NEW MEXICO LAW REVIEW

Volume 42
Issue 2 *Summer*

Summer 2012

A Eulogy for New Mexico Reports: The Evolution of Appellate Publication from 1846 to 2012

Robert A. Mead

A EULOGY FOR *NEW MEXICO REPORTS*: THE EVOLUTION OF APPELLATE PUBLICATION FROM 1846 TO 2012

Robert A. Mead*

I. INTRODUCTION

This article celebrates the life cycle of *New Mexico Reports*, the primary print venue for the opinions of the New Mexico Supreme Court and Court of Appeals. On March 1, 2012, the New Mexico Supreme Court issued a press release announcing both the termination of publication of *New Mexico Reports* and the use of the New Mexico Compilation Commission's homepage as the official publication source for the opinions of the supreme court and court of appeals.[1] Although some may mourn the passing of this seminal set of books, shifts in legal publishing wrought by the ubiquity of the Internet have induced the court to disseminate the appellate opinions in a new way. In addition to this change, our centennial celebration of statehood provides a timely excuse for examining both the past and future of judicial legal publishing in New Mexico. This article unveils the full life cycle of *New Mexico Reports*, illuminating certain themes that foreshadowed the court's final decision to adopt digital publication of appellate opinions. Part II examines the creation of *New Mexico Reports* during the territorial period. Part III explores the maturation of *New Mexico Reports* during the years after statehood. Part IV details the final death of the *New Mexico Reports* in the Internet era.

The life cycle of *New Mexico Reports* is instructive for more than the simple publication of appellate opinions. The nature and process of publication illuminate many values and trends inherent in New Mexico's legal history. Book history, an interdisciplinary examination of the history of

* State Law Librarian, New Mexico Supreme Court Law Library. The opinions expressed in this article are solely those of the author and should not be imputed to the New Mexico Supreme Court, the New Mexico Compilation Commission, or the State of New Mexico.

1. Press Release, New Mexico Supreme Court, New Mexico Supreme Court Announces New Era of Digital Official Court Opinions (February 27, 2012) (on file with author) (The New Mexico Compilation Commission serves as the State's official legal publisher).

printing, publishing, and reading,[2] is a key component of intellectual history that, unfortunately, often is veiled in legal scholarship by the emphasis on doctrinal development. Books, and their digital progeny, are more than simply the medium of the message.[3] The choice to publish, the process of publishing and selling, and the reader's choice to purchase and read are integral to understanding the intellectual impact of a printed work. This is especially true in law, given the general presumption that the American public has access to and knowledge of the law sufficient to justify the rule of law.[4] Whether law is accessible depends largely on economic, political, and cultural decisions made by a wide range of actors—judges, legislators, lawyers, publishers, librarians, and booksellers—each having particular motives and expectations that warrant examination.

As a subject for book history, *New Mexico Reports* provides an outstanding opportunity to study the profound changes in appellate case publication from the mid-nineteenth century to the present. Certain themes in the literature about American legal publication are widely dis-

---

2. Michael H. Hoeflich & Steve Sheppard, *Disciplinary Evolution and Scholarly Expansion: Legal History in the United States*, 54 AM. J. COMP. L. 23, 30 (2006) (written by two of the preeminent scholars of the history of law publishing and citing other key contributors to law book history, including Richard Ross, Mary Sarah Bikder, Ann Fidler, Alfred Brophy, Herbert Johnson, William Hamilton Bryson, and the late dean of law book history, Morris Cohen).

3. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN, 23 (1964). Although, at least in law, Marshall McLuhan's contention that "the medium is the message" carries the argument too far. The role and format of publication is important, but obviously does not render the content of appellate decisions subordinate to the means of dissemination. See Richard J. Ross, *Communications Revolutions and Legal Culture: An Elusive Relationship*, 27 LAW & SOC. INQUIRY 637 (2002), for a full critique of "legal McLuhanites" in relationship to the history of the book.

4. John Palfrey, *Cornerstones of Law Libraries for an Era of Digital-Plus*, 102 LAW LIB. J. 171, 183 (2010); *see also* Douglas E. Abrams, *Plain-English Drafting for the Age of Statutes*, 88 MICH. B.J. 50, 52 (2009) (making the corollary argument that drafting statutes in plain English and adequate access to statutory text is necessary to make the presumption that "*ignorantia juris non excusat*" (ignorance of the law is no excuse) a reality rather a legal fiction); U.S. v. Baker, 197 F.3d 211, 218 (6th Cir. 1999) ("Even those not versed in the law recognize the centuries-old maxim that 'ignorance of the law is no excuse . . . '—This maxim, deeply embedded in our American legal tradition, reflects a presumption that citizens know the requirements of the law. The benefits of such a presumption are manifest. To allow an ignorance of the law excuse would encourage and reward indifference to the law. Further, the difficulty in proving a defendant's subjective knowledge of the law would hamper criminal prosecutions.").

