of] all the state codes online, as well as codes for the District of Columbia, Puerto Rico and Virgin Islands").

It was not until the mid- to late 1990s that these systems attained sufficient scope and functionality to become comprehensive research environments—virtual libraries—rather than simply places to begin case research. A series of changes, due largely to external developments and pressures, led to online case reports becoming not only a plausible substitute for the print originals, but a compelling (albeit still costly) alternative. In the early 1990s, competition from CD-ROM-based legal research products spurred several key software improvements. One was the hyperlink reference, standard in early law CD-ROMs, but difficult to transplant onto the character-based, non-scrolling terminal interface with which Lexis and Westlaw users had to cope. Lexis first employed “link markers” set off in brackets adjacent to citations (e.g., <=160>). To follow such a reference, the user had to key in the bracketed formula (e.g., “=160”).¹⁰⁹ Link markers eventually morphed into link tokens to which a user could jump by striking the tab key.¹¹⁰ Finally, as lawyers and judges migrated (ever so slowly) to a Windows interface, link markers became links operated by means of a mouse.

Links made it far easier to leap from one text to another than had ever been possible in print. Even so, online research systems remained dramatically inferior to print as a reading environment or print source. First, reading an online case on a PC required the reader to page through the case screenful by screenful. Moreover, downloading proceeded in similarly small increments, and generating print copies was both clumsy and often inadequate. By contrast, CD-ROM case law products permitted users to extract cases formatted as word-processor documents.

While Westlaw and Lexis eventually responded,¹¹¹ scrolling up or down through the full text of an opinion and saving or printing it in its entirety only became fully possible in 1998 once both systems moved to the World Wide Web and a standard Web browser (rather than proprietary software) interface.¹¹² This new WYSIWYG window on decisions required

109. See LEXIS-NEXIS: THE LEGAL BASICS 34 (1995).

110. Westlaw was the initiator here with its “JUMP” feature. See DISCOVERING WESTLAW: THE ESSENTIAL GUIDE 10 (2d ed. 1992).

111. See, e.g., JEAN SINCLAIR MCKNIGHT, THE LEXIS COMPANION: A COMPLETE GUIDE TO EFFECTIVE SEARCHING 131-32 (1995) (discussing steps taken by Lexis to improve quality of printed product). With respect to Lexis, these responses came in the form of software known as “LEXFORM,” which removed both the “hard returns” responsible for irregular formatting and the headers that separated each screen of text from the next. See *id.*

112. See DISCOVERING WESTLAW: THE ESSENTIAL GUIDE 4 (8th ed. 1998); David Beckman & David Hirsch, *Don't Duck This Web Feat: With Lexis and Westlaw on the Internet, Access to Research Opens Up*, 84 A.B.A. J. 86, 86 (1998) (recognizing novelty of Lexis and Westlaw internet presence and discussing convenient features offered by both services online). Although the systems became accessible via the Web, many experienced users were slow to switch, and both Lexis and Westlaw continued to offer access via the old and more limited dedicated interfaces. See Hope Viner Samborn, *While Publishing Giants Lexis and Westlaw Race For the Internet Market, Smaller Firms Tail Close Behind*, 85 A.B.A. J. 75, 78 (1999) (recounting Lexis

Internet access at sufficient bandwidth to allow opinions to be delivered in full, rather than screen-sized chunks. Moreover, the shift required major investments in both software and data throughout what by then had become quite large systems. Neither database had been built with the demands or potential of this new environment in mind.¹¹³

B. *New Players in This New Environment*

At roughly the same time that Westlaw and Lexis were successfully putting case law research on the desktops of lawyers practicing in large firms, new players with new business models were beginning to bring electronic case law within the budgets of small firm lawyers. Here too, CD-ROM technology was an important catalyst. Throughout the early 1990s, Westlaw and Lexis offered more than most small firm lawyers needed, at prices they could not afford. Both companies charged in ways that made their services unattractive to those making repeated use of a single state's cases and statutes. In 1995, Law Office Information Systems (LOIS) began selling state-specific CD-ROMs for a flat price of \$600 per year.¹¹⁴

By 2000, a striking array of less costly research options was available to U.S. lawyers. All were specifically designed and priced for attorneys practicing in small firms. LOIS—by then Loislaw—had moved to the Internet and expanded to all fifty states. In some jurisdictions, Loislaw was underpriced by small CD-ROM publishers. VersusLaw, another online research alternative, offered a national online case law library priced at only \$83.40 per year for a solo practitioner.¹¹⁵ Lexis and Westlaw had themselves created fixed rate plans designed and priced specifically for small firms.¹¹⁶

and Westlaw's transition to Internet and noting that some veteran lawyers preferred DOS-based proprietary software).

113. See Linnea Christiani, *Meeting the New Challenges at West and LexisNexis: Post-SIIA Summit Interviews with Michael Wilens and Lisa Mitnick*, SEARCHER, May 1, 2002, at 68-69 (outlining Westlaw's efforts to convert propriety software to large servers). The transition also required a fresh editorial investment. Consider italics, which are often used for emphasis within opinions. Because italics could not be presented using the original terminal and printer technology, italics had not been encoded in cases digitized by West and Mead Data Central. This can still be seen in scattered portions of both systems. Other elements of typography not represented in early Westlaw or Lexis data were strike-through and underlining, which have traditionally been used to show amended text. See, e.g., *Denver by Bd. of Water Comm'rs v. Vail Valley Consol. Water Dist.*, 751 P.2d 68, 69 (Colo. 1988) (failing to show strike-through of phrase "Meadow Creek" in original); *Woodard v. Pa. Nat'l Mut. Ins. Co.*, 534 So.2d 716, 719 (Fla. Ct. App. 1988) (utilizing underline to indicate amendment to text of statute).

114. KENDALL F. SVENGALIS, *LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL* 125 (1996).

115. See KENDALL F. SVENGALIS, *LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL* 111 (2001).

116. See, e.g., STEVEN L. EMANUEL, *LEXIS FOR LAW STUDENTS*, at 1-26 (1994) (explaining Lexis initiatives designed to make Lexis/Nexis more accessible to smaller practices). Lexis led the way with its "Most Valuable Part of Lexis" (MVP) program, which offered a low-rate, unlimited-use plan to customers that primarily

By then, public, non-profit and advertising-supported sites had begun providing judicial opinions and other legal documents over the Internet without charge.

More recently, state bar organizations have become major players in the case law dissemination picture, contracting on behalf of their members with a still newer set of commercial providers. The “Casemaker” consortium, established by the Ohio Bar Association and a small electronic publisher, is leading this development. Bar groups joining the consortium provide Casemaker’s online service to their members without charge. Currently, Casemaker claims twenty-eight state bar association members.¹¹⁷ The Kansas State Bar is a recent addition to the group, having introduced this service to its membership in late 2006.¹¹⁸

Fastcase, another recent entrant, also uses this business model (as well as a search engine that has learned some lessons from Google).¹¹⁹ In the past three years, Fastcase has signed up ten state bar associations, plus a number of local or specialty bar associations and membership libraries.¹²⁰

As the legal information market sped through these rapid changes, networked computers moved to the desktops of nearly all lawyers and judges, providing them with writing spaces, communication channels, and scheduling and management tools. Print publishing itself was transformed. Once courts began producing opinions on computers, companies that published print law reports sought and acquired access to electronic rather than hard copy versions of those opinions. Electronic publishers, including the new entrants, pressed for the same.