cussed, including the role of private publishers,[5] the choice between selective and comprehensive publication of appellate opinions,[6] the importance of indexing and finding aids,[7] and the changes wrought by the Internet and digital dissemination.[8] Other themes in the history of *New Mexico Reports* are more uniquely "New Mexican" in character, including adoption of the common law, the power of the Santa Fe Bar in the nineteenth century[9] and the state's general suspicion of "Eastern" corporate interests.[10]

II. TERRITORIAL JUDICIAL PUBLISHING AND THE RULE OF LAW

The historical antecedents to the publication of *New Mexico Reports* are important, especially New Mexico's transformation from a Spanish civil law system to a common law system after the American capture of New Mexico during the Mexican-American War.[11]

---

5. William R. Mills, *The Decline and Fall of the Dominant Paradigm: Trustworthiness of Case Reports in the Digital Age*, 53 N.Y.L. SCH. L. REV. 917, 918 (2008–2009) ("The ease with which legal authors cite American case reports, and authors' abiding confidence in the accuracy and authenticity of their sources, are not a matter of happenstance. Accurate and authentic reporting of modern American case law rests almost entirely on an excellent and universal system that was developed at the end of the nineteenth century. The system was developed not by the courts or by governments, but rather by private enterprise. It is, of course, the National Reporter System and its Key Number digests, originated by the West Publishing Company.").

6. Richard A. Danner, *Legal Information and the Development of American Law: Writings on the Form and Structure of the Published Law*, 99 LAW LIB. J. 193, 197 (2007).

7. Mills, *supra* note 5, at 922–25.

8. Barbara Bintliff, *Context and Legal Research*, 99 LAW LIB. J. 249 (2007).

9. *See infra* text accompanying notes 49–55.

10. *See, e.g.*, Oliver La Farge, *New Mexico*, *in* THE SPELL OF NEW MEXICO 11 (T. Hillerman ed., 1976) ("In an acute form, then, New Mexico has the Western characteristic of too little water, which is one of the standard Western gripes. Another is that it is economically a colony, a producer of raw materials, much of the profits from which, including a considerable part of the profits of the cattle industry, are siphoned off to the East and West Coasts. The ultimate development of the state is to an alarming degree dependent upon the decisions of people to whom it is not home, is not essential, but merely an investment to be held only so long as it yields a good return.").

11. Professor George Zaphiriou contrasts civil law systems with the common law at four levels: (1) a more dogmatic and moralistic approach to legal principles; (2) extensive and integrated codifications; (3) no *stare decisis*, i.e., no binding precedence of court decisions; and, (4) different procedure and lack of a jury in civil as opposed to criminal trial. George A. Zapiriou, *Introduction to Civil Law Systems*, *in* INTRODUCTION TO FOREIGN LEGAL SYSTEMS 51–52 (Richard A. Danner & Marie-Louise

A. The Importation of Anglo-American Common Law to New Mexico

On August 18, 1846, at the start of the Mexican-American War, Brigadier General Stephen W. Kearny entered Santa Fe "without firing a gun or spilling a drop of blood."[12] Four days later, Kearny issued a proclamation to the inhabitants of New Mexico, outlining the need for cessation of hostilities and noting:

> It is the wish and intention of the United States to provide for New Mexico a free government, with the least possible delay, similar to those in the United States; and the people of New Mexico will then be called on to exercise the rights of freemen in electing their own representatives to the Territorial legislature.[13]

On September 16, 1846, Kearny wrote a letter to the Adjutant General declaring there to be no "organized resistance in this Territory to our troops," thus outlining his intention to march the majority of his army to California, leaving a garrison to hold New Mexico.[14] He explained that the "arrangements made relating to civil government for the Territory . . . [have been] a delicate and difficult task."[15] On September 22, 1846, Kearny appointed civilian territorial officers, as authorized by the President. These officers included Governor Charles Bent, later killed in the Taos uprising,[16] as well as the "first judges of the superior court," Joab Houghton, Antonio Jose Otero, and Charles Beaubian.[17] On the same day, Kearny released *The Organic Law for the Territory of New Mexico* and *Laws for the Government of New Mexico*, usually referred to as the Kearny Code.[18]

Bernal eds., 1994); *see also* DAVID M. WALKER, THE OXFORD COMPANION TO LAW 233 (1980) ("The characteristics of civil law systems are, normally, the existence of codes governing large areas of the law and setting down the rights and duties of persons in fairly general terms, the use of terminology and concepts and frequently of principles which can be traced back to the Roman law, a less strict regard for judicial proceedings, and a greater reliance on the influence of academic lawyers to systematize, criticize, and develop the law in their books and writings.").

12. Wash. Gov't Printing Office, Occupation of Mexican Territory, H.R. Exec. Doc. No. 60, at 23 (2d Sess. 1846) (Letter from General Kearny to General Wool).

13. *Id.* at 22 (Proclamation of General Kearny of 22d August).

14. *Id.* at 26 (Letter from General Kearny to the Adjutant General).

15. *Id.* at 27.

16. LAURA E. GOMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 25–29 (2007).

17. WASH. GOV'T PRINTING OFFICE, *supra* note 12, at 28 (appointment of civil officers by General Kearny).

18. *Id.* at 27. The Kearny Code was drafted by Colonel A.W. Doniphan with the assistance of Private Willard P. Hall and was based on the laws of Mexico, Missouri,

The Kearny Code created the original American judicial court for New Mexico, consisting of three judges who sat both as superior court justices and as "*ex officio* judges of the respective circuit courts."[19] Each of the three judges had his own trial circuit; the superior court was to sit twice a year in each circuit and "have appellate jurisdiction in all cases, both civil and criminal, which may be determined in the circuit courts."[20] The Kearny Code directed that the superior court "in appeals or writs to error, shall examine the record, and on the facts therein contained, alone, shall award a new trial, reverse or affirm the judgment of the circuit court, or give such other judgments as to them shall seem agreeable to law."[21] Thus, the judges sat as justices hearing appeals of their own decisions, likely a troubling conflict for most appellants.[22] In 1850, Congress passed an Organic Act for New Mexico,[23] allowing for the dissolution of the Kearny Code and establishing the Supreme Court, District Courts, Probate Courts, and justices of the peace.[24] Despite the name change, the three justices continued in their roles as trial court judges.[25]

Most important as it relates to New Mexico's territorial legal development, the Kearny Code largely retained Mexico's civil law system,[26] which did not possess a body of written judicial decisions constituting law. This is in marked contrast to the Anglo-American common law system. Common law is a broad term, referring not only to the general Anglo-American system of appellate court decision-making, as memorialized by written precedent and the corresponding doctrine of stare decisis, but also to what Justice Montgomery referred to as a "technical meaning," the English law, "both statutory and decisional, as developed by Parliament and the courts as of 1776 and incorporated into New Mexico law by the Territorial Legislature in 1876."[27] Thus, common law refers to both

---

Texas, Coahuila, and the Livingston Louisiana Code. *Id.* The Organic Law was taken directly from Missouri's organic law. *Id.*

19. *See id.* at 19.

20. *Id.* at 42.

21. *Id.* at 40–41.

22. ARIE W. POLDERVAART, BLACK-ROBED JUSTICE 4–5 (1948).

23. The Organic Act, 9 Stat. 446 (1850).

24. *Id.* at 449.

25. *Id.*

26. WASH. GOV'T PRINTING OFFICE, *supra* note 12, at 26 (Letter of General Kearny to the Adjutant General) (Kearny notes that Mexican law was modified to the extent made necessary by the Constitution and laws of the United States.).

27. Beaver v. Brumlow, 2010-NMCA-033, 148 N.M. 172, 231 P.3d 628 ("In 1876, our Territorial Legislature enacted Section 1823, C.L. 1884, which directs, 'in all courts of this territory, the common law, as recognized in the United States of America, shall be the rule of practice and decision.'"); Torrance Cnty. Mental Health Program, Inc. v. N.M. Health & Env't Dept., 113 N.M. 593, 830 P.2d 145 (1992);

the system of law that incorporates judicial decisions as binding precedent as well as to the particulars of English law derived from English court decisions.

Legal historian Lawrence Friedman identifies New Mexico's adoption of the common law as a "close case":[28] it eventually conformed to the American policy that "for the long haul . . . the law must be thoroughly Americanized"[29] because "in the long run, the civil-law tradition was too alien and inaccessible to survive."[30] Nonetheless, one remnant of civil law was the "muddled collection of land grants, which plagued the land law of California and New Mexico for decades,"[31] a plague responsible for enriching many Anglo-American attorneys in New Mexico during the territorial period.