The cumulative result of these developments is a fully electronic legal research environment that is quite new. As recently as 1995, lawyers, especially those a decade or more out of law school, relied heavily on printed reports when researching case law.¹²¹ Today, virtually all writing by law-

utilized Lexis for legal research within a single state. *See id.* (discussing MVP program); *see generally* Martin, *supra* note 71, ¶¶ 73-74 (discussing MVP program and noting that Lexis offered plan through state bar associations).

117. *See* SVENGALIS 2006, *supra* note 75, at 148 (providing comprehensive list of state bar association clients). The State Bar of North Dakota brought the Casemaker count to twenty-eight in the summer of 2007. *See* Casemaker, http://www.sband.org/sband_blast/082207/casemaker_info.pdf (last visited Dec. 7, 2007).

118. *See* Kansas Bar Association Joins Casemaker Database (Feb. 9, 2006), http://www.ksbar.org/public/kba/2006_news/casemaker.shtml (recounting Kansas State Bar announcement to join Casemaker Database).

119. *See* Fastcase, Product Overview, <http://www.fastcase.com/Corporate/Product.aspx> (last visited Dec. 7, 2007).

120. E-mail from Philip Rosenthal, President, Fastcase, Inc., to author (Oct. 4, 2007) (on file with author). *See generally* Alan Cooper, *Fastcase Awarded Contract by Virginia State Bar*, VA. LAWYERS WKLY., Feb. 6, 2006 (discussing newly formed contract between Fastcase and Virginia State Bar Association).

121. *See* Donna M. Bergsgaard & William H. Lindberg, *A Dissenting View, in* TASK FORCE ON CITATION FORMATS, AM. ASS’N OF LAW LIBRARIES, FINAL REPORT (1995), *reprinted in* 87 LAW LIBR. J. 580, 609 (1995) (“While slightly more than half

yers and judges—whether memoranda, briefs or judicial opinions—is composed and revised on a computer. Most case law research is done on a computer as well. Quotations are copied from digital sources, rather than rekeyed. Lawyers, young and old, write briefs without ever pulling a law report volume from the shelf. Libraries pressed for shelf space and funds have ceased acquiring new volumes¹²² and even sought to rid themselves of old ones.¹²³

IV. THE PROBLEMATIC AND COSTLY STATUS QUO

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

A. *Costs or Inefficiencies Resulting from the Continued Dominance of Print Concepts and Practices*

1. *Citation Norms Still Dependent on Print*

In most U.S. jurisdictions, precedent must still be cited to print reports—those of the National Reporter System and in states like Kansas, where they continue to be produced, public reports as well. Decisions of Kansas courts and briefs submitted to them are required to cite state precedent using the following format: *Lawless v. Cedar Vale Regional Hosp.*,

of the [Wisconsin] bar now use computers to some extent in legal research, the remaining 45% are using printed sources *exclusively*.”).

122. See S. Blair Kauffman, *Rededication Symposia: Evolving Technology and Law Library Planning: Technology and Law Library Design*, 70 ST. JOHN'S L. REV. 163, 169 (1996) (noting that academic law libraries had begun to remove duplicate primary materials available online); see also Donald J. Dunn, *Why Legal Research Skills Declined, or When Two Rights Make a Wrong*, 85 LAW LIBR. J. 49, 60 (1993) (commenting on shift to computerized legal research and hypothesizing that volume of online material would soon surpass volume of printed material).

123. See Kansas Reports Available, <http://legalminds.lp.findlaw.com/list/kansasattorneys-l/msg00756.html> (last visited Dec. 7, 2007). In March 2003 the following appeared on several law listservs:

Washburn University Law Library has several sets of Kansas Reports available for sale. We seek to dispose of these items by April 15, 2003.

For further information please see <http://washburnlaw.edu/library/usedbooks/>

Thanks for your interest.- Martin Wisneski

Id.

252 Kan. 1064, 1072-73, 850 P.2d 795 (1993). The writer must adhere to this format despite having found and read the opinion using Westlaw, Lexis, Casemaker or some other digital source. Because Westlaw (the on-line system used by Kansas appellate courts) provides “star pagination” to the state’s “official” set of reports, the pinpoint or specific passage reference need employ only the pagination of the *Kansas Reports*. Nevertheless, the system’s dependence on volume and page numbers inevitably produces a significant period during which any case citation must be incomplete or temporary.

While decisions of the Kansas Supreme Court and Kansas Court of Appeals are available on a public website from the day of their release, three to four weeks pass before these cases receive their volume and page number assignments in the National Reporter System on Westlaw. Individuals relying on the print advance sheets must wait several weeks longer. Another three months pass before decisions acquire their official *Kansas Reports* or *Kansas Court of Appeals Reports* citations, or at least before those citations are added to Westlaw and Lexis.

Lawyers, judges and legal scholars have, of course, coped with this “citation lag” for as long as law reports have existed. What has changed is that the Internet, and specifically court websites, have at once given the problem greater salience and offered a straightforward solution.¹²⁴ Furthermore, the number of electronic distribution channels has quite literally multiplied both the inconvenience and cost of retrofitting print-derived citation information on opinions weeks and months after their release. Citation retrofitting is a redundant task that each electronic publisher is compelled to perform. The burden reinforces the market position of the more established and expensive online systems. Through a variety of means, the larger companies are able to gain and apply print citations to their case data with greater speed and economy than their smaller competitors. To eliminate the citation lag and the costs and consequent barriers to greater competition, Kansas (as well as thirty-odd other states and the federal courts) simply need to do what over a dozen states have already done: implement a system of court-attached citation that does not depend on where a decision is ultimately placed in one or more sets of print law reports or the decision’s designation in a commercial database.

On April 10, 2007, the North Dakota Supreme Court released seven opinions. A month later they had all been assigned volume and page numbers in the National Reporter System. These parameters were first displayed in Westlaw. They appeared in Lexis shortly thereafter. Slowly, each opinion’s print-derived numbers rippled through the other online

124. Because of the publication lag, judges often cite using placeholders relying on the reporter or publisher to fill them in subsequently. When the Kansas Supreme Court decided *State v. Drennan*, 101 P.3d 1218 (Kan. 2004) on December 17, the court had to cite its decision of the same date, *State v. Hurt*, as “278 Kan. ___, __ P.3d ___ (2004).”

services. From the day of release and forever thereafter, however, all of those opinions could be cited using a system illustrated by the following citation: *Odden v. Rath*, 2007 ND 51, ¶ 18.

Because this method of reference is based on the year, court, decision and paragraph number, and because each component is embedded in the opinion by the court, *Odden* could readily be cited from the moment the decision was available on the court website and in Lexis, Westlaw, Casemaker or any other source. Any researcher can use *Odden's* medium-neutral, non-print-dependent, non-proprietary citation to retrieve *the case* from the same range of sources and proceed directly to the cited passage.

So long as citation information and other revisions are added after a decision's initial release and are authoritatively implemented by only one of several disseminators, all other publishers must, in one way or another, secure that data and incorporate it into their versions of the same decisions. This necessity injects wasteful expense, time lag and risk of error into the business of electronic law publishing. Moreover, in the case of proprietary pagination, a publisher faces licensing costs or litigation risks.¹²⁵

2. *Publicly Accessible Digital Opinions: Neither Official Nor Final*

Citation norms are not the only factors that tie Kansas precedent to print. Kansas appellate courts release their "published" opinions on a website that carries this notice:

Slip opinions [as those at the site are denominated] . . . are subject to modification orders and editorial corrections prior to publication in the official reporters. Consult the bound volumes of *Kansas Reports* and *Kansas Court of Appeals Reports* for the final, official texts of the opinions of the Kansas Supreme Court and the Kansas Court of Appeals.¹²⁶

Thus, because the print reports remain the official dissemination path, opinions may be subjected to both editorial and even substantive revision during the lengthy period prior to final publication in the final bound

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

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

Id.

126. See generally Kansas Supreme Court and Kansas Court of Appeals Opinions, available at <http://www.kscourts.org/Cases-and-Opinions/opinions/> (last visited Dec. 7, 2007).

volumes. This notice warns both users and publishers that the publicly accessible versions of opinions distributed on the Internet are not subsequently conformed to the final, revised official print versions. To date, relatively few states have acknowledged the importance of minimizing post-release revision and of posting changes to opinions on their public websites when such changes are made.¹²⁷

3. *The Risk of Inconsistent Versions*

Print may be the “official” channel for Kansas precedent, but most lawyers and judges in the state and elsewhere draw case law from one of the competing virtual libraries. The judiciary’s failure to release appellate decisions electronically in an official, final and citable form gives rise to an indeterminate risk that those online versions may be inconsistent. Furthermore, there is no readily available means of verifying the accuracy of a critical passage, other than tracking down a copy of the “official” print report.

The judges and staff of the Kansas Supreme Court and the Kansas Court of Appeals use Westlaw.¹²⁸ While contracting practices and licensing terms vary from jurisdiction to jurisdiction, appellate courts across the United States provide their judges, clerks and other legal staff with subscriptions to Westlaw, Lexis or both. The same is not uniformly true for the trial courts beneath them.

In Kansas, the state’s 105 counties are individually responsible for funding library and electronic legal research services for Kansas district courts. Because those counties vary enormously in scale and resources, the online research services available to the state’s trial judges range from Westlaw or Lexis to none at all.¹²⁹ State monies continue to dispatch copies of *Kansas Reports* and *Kansas Court of Appeals Reports* to all district judges, but there is no effective assurance that the district judges, or the lawyers appearing before them, will have access to a collection of Kansas precedent as complete, accurate and up-to-date as the collection in the hands of the appellate judges who establish it.

127. See Martin, *supra* note 71, ¶¶ 26-27 (explaining that some states revise online versions of cases after release, but most simply warn users that online versions are not final). Some states have realized the importance of timely revisions and immediate disclosure over the Internet of any necessary revisions to opinions. See, e.g., Martin, *supra* note 71, ¶ 29 (discussing editorial practices adopted by Maine, New Mexico, North Dakota and Oklahoma). The Michigan Court of Appeals tags opinions at its website once they have been through editorial review and forwarded to the publisher of its “official reports.” See Michigan Court of Appeals—Court Opinions, <http://courtofappeals.mjud.net/resources/opinions.htm> (last visited Dec. 7, 2007) (explaining process of posting opinions before and after review by Editor’s Office). At that point, the final version is substituted for the original slip opinion. *Id.*

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

129. *Id.*

Lawyers in Kansas, like those across the country, constitute a complex market. Their decisions regarding online services vary according to the type and prosperity of their practice, and the size and location of their firm. But there is now a baseline. Like lawyers in a majority of states, Kansas state bar association members have access to Casemaker, at no additional charge. For these attorneys, Casemaker has replaced the county law library collection of law reports. This development renders all the more problematic the lack of an official digital source from which Casemaker or any other online service can draw or against which it can authenticate the text of Kansas decisions.

4. *The Temptation to Trade Privileged Data Access or Official Status for Online Services*

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

While Kansas publishes its own official reports, a majority of states outsource the activity. Over the past decade, contracts for official report publication have become increasingly concentrated in two companies: Thomson / West and LexisNexis. These contracts afford the successful bidder with unique access to digital formats of final decision texts, editorial enhancements and official citation data. In states such as California, New York and Ohio, where the demand for legal information is high, report publication contracts have become a mechanism for extracting substantial benefits for the judiciary, including free or discounted use of the publisher’s online system.¹³⁰

Absent such a publishing contract, the judiciary’s online service subscription agreement itself can provide a framework for exchanging judicial assistance in data acquisition for favorable use terms. The Westlaw contract with the Kansas appellate courts contains a “non-disclosure” provision.¹³¹ Thus, there is no sure way to determine whether the contract’s price terms are tied to judicial cooperation with Thomson’s production of the *Pacific Reports*, or to judicial delivery of certain Kansas data to Westlaw. Such provisions do exist in Thomson’s contracts with other states.¹³²

130. See Martin, *supra* note 71, ¶¶ 45-49 (discussing benefits obtained by large state court systems under their official report publication deals). The benefits enjoyed by large states such as California and New York were such that neither state supported adoption of competition-friendly, neutral citation forms. See *id.*

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

132. See, e.g., Letter from Ann S. Koto, State Law Librarian, Hawaii, to author (Feb. 5, 2007) (on file with author) (“[C]ontract amount is tied in with the courts’

Bundled with “official report” services, both Thomson / West and LexisNexis are prepared to provide states with a free and “open-to-the-public” case law site. They do so, however, on terms that prevent competitors from drawing data from the site or lawyers from using it professionally.¹³³

5. *Market Dominance Reinforced, Competition Inhibited*

The continued link between precedent and print harms small legal publishers and reinforces the market positions of the two dominant legal information vendors, Thomson / West and Reed Elsevier. Thomson / West utilizes a century of judicial and professional acceptance of its National Reporter System, and the resulting network effects to maintain its leading position in the market for online legal information. Users are drawn and held by the system’s consistency of format and editorial treatment over the full expanse of U.S. case law, by its citation scheme, deeply engrained in both individual habit and practice norms, and by brand loyalty.

LexisNexis, working under the undisclosed terms of its cross-licensing agreement with Thomson, is able to come close to Westlaw in the timeliness, comprehensiveness and citability of its case law collection. Indeed, LexisNexis has managed to surpass Thomson in some ways. LexisNexis has the capacity to compete with Thomson for contracts to publish official print reports. Lexis has employed aggressive pricing to secure substantial numbers of judicial subscriptions. Measured either in revenues or use, it is a strong number two among lawyers.¹³⁴ The lower cost vendors relied

agreement to electronically transmit appellate court dispositions to Thomson / West.”); Letter from Karen Quinn, State Law Librarian, Rhode Island, to author (Feb. 22, 2007) (on file with author) (“Unlimited and gratis access to the Rhode Island Briefs is afforded under this contract due to the assistance of the Rhode Island Judiciary in providing West with the data involved.”).

133. See, e.g., Notice of Copyright and Trademarks, <http://west.thomson.com/copyright/> (last visited Dec. 7, 2007) (“West hereby grants users of this West site permission to reproduce materials available therein for the sole purpose of educating authorized users and potential users of West products or services. Re-use or reproduction or distribution for commercial purposes is prohibited.”); California Courts: Opinions of the Supreme Court and Courts of Appeal: Special Caution, <http://www.courtinfo.ca.gov/opinions/continue.htm> (last visited Dec. 7, 2007) (providing copyright limitations for use of decisions). The LexisNexis California Supreme Court database provides:

There is no charge for using the Official Reports page and there is no copyright on opinion text, but the page is limited to personal use (see the publisher’s limitations on use). . . . The Official Reports page is primarily intended to provide effective public access to all of California’s precedential appellate decisions; it is not intended to function as an alternative to commercial computer-based services and products for comprehensive legal research.

Id. (same). In both instances the limitation is reinforced by the removal of star pagination necessary for citation.