By 1919, the New Mexico Supreme Court had fully embraced the supremacy of the common law, explaining:

> When the Legislature in 1876 adopted the common law as the rule of practice and decision, the whole body of that law . . . came into this jurisdiction. Where it found a statute counter to its provisions, it yielded to the statute, but it gave way only in so far as the statute conflicted with its principles. In so far as was possible it operated in conjunction and harmony with the statutes. If the statutes conflicted with it, it bided its time, and upon repeal of the statute became again operative. In other words, the common law, upon its adoption, came in and filled every crevice, nook, and corner in our jurisprudence where it had not been stayed or supplanted by statutory enactment, in so far as it was applicable to our conditions and circumstances.[32]

The court concluded that New Mexico's attempt to garner congressional approval for statehood was the primary motive of the 1876 adoption of common law, as the Legislature "evidently desired to harmonize its fundamental law with the jurisprudence of the other states, with which it was

---

Browning v. Browning, 3 N.M. 659, 671, 675, 9 P. 677 (1886) (quoting Section 1823). Under Section 1823, the legislature intended "to adopt the common law, or *lex non scripta*, and such British statutes of a general nature not local to that kingdom, nor in conflict with the [C]onstitution or laws of the United States, nor of this territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country." *Id.* at 675, 9 P. at 684.

28. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 365 (2d ed. 1973).

29. *Id.* at 168.

30. *Id.* at 171.

31. *Id.* at 365.

32. Beals v. Ares, 25 N.M. 459, 486, 185 P. 780, 787 (1919).

thereafter to be indissolubly associated; hence it adopted the same basic law."[33]

The adoption of English common law was not a seamless transition. As late as 1887, the nascent New Mexico Bar Association's Committee on Law Reform made the following critique:

> In view of the anomalous condition of our laws, owing to the grafting of the Common Law system of Jurisprudence, and its accompanying methods of procedure, upon the Spanish and Mexican system, which formerly obtained in the Territory, clear and definite legislation is required in order to enable the people to know what are the laws of which obedience is exacted from them, and of which actual knowledge is imputed to them. No State can make wholesome progress so long as its laws are a mystery to its people. Yet, we find in New Mexico, where the vernacular of at least three-fourths of the population is Spanish, and where the traditions, usages and customs of the same population are derived from Spain and Mexico, that the Common Law, as generally recognized in the United States, was first introduced as a system by a statute, passed in 1876, merely declaring that after its passage such Common Law should be the rule of practice and decision. It seems better to us that the Legislative rather than the Judicial department of our Territorial government should determine and establish what English statutes are applicable to our situation. Otherwise, there must be great uncertainty in our jurisprudence. There is a wide range of legal rules, containing many features obnoxious to modern ideas of right, which were found in the body of Common Law at the date of our Revolution . . . England has reformed old abuses, every State in the Union has passed the same enlightened course, yet we continue to cherish them as so many vestal fires.[34]

The continuing distrust of judicially created common law and the desire for broad statutory reform and codification of the law is not surprising, given the thirty years of civil law in territorial New Mexico.

---

33. *Id.* at 788; *see also* Louis F. del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System,* 58 AM. J. COMP. L. 1, 5 (2010) ("As each new state set out on the newly charted path of independence from England, the need for English legal standards became ever more apparent. After the Revolution, the states used English law to fill gaps in their legal systems until they could establish their own legal norms by creating domestic case or statutory law.").

34. New Mexico Bar Association's Committee on Law Reform, Minutes Constitution and By-Laws of the New Mexico Bar Association, 18–19 (1887).

Dissemination of appellate opinions is interconnected with appellate authority:[35] it is impossible to craft the common law without access to written opinions. The legislature's formal adoption of the "technical" common law occurred only five years prior to the first publication of New Mexican appellate decisions in 1881, which finally allowed for everyday legal practice based on common law precedent. While pre-1881 New Mexico Supreme Court decisions probably had precedential value, they were almost never cited by anyone other than Justice Kirby Benedict, "the most bizarre of all New Mexico Territorial Supreme Court judges."[36] New Mexico appellate decisions were cited only eleven times in the eighty-one cases reported in Volume One of *New Mexico Reports*.[37] With the publication of Volume One of *New Mexico Reports*, Kearny's original task of transitioning New Mexico's governmental system to one "similar to those in the United States" was finally complete, at least in respect to the judicial branch.

---

35. Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 VILL. L. REV. 1, 9 (2008) ("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.").