134. See Sarah Kellogg, *Web Wars: Online Legal Research at the Crossroads*, 65 OR. ST. B. BULL. 8, 10 (2005) (disclosing annual sales figures in 2003 for top legal

upon by many small firm lawyers either fail to include essential citation information (i.e., print volume and page numbers) and post-release revisions (VersusLaw), or include them only long after that information has appeared in Westlaw and Lexis. To obtain the critical volume and page numbers along with any post-release revisions, smaller vendors must redigitize the opinion texts from the still “authoritative” print reports. With Casemaker, the resulting delay is more than six months. Consequently, researchers using the lower tier online systems are not only burdened with the resulting unnecessary costs passed on through the systems’ charges, but they are also forced to use other sources for the most recent decisions and to employ print sources or the more costly online sources to obtain citation information for any recent decisions they need to cite.

B. *Simple Means for Court Systems to Re-Establish Public Control Over the Dissemination of Their Precedent*

During the mid-1990s, a series of reports urged the nation’s courts to attach full, medium-neutral citation data to decisions prior to release. Companion recommendations called on courts to revise their rules governing briefs and memoranda to require the use of citations based on this non-proprietary scheme. Jurisdictions were also urged to create digital archives holding their case law in final, officially citable form—archives open on equal terms to all publishers and members of the public.

Today, these reforms can be seen at work in several states and accessible via websites that feature capable search engines, other case finding methods and complementary elements that make them useful tools for the direct public dissemination of precedent. Such measures also enable frictionless redistribution by all commercial players.¹³⁵ These are totally feasible foundational reforms that Kansas and other states still stuck in the print law report paradigm need to undertake. Their doing so should not only yield direct benefits, but also clear the way to richer and more expansive conceptions of precedent made possible by digital dissemination.

publishing companies and reporting Lexis as second in gross sales behind Thomson Corporation); Mark D. Killian, *Who’s Using What? Technology in Today’s Law Offices*, FLA. BAR NEWS, Jan. 15, 2005, at 5 (documenting research habits of Florida attorneys and reporting that 54% of survey respondents preferred Westlaw as chief legal research tool, 18% preferred Lexis and 12% used combination of both); Sarah Palmer, *If You Can’t Beat ‘Em, Train ‘Em: How Lawyers Conduct Legal Research*, LEGAL INFO. ALERT, Jan. 1, 2006, at 1, available at http://www.abanet.org/tech/ltrc/publications/lia_training.html (reporting results of survey finding that 49% of respondents used Westlaw and 47% used Lexis).

135. Cf. Martin, *supra* note 71, ¶¶ 36-39 (explaining that public dissemination of structured electronic documents “facilitates . . . the work of commercial publishers”).

V. OPPORTUNITIES FOR RICHER AND MORE EXPANSIVE CONCEPTIONS OF
PRECEDENT ONCE DIGITAL DISSEMINATION DISPLACES PRINT AS
THE OFFICIAL CHANNEL

A. *Removal of the Sharp Dichotomy Between Decisions That Are Published and
Those That Are Not*

Print law reports are costly to produce, distribute and store. They are also difficult to search. As a consequence, print dissemination of precedent encourages, if it does not compel, selective publication. As reported earlier, regardless of whether state high courts engaged in selective publication, the addition of intermediate courts of appeal to state judicial systems was almost invariably coupled with policies limiting publication of their decisions. In most states, the choice not to publish a decision effectively foreclosed access to it. Because of the serious issues that could arise if unpublished (and therefore unknown) decisions were to serve, nonetheless, as binding precedent, most jurisdictions declared unpublished decisions to be non-precedential.

Ultimately, selective publication became the norm. Nevertheless, jurisdictions varied widely with respect to both the nomenclature used to distinguish published precedential opinions from those opinions simply disposing of a case and the criteria for choosing which opinions belong in the precedential category.¹³⁶ During the latter quarter of the twentieth century, as the volume of appeals handled by appellate courts climbed, the percentage of opinions distributed as precedent declined.¹³⁷

136. See Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 125-27 (1994) (conceding that publication rules “differ in procedure and degree of specificity” and discussing common characteristics among states); Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 LAW LIBR. J. 21, 22 (1991) (recognizing that “[p]ublication standards vary widely among jurisdictions” and discussing various state approaches with respect to publication decisions and precedential value of published and unpublished decisions).

137. See COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2001, at 85 (Brian J. Ostrom et al., eds., 2002); COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 1998, at 101 (Brian J. Ostrom & Neal B. Kauder eds., 1999), available at http://www.ncsconline.org/D_Research/descriptions.html#manage (follow “Court Statistics Project” hyperlink; then follow “Past Reports 1975-2004” hyperlink) (reporting on percentage of cases heard and published by intermediate appellate courts and courts of last resort for 1996 through 1998); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 308 (1990) (concluding that at time of publication, “a majority of all final decisions by judges on the courts of appeals [were] unpublished . . .”). Kansas exemplifies the trend. In 1980, 39% of the opinions of the Kansas Court of Appeals (169 of 433) were published. See 4 KAN. APP. 2D xi-xiii (listing unpublished opinions of Kansas Court of Appeals in late 1979 and early 1980); 5 KAN. APP. 2D xi-xvii (listing unpublished opinions issued by Kansas Court of Appeals from May 1980 to March 1981). By 1995, the figure had dropped to 15.8% (187 of 1181). See 20 KAN. APP. 2D xiii-xxxiii (listing unpublished opinions of Kansas Court of Appeals from October 1994 to April 1995); 21 KAN. APP. 2D xxxii-lvi (listing unpublished opinions of Kansas Court of Appeals from May 1995 to February 1996).

Kansas court rules divide appellate decisions into two categories: published formal opinions and memorandum opinions.¹³⁸ Decisions are placed in the first category only if they address new issues or are otherwise thought to have “value as precedent.” Memorandum opinions are not “binding precedents,” and their citation, while not forbidden (the case in some other states¹³⁹ and, not so long ago, in Kansas¹⁴⁰), is said to be “not favored.”¹⁴¹ Nearly 90% of the decisions rendered by the Kansas Court of Appeals are delivered by such non-precedential opinions.¹⁴²

Following the early lead of Lexis, online redistributors of court decisions have not restricted their databases to opinions published in print law reports. Judicial proceedings are public in the United States. Subject to very limited exceptions, the resulting judgments are available to any database builder prepared to make the arrangements necessary to secure them. Originally, to load unpublished decisions into its federal and state files, Lexis was forced to digitize physical copies of decisions obtained from court clerks or reporters.

As courts moved to word processors and began placing opinions on dial-up bulletin boards, the process of providing unpublished decisions became simpler and therefore feasible for a wider range of private sector redistributors. By the end of the twentieth century, court bulletin boards had been supplanted by websites, most of which offered many more decisions than were being distributed in print law reports. Indeed, in some U.S. jurisdictions, legislative action encouraged or even mandated a more comprehensive release of court opinions. The E-Government Act of 2002 requires that federal courts at all levels furnish via a public website “[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court

138. See KAN. STAT. ANN. § 60-2106(a) (2006). This distinction is authorized but not required by statute. See *id.* (authorizing but not mandating that judge prepare “[a] memorandum opinion . . . in any case where no new question of law is decided or which is otherwise considered as having no value as a precedent.”).

139. See Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003) (inventorying no-citation rules and highlighting three areas in which such rules have come under fire); Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349, 349 (2005) (“some [states] have clearly rejected citation of unpublished decisions . . .”).

140. See Hinderks & Leben, *supra* note 19, at 158 n.15 (citing Gilbert Merritt, *The Decision Making Process in Federal Courts of Appeal*, 51 OHIO ST. L.J. 1385, 1393 (1990)) (noting that at time of publication, Tenth Circuit limited Internet opinion posting to those opinions published in Federal Reporter); Serfass & Cranford, *supra* note 139, at 349 (noting that Kansas and other states had adopted rules “allow[ing] citation of unpublished opinions either as persuasive authority or in some cases as precedent”).

141. KAN. SUP. CT. R. 7.04(f)(2)(ii) (2004) (“All memorandum opinions . . . are not favored for citation.”).

142. For further discussion of the disposition of Kansas appellate and Supreme Court decisions, see *supra* notes 22 and 24-27 and accompanying text.

reporter.”¹⁴³ And while the act permits removal of other digital information concerning closed cases after one year, it mandates that “all written opinions . . . remain available online.”¹⁴⁴

In numerous states where appellate courts produce “unpublished” non-precedential opinions, judicial websites nonetheless systematically disseminate those decisions. In some instances, this has occurred only in response to pressure from lawyers and lower courts.¹⁴⁵ Typically, unpublished decisions released in this fashion carry some standard notice alerting researchers to their limited precedential value. Some states, including Ohio, have gone so far as to erase or moderate the distinction between “published” and “unpublished,” “precedential” and “non-precedential” decisions.¹⁴⁶ Kansas has yet to start down this path. Unpublished Kansas decisions are available, but only upon request from the Supreme Court Library.¹⁴⁷ Apparently, however, Thompson regularly requests unpublished decisions, for unpublished decisions appear in full text in

143. Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2910, 2913 (2002).

144. *Id.* § 205(b)(2), 116 Stat. at 2914. This requirement to archive opinions applies only to those opinions issued after the section’s effective date, April 17, 2004. *See id.*

145. *See, e.g.,* Order, Indiana Supreme Court (Aug. 21, 2006), *available at* <http://www.in.gov/judiciary/orders/other/2006/94s00-0608-ms-299.pdf> (last visited Dec. 7, 2007) (allowing publication of “not-for-publication memorandum decisions” on Internet without changing their not-for-publication status). In this order, the Indiana Supreme Court granted the request of that state’s court of appeals that appellate court decisions marked “Not for Publication” be released and stored at the Indiana Courts’ website. *See id.*

146. *See* OHIO SUP. CT. R. FOR REPORTING OF OPINIONS 4 (abolishing distinction between precedential and non-precedential opinions in absence of Supreme Court’s decision that particular case should not be relied upon as legal authority). Ohio’s rule, enacted in 2002, maintained the non-precedential status of unreported decisions handed down prior to the enactment of the rule. *See id.*; *see also* Grand County v. Rogers, 44 P.3d 734, 736-39 (Utah 2002) (rejecting view that unpublished decisions of state’s court of appeals were not binding precedent). *Id.* at 737.

147. *See, e.g.,* Opinions Released Jan. 5, 2007, <http://www.kscourts.org/ks/cases/ctapp/2007/20070105/20070105.htm> (last visited Dec. 7, 2007) (stating that full-text versions of unpublished opinions are not available on web and to contact Kansas Supreme Court Law Library for such decisions). Whereas Lexis notes the existence of dispositions “without published opinion” by both the Kansas Supreme Court and Kansas Court of Appeals, it does not go to the trouble of gathering and disseminating either court’s supporting memorandum opinions. Compare *Citizens Bank v. Kan. Bankers Sur. Co.*, 149 P.3d 25 (Kan. Ct. App. 2007) (unpublished) as it appears on Lexis with the Westlaw version. By contrast, both Lexis and Westlaw provide access to “unpublished” decisions of the Wisconsin Court of Appeals, which they are able to collect at the state website, warning users that under Wisconsin’s appellate rules, these decisions have “no precedential value” and “may not be cited.” *See, e.g.,* *Wood v. Anacker*, 2005 WI App 176 (Wis. Ct. App. 2005) (unpublished) (listed in disposition table in state’s print law reports, 285 Wis. 2d 807, 701 N.W.2d 654, but available in full text at court website and on both Westlaw and Lexis).

Westlaw less than a week after release.¹⁴⁸ They are not to be found, however, on Lexis, Casemaker or any of the other online systems. Recall that while Westlaw is the system used by Kansas appellate judges, not all district judges in the state have access to it, nor, of course, do all lawyers.

With a medium that does not require selective dissemination, the case for distinguishing between precedential and non-precedential appellate decisions on the basis of print publication is difficult (if not impossible) to make.¹⁴⁹ The consequences of continuing such policies are particularly troubling when “unpublished,” “non-precedential” decisions are in fact available through one or more commercial systems, but not at the judiciary’s public site.¹⁵⁰ The digital environment allows appellate courts to tag those opinions they believe to involve routine application of settled law and for those conducting case research to focus initially on other opinions, without giving rise to all the problems that can flow from withholding opinions from general circulation on that ground or declaring those opinions non-precedential and uncitable.¹⁵¹

B. *Inclusion of Trial Court Decisions in the Flow of Precedent*

The same capacity, cost and search concerns that induced most U.S. jurisdictions to publish only selected appellate decisions led, with but a few exceptions, to trial court decisions being completely excluded from organized distribution and availability as precedent.¹⁵² Trial courts are, of course, bound by vertical precedent flowing down from the jurisdiction’s appellate courts, but they have not generally been seen as producing pre-

148. See, e.g., *State v. Sheppard*, No. 95,660, 2007 WL 959618 (Kan. Ct. App. Mar. 30, 2007) (unpublished) (providing full text of unpublished opinion).

149. Even so, some jurisdictions have continued to reaffirm a policy of denying unpublished decisions any precedential value, reinforced by rules forbidding their citation. See, e.g., *In re Amendment of Wis. Stat. § (Rule) 809.23(3) Regarding Citation to Unpublished Opinions*, 2003 WI 84, available at <http://www.wi.courts.gov/sc/rulhear/DisplayDocument.html?content=html&seqNo=953> (showing petition to amend rule barring citation of unpublished decisions denied, two justices dissenting). The one place the court’s decision does not appear is in N.W.2d. Using the “neutral” cite one can retrieve it at the public site and also on Lexis.

150. Unequal access has been an enduring problem with “unreported decisions.” See Dragich, *supra* note 86, at 778 (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)) (“Inherent in certainty is the idea that it is sometimes more important to have a well-established rule than to search endlessly for the best rule.”); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 955 (1989) (finding that “research on institutional litigants indicates that the methods the courts employ to discourage use of unpublished opinions—limited distribution and no-citation—do not work”). Robel goes on to say that these methods actually “aggravate and enhance any inherent unfairness the selective publication plans might have.” *Id.*

151. See, e.g., Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1373-77 (1995).

152. See *supra* notes 18-19, 87-90 and accompanying text.

cedent in any form. Yet the experience of those jurisdictions that publish some trial court decisions and examples from others where local distribution channels—legal newspapers, bar publications and in recent years websites—have given courts and counsel access to trial decisions demonstrate their value as precedent in the looser non-binding sense. There is, of course, the conspicuous example of the federal courts. Decisions of the U.S. District Courts, including many not published in print, are widely cited and relied upon even though they are not binding precedent.¹⁵³

Important legal questions can recur in litigation numerous times without being appealed. For example, the question whether data available from an automobile's black box can be admitted as evidence of the vehicle's speed without a prior hearing on reliability has been addressed by appellate courts of a few states, but not New York.¹⁵⁴ The issue must, therefore, be addressed by New York trial courts without the direction of vertical precedent. Because trial court decisions do circulate in New York, including significant numbers beyond those selected for publication in the official reports, any New York lawyer or judge confronting this question can find guidance in several unappealed lower court rulings.¹⁵⁵

There are particular legal domains within which important legal issues are repeatedly litigated without ever being appealed to a court producing decisions eligible for publication in a law report. Family law is one of these areas. Since 1977, selected opinions of Delaware's state-wide family court have been published in print,¹⁵⁶ on average five to six per year.¹⁵⁷ Beginning in the 1980s, first Lexis and then Westlaw began to load the court's "unpublished decisions." Today, both systems have significant collections of Delaware family court precedent.¹⁵⁸ All of Delaware's judiciary, including family court judges, has access to both online services.¹⁵⁹ On such context-dependent questions as the division of assets and liabilities in a divorce,¹⁶⁰ the termination of alimony because of "co-

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

154. *See, e.g.*, *Bachman v. Gen. Motors Corp.*, 776 N.E.2d 262 (2002) (judging admissibility of sensory data from air bag systems).