36. POLDERVAART, *supra* note 22, at 49. Although tangential to this article, Benedict's life is well documented. *See also* AURORA HUNT, KIRBY BENEDICT: FRONTIER FEDERAL JUDGE (1961). Perhaps the most telling statement regarding Benedict is from President Abraham Lincoln, who, in response to a complaint regarding Benedict's drunkenness, responded, "Well, gentlemen, I know Benedict. We have been friends for over thirty years. He may imbibe to excess, but Benedict drunk knows more law than all the others on the bench in New Mexico sober. I shall not disturb him." POLDERVAART, *supra* note 22, at 59. Justice Benedict cited New Mexico decisions five times, in *Sanchez v. Luna*, 1 N.M. 238, 245 (1857) (citing Archibeque v. Miera, 1 N.M. 160 (1857)); *Waldo, Hall & Co. v. Beckwith*, 1 N.M. 182, 183 (1857) (citing Waldo v. Beckwith, 1 N.M. 97); *Arellano v. Chacon*, 1 N.M. 269, 272 (citing Quintana v. Tompkins, 1 N.M. 29 (1853)); *Secou v. Leroux and Ortiz*, 1 N.M. 388, 389–90 (1866) (citing Tipton v. Cordova, 1 N.M. 383 (1866); Waldo, Hall & Co. v. Beckwith, 1 N.M. 182 (1857)). Nonetheless, Justice Watts was the first New Mexico Justice to cite a New Mexico decision in *Ward v. Broadwell*, 1 N.M. 75, 90 (1854) (citing Pino v. Beckwith, 1 N.M. 19 (1852)). Additionally, a New Mexico case, *Tenorio v. Territory*, 1 N.M. 279, was cited by Attorney General H.N. Smith as precedent in *Leonardo v. Territory of New Mexico*, 1 N.M. 291, 292 (1859)). In 1879, in *Territory of New Mexico v. Rivera*, 1 N.M. 640, 641, 643 (1879), Justice Parks cited *Territory v. Basilio Perea*, 1 N.M. 627 (1879) and Attorney General Waldo cited *Francisco Leonardo v. Territory*, 1 N.M. 291 (1859). In *Territor y v. Perea*, 1 N.M. 627 (1879), Justice Bristol cited *Leonardo v. Territory*, 1 N.M. 291 (1859).

37. *See supra* note 36.

Prior to the importation of the common law in 1876, New Mexico's judiciary was of dubious quality.[38] Only eighty-one decisions were written, with no decisions in 1856, 1858, 1860–1861, 1863–1865, and 1877–1878. Some of this is attributable to the chaos wrought by the Civil War; nonetheless, appellate activity was minimal until the arrival of the railroads in 1879.[39] Arie Poldervaart, the dean of New Mexican law librarians, explains the dearth of appellate decisions:

> Distances to the capital were so great and the attendant cost of appeal was so excessive that each district was very much the law unto itself. Furthermore, the thought that the trial judge needed to win but one of the other judges over to his view to affirm, furnished little incentive for an appeal.[40]

Of the eighty-one decisions in Volume One, seventeen are appeals in criminal cases, five are family law appeals, and eleven are property appeals, with three of the eleven focused on land grants. The volume contains nine probate cases, three tort cases, one bankruptcy, twenty-nine commercial and contract law disputes, and six constitutional or habeas corpus cases. The court's intermittent hand-written opinions were recorded in the *Opinions of the Justices of the Supreme Court of the United States for the Territory of New Mexico for the First Term of Said Court Beginning and Held on the 5th Day of January 1852 to the January Term A.D. 1879*.[41] This heavy, eleven inch by sixteen inch by two inch tome is the official record of the opinions of the New Mexico Supreme Court. It is stored in the basement of the Supreme Court Clerk's Office on a special shelf equipped with brass rollers to distribute the weight of the volumes. This tome is the source used by Charles H. Gildersleeve to construct Volume One of *New Mexico Reports*.[42] In the period immediately following the creation of *New Mexico Reports*, the frequency of cases before the Territorial Supreme Court greatly increased,[43] resulting in an additional fifteen volumes of opinions between 1880 and the end of 1911.

---

38. Friedman, *supra* note 28, at 374–75.

39. POLDERVAART, *supra* note 22, at 7.

40. *Id.*

41. The Opinions of the Justices of the Supreme Court of the United States for the Territory of New Mexico for the First Term of Said Court Beginning and Held on the 5th Day of January 1852 to the January Term A.D. 1879 is a manuscript, hand-written tome in the Supreme Court Clerk's record room.

42. Charles H. Gildersleeve, *Explanatory Note* to 1 NEW MEXICO REPORTS (1881).

43. *Id.* at 9.

B. Charles H. Gildersleeve and the Creation of New Mexico Reports

Charles H. Gildersleeve, New Mexico's inaugural court reporter, was a Santa Fe lawyer, entrepreneur, and political operative who saw the publication of *New Mexico Reports* as one of many opportunities to capitalize on his investment in New Mexico's territorial law and real estate industries. Gildersleeve, born in Liberty, New York, emigrated to New Mexico in July, 1874, "for the purpose of going into the wool and hide business," presumably seeking to expand on his father's trade of tanning.[44] Perhaps because of his education at Monticello Academy and Claverack College in New York, he caught the eye of the Santa Fe business society, such that, as Gildersleeve reports in *The Encyclopedia of the New West* in a presumably autobiographical entry, "on the advice of his friend, Judge J.G. Palen, at the time chief justice of New Mexico, he commenced studying law."[45] Gildersleeve read the law with Stephen B. Elkins and Thomas Benton Catron and entered into practice in 1875 with Catron, then the U.S. District Attorney for New Mexico.[46] In May of 1877, Gildersleeve started his own law practice, but he was also heavily invested in railroads, irrigation, and, especially, land.[47]