155. *See, e.g.*, *People v. Slade*, No. 0666-03, 2005 N.Y. Misc. LEXIS 3217 (N.Y. Sup. Ct. Jan. 18, 2005); *People v. Hopkins*, No. 2004-0338, 2004 N.Y. Misc. LEXIS 2902 (N.Y. Cty. Ct. Aug. 30, 2004); *People v. Christmann*, 776 N.Y.S.2d 437 (N.Y. Vill. Just. Ct. 2004).

156. *See BLUEBOOK*, *supra* note 48, tbl.T.1, at 204.

157. As of June 15, 2007, Westlaw contained 167 Delaware Family Court decisions with "A.2d" citations.

158. For 2006, Westlaw added 228 decisions; Lexis added 233.

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

160. *See P.L. v. W.L.*, No. CN05-04694, 2006 Del. Fam. Ct. LEXIS 264 (Del. Fam. Ct. Dec. 13, 2006).

habitation,"¹⁶¹ or extension of parental custody preference to a "de facto" relationship,¹⁶² Delaware family courts are able to find more guidance in other family court decisions than in opinions of the state's supreme court.¹⁶³

Providing vastly expanded access to trial court decisions is feasible in a digital age. In many states, however, that may require a coordinated public initiative. Montana illustrates the point. Until recently, the official publisher of opinions of the Montana Supreme Court was a local firm, State Reporter of Helena. The firm also operated an online database.¹⁶⁴ While not publishing Montana trial court opinions in print, it began to add them to this online system, offering free access to those courts that contributed decisions.¹⁶⁵ Eventually all courts responded. By the year 2001, approximately 2,000 district court opinions were being added per year.¹⁶⁶ Lawyers referred to them; district judges cited them.¹⁶⁷ When LexisNexis acquired State Reporter in 2005, this database of over 16,000 trial opinions became part of Lexis, but the relationship with Montana's district courts was ruptured. The annual flow of district court opinions dropped dramatically.¹⁶⁸ Competing collection development priorities make it unlikely, at least in the short term, that Lexis will restore the opinion flow.¹⁶⁹ Montana's district courts have been brought under the state judiciary's Lexis contract so that all judges in the state have access to this collection of trial court opinions, but its value is no longer being maintained.¹⁷⁰ Longer term, an electronic case document system planned by the state may, as it has in other jurisdictions,¹⁷¹ open trial decisions to

161. See *M.D. v. C.D.*, No. CN01-09121, 2007 Del. Fam. Ct. LEXIS 11 (Del. Fam. Ct. Mar. 15, 2007).

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

163. Many of the most challenging issues that family court judges confront fall within zones of discretion not reviewed by the Delaware Supreme Court. See, e.g., *Jones v. Lang*, 591 A.2d 185, 188 (Del. 1990) (discussing review of trial court's decision under abuse of discretion standard).

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

165. Telephone interview with Judy Meadows, Montana State Law Librarian (Jan. 1, 2007).

166. The Montana district court decisions now on Lexis total 2,162 for 2001, 1,986 for 2002, 2,030 for 2003 and 2,008 for 2004.

167. See, e.g., *Mitchell v. Stevens*, No. ADV-2003-722, 2005 Mont. Dist. LEXIS 1423, at *2 (Mont. 1st Jud. Dist. Ct. Nov. 17, 2005); *Valley Capital v. Smith*, DV 99-370, 2001 Mont. Dist. LEXIS 2664, at *16 (Mont. 18th Jud. Dist. Ct. Dec. 14, 2001).

168. Lexis contains 1,379 Montana district court decisions for 2005, 1,075 for 2006 and only 216 for the first six months of 2007.

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

170. Meadows, *supra* note 165.

171. The federal courts' CM/ECF system is one example. See, e.g., Case Management/Electronic Case Filing System (CM/ECF), <http://pacer.psc.uscourts.gov/announcements/general/ecfnews.html> (last visited Dec. 7, 2007). The New

direct public access and facilitate commercial redistribution (by more than a single provider).

Including trial opinions in the pool of available precedent not only provides trial judges with useful guidance in situations where they are not bound by vertical precedent, but it affords appellate courts a broader view of individual appeals by enabling them to see how trial courts collectively have dealt with vexing issues. Access to trial court decisions is also valuable to those who are seeking to avoid litigation, deciding whether to litigate, contemplating settlement of a dispute or weighing the need for legislation in an area.¹⁷² Finally, accessible trial court opinions may make it possible for some appellate decisions to be brief.¹⁷³ In the evident belief that there is potential demand for state trial court opinions, Westlaw has very recently begun collecting and offering "State Trial Court Orders." Already, the database holds over 350,000 decisions, most from the largest states and dating from the past five years.¹⁷⁴

C. *Opinions Structured Not Merely For Print But For Digital Distribution, Navigation and Search*

Most state court websites, like that of the U.S. Supreme Court, offer digital files that are designed to replicate the paper "slip opinions" for which they substitute. This has the advantage of assuring consistent pagination and format—indented quotations are indented; emphasized text is shown in bold or italics; embedded maps, photographs and other graphic material are displayed in context. The dominant format is the portable document format (pdf). That approach, powerful evidence in itself of the

York Unified Court System's eCourts is another. See E-Courts, <http://www.courts.state.ny.us/ecourts/> (last visited Dec. 7, 2007).

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

173. See, e.g., *Millivision, Inc. v. Gardner*, No. MW 05-054, 2006 Bankr. LEXIS 514, at *1-2 (B.A.P. 1st Cir. Apr. 10, 2006) (unpublished). The court in *Millivision* stated:

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

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

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

Id. at *1-2.

174. E-mail from Timothy Nixon, Thomson / West, to author (Oct. 10, 2007) (on file with author). See Westlaw Litigator—State Trial Court Orders, <http://west.thomson.com/westlaw/litigator/statetrialcourtorders/?tf=90&tc=14> (last visited Dec. 7, 2007).

continuing hold of the print paradigm, is seriously deficient for documents destined to reach readers by means of a database search or other electronic process.

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

Taking digital dissemination seriously requires encoding the structure, not merely the appearance of opinions. This entails separating such distinct data elements as syllabus, judge, date, cited authority and the structure of opinions' legal analysis as reflected in their headings and sub-headings and linking to cited references. XML, the data standard capable of doing all this, is now built into most forms of text handling software including Adobe Acrobat, Word and WordPerfect, and the major contemporary Internet browsers. This capacity needs to be used. Taking this largely invisible step can have a positive effect on the usefulness of court websites and, at the same time, reduce the costs of redistribution through commercial systems. One can even imagine it having a long range beneficial effect on the analytic structure of decisions.

D. *Precedent Augmented by Related Data*

Throughout their history, U.S. print law reports, whether prepared by public reporters or commercially published, have bundled pertinent other material with judicial opinions. The earliest American law reports actually devoted more attention to these matters than to the words coming from the judges.¹⁷⁵ Editorial notes, summaries of arguments of counsel and indices were—and still are—common features. In addition, opinion authors have, on occasion, placed important background material in appendices.¹⁷⁶ Limitations of the medium effectively required some of these editorial enhancements (hyperlinks not being an option), but print also severely restricted the amount of supplementary data and forced hard choices about placement in relation to opinion text. The digital environment has at once reduced the need for some editorial features, dramatically relaxed the quantitative constraints, expanded format options and enabled direct access to vast amounts of background material previously unavailable to all but the most resolute researchers.

175. See Kempin, *supra* note 42, at 35 (explaining that until very end of eighteenth century, reporters were mostly interested in arguments of counsel); Tiersma, *supra* note 4, at 1223 (explaining that early American reports "would have resulted from a private individual sitting in a courtroom, taking notes of what the lawyers argued and the opinions or judgments that the judges delivered, and publishing a synopsis of the proceedings").

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

With limited exceptions, the headnotes and issue summaries prepared for official print reports by public law reporters have not accompanied the decisions themselves onto the Internet or into commercial online collections. For Westlaw and Lexis, their inclusion would be redundant; for most of the others, it is too costly. Following the historic approach of the National Reporter System, except as its publishing contracts require otherwise, Westlaw replaces all state-produced notes with proprietary editorial matter. Lexis now does much the same, although for some states, including a few for which it publishes the print reports, the service inserts "official headnotes" following its own. Loislaw, which adds no analytic summaries of its own preparation, includes reporters' notes in a somewhat larger number of jurisdictions, presumably those states important to its subscriber base for which acquiring both the data and rights to use it are not especially difficult. The other online case law services simply omit law report content not authored by the court itself. Apparently, they have concluded, not unreasonably, that in a searchable collection of precedent, jurisdiction-specific editorial additions contribute insufficient value to justify the substantial costs of including them.

These costs exceed those of gathering the underlying court opinions for two reasons. First, with only a handful of exceptions, state preparation of headnotes, syllabi and the like occurs well after release of the decisions. Being generated during the print publication process, these post-release enhancements never join the opinions on a court website. Any online distributor desiring to merge them with the underlying opinions must, therefore, digitize their text from the print reports. The difficulty is compounded by copyright issues. States and publishers producing such supplementary material, even those that acknowledge that judicial opinions per se are in the public domain, quite commonly assert copyright in all law report editorial additions.¹⁷⁷

Only when digital dissemination and competitive redistribution are taken seriously will those jurisdictions still preparing case summaries and analytic indices for print be likely to attend to the challenge of adapting content of this sort to online case law and to let go of concerns about redistribution. Beyond linked and searchable headnotes and case summaries are myriad possibilities. Court systems have begun to deploy computer-based case and file management systems. Some encourage or even require electronic filing of briefs and other case documents. Many now record all oral arguments digitally. Increasingly, those reading a judicial opinion online should be able, if they choose, to read it against the full arguments made by counsel, the record on appeal and perhaps statistical

177. See, e.g., N.Y. JUD. LAW § 438 (2007); Agreement between Gary D. Spivey, New York State Reporter, and West Publishing Co. § 7, at 13 (Oct. 25, 2005), available at http://www.access-to-law.com/elaw/contracts/NY_2005.PDF. The distinction between the opinions per se and a reporter's editorial additions traces back to *Callaghan v. Myers*, 128 U.S. 617 (1888).

data on the judges' dispositions in similar cases. A number of these elements are already in place on state court websites.¹⁷⁸

E. *Opinions Employing More Than Text*

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

Over a decade ago, the U.S. Supreme Court delivered an important trademark opinion in *Qualitex Co. v. Jacobson Products Co.*¹⁷⁹ Writing for a unanimous Court, Justice Breyer construed the language defining the reach of the Lanham Act—"word, name, symbol, or device"—as encompassing color.¹⁸⁰ Qualitex had registered "a special shade of green-gold" as a trademark for pads it sold to dry cleaning firms.¹⁸¹ The litigation that brought this issue to the Court arose when a competitor, Jacobson Products, began selling pads of a similar color.¹⁸² Prior law on this point was far from settled, but market realities had already broken down narrow readings of the Act.

The Court's decision explored and ruled on the role of color in identifying the Qualitex pressing pads without aid of an image of this "green-gold" object or its "similar" competitor. Three years earlier in *Two Pesos, Inc. v. Taco Cabana, Inc.*,¹⁸³ the Court dealt with the question whether Taco Cabana's restaurant décor constituted trade dress protected by Section 43(a) of the Lanham Act.¹⁸⁴ The issue came framed by a jury finding that the restaurant chain's interior and exterior had not acquired secondary meaning but were "inherently distinctive."¹⁸⁵ The opinion begins with a short description of Taco Cabana's Mexican trade dress.¹⁸⁶ A pho-

178. See, e.g., North Dakota Supreme Court Home Page, <http://www.court.state.nd.us/>. All recent decisions of the court carry a link to their docket entries, which, among other things, provide access to the parties' briefs and audio recordings of the oral arguments. At the Oklahoma State Courts Network site, recent opinions of the state supreme court link back to the trial court proceedings, providing docket entries and documents filed or issued below. See, e.g., *Oklahoma City Zoological Trust v. State*, 158 P.3d 461 (Okla. 2007), available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448713>. The Michigan Supreme Court site offers briefs filed in cases from April 2002 forward. See Supreme Court Summaries of Oral Argument, <http://courts.michigan.gov/supremecourt/Clerk/msc-orals-2001-2002-session.htm> (last visited Dec. 7, 2007).

179. 514 U.S. 159 (1995).

180. *Id.* at 162.

181. *Id.* at 161.

182. *Id.*

183. 505 U.S. 763 (1992).

184. *Id.* at 764-65.

185. *Id.* at 766.

186. *Id.* at 765 (citing *Taco Cabana Intern., Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1117 (5th Cir. 1991)).

tograph or two drawn from the record would undoubtedly have been more useful.

In the years since, the Supreme Court has begun to incorporate images and color in its opinions. From the beginning of 1999 through the end of the October 2006 term, ten opinions issued by the Court have included a graph, map or other image.¹⁸⁷ In the previous decade, there were none. In April 2007, with a case in which a sixteen minute police video was pivotal, the majority opinion effectively incorporated the clip by means of a link to a digital video file loaded onto the Supreme Court website.¹⁸⁸ The pathbreaking passage by Justice Scalia reads:

Justice Stevens suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. . . . We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rm vb and in Clerk of Court's case file.¹⁸⁹

The Supreme Court's movement in this area has paralleled a gradual shift in the lower federal courts and states. That graphics-capable computers have prompted inclusion of non-textual material in court opinions—just as they have in many other forms of writing—is hardly surprising. More revealing, perhaps, is how slow the change has been. United States precedent remains heavily text bound. Out of the thousands of federal court decisions decided in 2006 and loaded into Lexis, only 157 include a chart, map, photograph or other graphical element. The count for the same year's state court decisions is sixty-three. Ironically, such figures can readily be determined on Lexis because the service does not include images in its database, apparently without serious market disadvantage to date. Wherever an opinion contains a photograph, diagram, map, form or other image, Lexis replaces it with an editorial note referring the user to the "printed opinion" or the "original."¹⁹⁰

187. See *Vieth v. Jubelirer*, 541 U.S. 267, 342 (2004); *Nike, Inc. v. Kasky*, 539 U.S. 654, 685 (2003); *United States v. Arvizu*, 534 U.S. 266, 278 (2002); *Williams v. United States*, 535 U.S. 911, 922 (2002); *Kyllo v. United States*, 533 U.S. 27, 52 (2001); *New Hampshire v. Maine*, 532 U.S. 742, 756 (2001); *Overton v. Ohio*, 534 U.S. 982, 986 (2001); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142-43 (1999); *Hunt v. Cromartie*, 526 U.S. 541, 554 (1999); *New Jersey v. New York*, 526 U.S. 589, 602 (1999).