The 1881 *Encyclopedia of the New West* entry for Gildersleeve gives insight into both his wealth and personality:

> In politics, he is an Independent, but is generally classed as a Democrat. Having thrown off political shackles, he asserts and advocates whatever he thinks is right. The tone of voice, the manners, the whole look of the man impresses one with the idea that he can never be a hide-bound party man, nor anything else but an independent man, "wearing his own head," doing his own thinking, and exercising his own brain-power . . . In religion, like politics, he is an independent thinker. He began life on nothing but his brains, and now owns one of the nicest residences and many of the more valuable building lots and parcels of real estate in Santa Fe, and, though only thirty-two years of age, is counted rich. He owns some two hundred and fifty thousand or three hundred thousand acres of land, the result of foresight and judicious investments in mineral lands and professional fees.[48]

---

44. THE ENCYCLOPEDIA OF THE NEW WEST 8 (William S. Speer & John Henry Brown, eds., Southern Historical Press 1978) (1881).

45. *Id.* Poldervaart reports that Chief Justice Palen was perceived as being friendly with the Santa Fe Ring, an allegation that was likely true, if Palen assisted Gildersleeve in securing a position with Catron. POLDERVAART, *supra* note 22, at 89.

46. *Id.*

47. *Id.*

48. *Id.* at 9.

Gildersleeve's uncertainty regarding the extent of his land holdings is not surprising, given the well-documented land "chicanery"[49] attributable to his circle of professional colleagues, known as the "Santa Fe Ring."[50]

Historian Thomas Chavez defines the Santa Fe Ring as "loosely connected group of men" who "came together over mutual interest, were not formerly organized, and used the confused legal status of land and other matters in New Mexico to their advantage."[51] In 1877, English expatriate John Tunstall, an early victim in the Lincoln County War, wrote a letter to his father explaining:

> Everything in New Mexico that pays at all . . . is worked by a "ring." There is the "Indian ring," the "Army ring," the "political ring," the "legal ring," the "Roman Catholic ring," the "cattle ring," the "horse thieves ring," the "land ring," and half a dozen other rings; now, to make things stick "to do any good," it is necessary to either get into a ring or make one for yourself.[52]

The alleged power, secrecy, and interconnectedness of the Santa Fe Ring have led many commentators to dwell on the pervasive and pugnacious nature of the Santa Fe Ring members:

> They garnered wealth as well as influence and used the time and place as an opportunity to advance themselves. They became associated with the railroads, mining, government contracts, and cattle companies, as well as land speculation . . . the Santa Fe Ring and those connected to them used whatever means available, including murder, to achieve their ends. Naturally, people fought back, and the whole image of a corrupt and violent land did much to forestall statehood.[53]

Other commentators have a somewhat more nuanced view of the Santa Fe Ring's activities, noting that the majority of the Territory's Anglo-American business and legal community at the time was activity and openly engaged in land speculation, "the accepted practices of the territory, the conventional wisdom of the time."[54]

---

49. *See, e.g.*, MALCOLM EBRIGHT, THE TIERRA AMARILLA GRANT: A HISTORY OF CHICANERY (1980).

50. THOMAS E. CHAVEZ, NEW MEXICO: PAST AND FUTURE 128 (2006).

51. *Id.*

52. MICHAEL WALLIS, BILLY THE KID: THE ENDLESS RIDE 179 (2007).

53. CHAVEZ, *supra* note 50, at 128–30.

54. David Correia, *APPENDIX: Land Grant Speculation in New Mexico During the Territorial Period*, 48 NAT. RESOURCES J. 927, 929 (2008).

Governor Edmund G. Ross, a reformed-minded Democrat appointed Governor by President Grover Cleveland in 1885, considered Gildersleeve, the Chairman of the New Mexico Democratic Party's Central Committee, the "main Democratic manipulator for the Santa Fe Ring and the most unscrupulous of all that combination."[55] Nevertheless, there is nothing in the historical record to suggest that Gildersleeve was guilty of anything more sinister than close, secret collaboration with Catron and others to use both legal and corrupt methodologies to accumulate as much property as possible.[56]

For a lawyer-entrepreneur like Gildersleeve, one unexploited opportunity in New Mexico was legal publishing. In this venture, he was likely following the lead of Chief Justice L. Bradford Prince, a future Governor and another purported member of the Santa Fe Ring, who had taken it upon himself to publish an unauthorized compilation of *The General Laws of New Mexico* in 1880.[57] The judicial branch provided an even brighter opportunity—the cases of the Territorial Supreme Court had never been published and were unavailable for use as precedent except by attorneys in Santa Fe who could peruse the original copy at the court. In 1881, Gildersleeve published Volume One of *New Mexico Reports*, containing the case opinions of the Territorial Supreme Court from 1852 to 1879.[58] In a preface page in the volume entitled Explanatory Note, he explains his publication strategy, noting:

> When the present volume was undertaken the reporter intended to include in it only a collection of the more important cases decided by the supreme court of New Mexico. On reflection, however, he concluded that as the cases were comparatively few in number it would be more acceptable to the bench and bar of the territory to report all the decisions in which written opinions had been filed. This has been and exceedingly laborious task, owing to

55. Howard R. Lamar, EDMUND G. ROSS AS GOVERNOR OF NEW MEXICO TERRITORY; A REAPPRAISAL, 36 N.M. HIST. REV. 177, 186 (1961) (citing "The Gildersleeve, Springer, Joseph Combination." Undated manuscript in the Ross Papers).

56. ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD, 1846–1912, 144, 163–64, 337 n.36 (1968); *see also*, David Correia, *supra* note 54, at 936–38 (outlining Gildersleeve's speculative activities regarding the Petaca grant); David Correia, *Taking Timber, Earth, and Water: The Denver and Rio Grande Railroad and the Struggle for New Mexico's Land Grants*, 48 NAT. RESOURCES J. 949 (2008).

57. In the preface to *The General Laws of New Mexico*, Prince justified his decision to unilaterally codify a new statutory code because the 1865 Compiled Laws were "practically unobtainable" with even the Territorial Legislature unable to procure a copy for their own use during the 1872 legislative session.

58. Gildersleeve, *supra* note 42.

> the neglect of some of the clerks to record opinions deposited with them.[59]

The next year, the Legislative Assembly of the Territory of New Mexico ordered the Territorial Librarian to purchase "three hundred copies of volume one, Supreme Court Reports of the Territory of New Mexico edited by C.H. Gildersleeve, Esq., at a price not to exceed three dollars and twenty-five cents per copy, to be bound in sheep, and delivered as hereinafter specified, free of freight, mail, or express charges."[60] The Territorial Librarian was directed to distribute copies of Volume One to various officials, who were instructed to deliver the volumes to their successors in office or they would be held "liable for damages in the sum of ten dollars, together with all costs."[61] This US$975 sale to the territorial government plus private sales to the Bar in New Mexico and the fledgling law libraries beginning to coalesce around the United States, likely turned a handsome profit for Gildersleeve. He raised the price for Volume Two of *New Mexico Reports*, consisting of the cases from 1880 to 1883, to US$5 a volume[62] and continued to report the cases through Volume Ten, reporting the cases from 1900 and 1901.

C. Publishing Competition from Colonel Ruel M. Johnson for Volumes Three and Four of New Mexico Reports

American lawyers have traditionally been, at least begrudgingly, willing to purchase libraries of professional books.[63] The value of one volume of *New Mexico Reports* at US$3.25 was roughly equivalent to today's price of US$60 per volume.[64] Thomas Jefferson famously observed that

---

59. *Id.*

60. Chapter LIV, §1 Acts of the Legislative Assembly of the Territory of New Mexico, Twenty-Fifth Session (1882), pp. 89–91.

61. *Id.* at 90.

62. *The Publishers' Weekly*, July 28, 1883, at 121.

63. *See* M.H. Hoeflich, *Legal History and the History of the Book: Variations on a Theme*, 46 UNIV. OF KAN. L. REV. 415 (1997) ("Any serious history of law must also be a history of law books . . . . Lawyers are indeed 'bookish.' They are bookish not because they enjoy reading or because they are, by nature, book collectors. They are bookish of necessity. Just as there could be no medicine without the human body and the tools used to treat it, there could be no law without the means of disseminating it: books.").

64. Official Product List, New Mexico Compilation Commission, *available at* http://www.nmcompcomm.us/printProducts.htm#nmreports (last visited on February 15, 2012). In 1913, the earliest year available on the federal government's consumer price index calculator, one dollar was equivalent in purchasing power to US$22.85 in 2011. CPI Inflation Calculator, United States Department of Labor, Bureau of Labor Statistics, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited on February 15, 2012).

"[b]ooks constitute capital. A library book lasts as long as a house, for hundreds of years. It is not, then, an article of mere consumption but fairly of capital, and often in the case of professional men, setting out in life, it is their only capital."[65] This was certainly true for lawyers in the late Territorial period who needed significant sums to procure the necessary tools of their trade. Even in a sparsely populated jurisdiction such as New Mexico in the 1880s, the opportunity to print and sell the official court reports was lucrative and tempting.