188. *Scott v. Harris*, 127 S.Ct. 1769 (2007).

189. *Id.* at 1775 n.5. Contrast a recent decision of the Pennsylvania Supreme Court that concerned the use at trial of a computer-generated animation depicting the prosecution's theory of how a murder took place. *Commonwealth v. Serge*, 896 A.2d 1170 (Pa. 2006). The opinion's guidance for trial judges having to rule on such demonstrative evidence would have been far clearer had it, like *Scott v. Harris*, directed readers to the video clip in question rather than relying on a brief textual description.

190. For example, see the Lexis versions of *Williams v. United States*, 535 U.S. 911, 922 (2002), ("[Graphic images omitted. See printed opinion.]") and *Sunday*

Today, that “original” as mounted at a court website will, in all likelihood, include the graphic material, in color where called for. Fastcase, Casemaker and VersusLaw join Lexis in omitting non-textual material. Westlaw and LoisLaw provide scanned images, but only in black and white.

A moment’s reflection on today’s web environment should make it clear that once dissemination of precedent is liberated from the economics and technical limits of print, and commercial databases respond—as they will have to—to opinions containing images and charts, complete with color, there are numerous situations where clarity should be enhanced. After all, visual exhibits can be immensely effective in the trial setting. If the proverbial picture–word ratio holds, opinion length could be reduced. Major second order consequences are also likely.¹⁹¹ Some have argued that the absence of images from printed law promotes the use of abstract concepts and that the shift to electronic media is likely to reduce their hold on our legal system.¹⁹²

VI. INSTITUTIONAL INHIBITIONS AND SOURCES OF RESISTANCE

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

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

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

v. Harboway, 136 P.3d 965, 967 (Mont. 2006), (“[SEE ILLUSTRATION IN ORIGINAL]”).

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

192. See M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 247-65 (1989); M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* 133-71 (1995); see also Kenneth H. Ryesky, *From Pens to Pixels: Text-Media Issues in Promulgating, Archiving, and Using Judicial Opinions*, 4 J. APP. PRAC. & PROCESS 353, 358-66 (2002).

Third, while it is common to speak of a state's courts as a "judicial system" or even a "unified system," the array of courts in many U.S. jurisdictions do not comprise coherent units, administered and financed as a whole. Adapting the model of state responsibility for dissemination of precedent represented by preparation and distribution of public law reports and the maintenance of public law libraries to the new reality of online law requires a level of jurisdiction-wide leadership, administration and funding all-too-rare in the states. Even in jurisdictions like Kansas where trial courts fall under a significant measure of state control and funding, decisions about and the funding of online research services together with other support costs often remain a county or judicial district responsibility. The most complete embrace of digital methods of disseminating precedent has occurred in states where responsibility for meeting the legal information needs of judges at all levels, not merely those hearing appeals, has been consolidated within court systems that are unified in reality, not simply in name.¹⁹³

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

VII. CONCLUSION

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

The World Wide Web has presented researchers of all sorts with quantities of information far beyond past imagining, thereby giving rise to concerns about information overload. Similarly, the prospect of digitally

193. See Martin, *supra* note 71, ¶ 53 (describing North Dakota's and Oklahoma's transitions, led by "leadership from one or more members of the jurisdiction's highest court and an information expert working closely with them").

accessible case law that includes all appellate decisions (not simply a small selected fraction), many decisions of trial courts, deep background data on cases and non-textual material inevitably prompts fears of lawyers and judges being overwhelmed, with adverse consequences for the cost and quality of justice. That is a possible outcome, but only if both the way precedent operates and the tools for searching, filtering and ranking legal information remain static. The historic interplay between ideas about precedent and the means for its dissemination suggests the former is unlikely. The rapid development of sophisticated Internet search tools provides strong evidence that with the right combination of public sector involvement and private sector competition in the dissemination of legal information, the latter need not occur. Some have suggested that access to vastly more judicial opinions may induce a return to much earlier notions of precedent that gave greater weight to facts and outcome than what the judges said.¹⁹⁴ A related speculation is that weight of opinions as precedent will come to be less dichotomous (binding versus having no precedential effect) with the force of a non-binding decision becoming much more a function of the reputation of the court and the opinion author, the evident thoroughness of research and the clarity and force of its reasoning.¹⁹⁵ Should either or both of these shifts occur, it is not difficult to imagine software tools being devised that would facilitate retrieval and analysis of relevant decision data by legal professionals, scholars and others, including the public. Opinions identified by a search could, for example, be arranged according to the number of citations to them in subsequent decisions and briefs.¹⁹⁶ Statistical and other forms of pattern analysis are likely to prove useful in some fields.

In many—if not most—states, the front-line trial courts that adjudicate the broad range of civil disputes, divorces and other domestic issues, traffic violations and criminal charges are widely dispersed. Historic norms of geographic proximity and local accountability place judges in sparsely populated and under-resourced areas.¹⁹⁷ Effective legal representation at the trial court level is more an aspiration than pervasive reality. Error-correction through appeal is spotty; less than one-third of one per-

194. See Tiersma, *supra* note 4, at 1272.

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

196. One of the options Fastcase provides its users is the presentation of a set of search results in order of the number of citations to each of the retrieved decisions.

197. New York's Town and Village Justice Courts, presided over by roughly 2,000 justices, hear two million cases a year. JUDITH S. KAYE & JONATHAN LIPPMAN, ACTION PLAN FOR THE JUSTICE COURTS, STATE OF NEW YORK UNITED COURT SYSTEM, at preface (2006), available at <http://www.courts.state.ny.us/publications/pdfs/ActionPlanJusticeCourts.pdf>. Under the state constitution, they are more closely tied to local government than New York's "Unified Court System." The majority of these justices are not lawyers, and in smaller communities court infrastructure is minimal. *Id.*

cent of trial court decisions are appealed.¹⁹⁸ For these and other reasons, no one should suppose that improvements in the dissemination and operation of precedent of the sort surveyed here will, without more, dramatically enhance the consistency and accuracy of trial court decision-making. While they constitute a critical component, the larger goal calls for attention to judicial qualifications and training, the creation and distribution of manuals, benchbooks and computer-based systems capable of furnishing “on demand” guidance, and greater administrative supervision and accountability. Many of these measures draw upon the precedent system and will therefore, at least indirectly, benefit from its improvement. (Most of them can also gain substantial leverage from digital information and communication technologies. But those are topics for another day.) Precedent, broadly conceived and reconfigured for digital dissemination and access, has more than enough practical and symbolic connection to broader notions of rule of law, stability and predictability to warrant serious study on its own.

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