Because of the potentially lucrative nature of nineteenth century legal publishing, Gildersleeve faced a marketplace challenge from Colonel Ruel M. Johnson to his role as the volunteer reporter and publisher of *New Mexico Reports*. Poldervaart highlights this challenge from Johnson:

> Volumes 3 and 4 of the New Mexico reports have been the subject of much confusion in citation. Hezekiah Johnson, a former judge of the Supreme Court, noting the success with which Gildersleeve had sold the first two volumes of his reports, applied for and received appointment as the court's 'official reporter,' although he was a resident of Las Vegas, New Mexico. Gildersleeve also continued his series of the reports. Unfortunately the two men reported the cases in different order. Some of the decisions which appear in one volume of Johnson's edition were reported by Gildersleeve in another volume. The differences in page and volume numbers make it necessary in citing volumes 3 and 4 of the New Mexico reports to use and abbreviation "(John.)" or "(Gild.)" in the citation to indicate which edition is used.
>
> The confusion does not end there. After Judge Johnson and Mr. Gildersleeve had issued their respective versions of Volume 4, the New Mexico Bar Association, having noted the confusion resulting from publication of the two editions, registered a complaint concerning it with the Supreme Court. The Court thereupon took note of the fact that some errors had been found in Johnson's reporting, and by court order decreed that thenceforth only the Gildersleeve volumes would be considered as official.[66]

Poldervaart's analysis contains a critical error: Gildersleeve's competitor was Colonel Ruel M. Johnson of Las Vegas, New Mexico, rather than the

---

65. Letter from Thomas Jefferson to former President James Madison (Sept. 16, 1821), *cited in* Goldstone v. Bloomfield Tp. Public Library, 737 N.W.2d 476, 499 (Mich. 2007).

66. ARIE POLDERVAART, MANUAL FOR EFFECTIVE NEW MEXICO LEGAL RESEARCH 18 (1955).

former Justice Hezekiah Johnson.[67] Nevertheless, Poldervaart emphasizes two critical attributes for successful publishing of primary law: fidelity to the original source and acceptance by the intended audience.

Johnson was the clerk of Chief Justice Elisha Van Buren Long of Warsaw, Indiana, who was appointed by President Grover Cleveland in 1886. Johnson accompanied Long from Indiana, having practiced law in Elkhart County next to Kosciusko County, where Long was an attorney and judge.[68] Territorial-period attorney and historian Ralph Emerson Twitchell suggests that the Long court was "the strongest, intellectually, ever sitting on the bench in New Mexico."[69] Judge Long was appointed to the newly created Fourth Judicial District, "breaking the long established precedent of having the chief Justice [sic] head the first judicial district and reside in the capital."[70] Both Justice Long and Johnson were Democrats,[71] Easterners, and outsiders to Santa Fe legal and political circles.

Johnson was a veteran of the Civil War who earned the Medal of Honor for actions at Chattanooga, Tennessee, having risen through the ranks to Colonel while leading the Hundredth Indiana Infantry.[72] He was an 1858 graduate of the University of Michigan who practiced law in Goshen, Indiana, prior to serving in the Civil War.[73] An Elkhart County, Indiana, biographical memoir contains the following entry:

> After the war, upon returning to Elkhart county, Col. Johnson soon formed a law partnership with Capt. A.S. Blake, and continued in the practice at Goshen, this State, until 1886, when he went

67. It is highly unlikely that Hezekiah Johnson would have made the publication errors committed by Ruel M. (R.M.) Johnson, partially because he died in 1876, five years before Volume Three was published, but also because he was a professional printer and newspaper editor prior to becoming a lawyer and judge and probably would not have made printing errors. Hezekiah Johnson was judge of the Second District, seated in Albuquerque, from 1869 to 1876. Don Bullis, NEW MEXICO HISTORICAL BIOGRAPHIES, 375 (2011); Charles Lanman, BIOGRAPHICAL ANNALS OF THE CIVIL GOVERNMENT OF THE UNITED STATES DURING ITS FIRST CENTURY 228 (1876).

68. Letter from Elisha V. Long to his wife (1886), *in* E.V. LONG COLLECTION, FAMILY PAPERS, PERSONAL LETTERS SENT (transcribed by Robert Torrez) *available at* http://www.newmexicohistory.org/filedetails_docs.php?fileID=21558 (last visited Oct. 13, 2012).

69. RALPH EMERSON TWITCHELL, LEADING FACTS OF NEW MEXICAN HISTORY, Vol. II, 497–98 (1912).

70. POLDERVAART, *supra* note 22, at 138.

71. POLDERVAART, *supra* note 22, at 137.

72. *Ruel M. Johnson*, Military Times, http://militarytimes.com/citations-medals-awards/recipient.php?recipientid=2816 (last visited Oct. 13, 2012).

73. Pictorial and Biographical Memoirs of Elkhart and St. Joseph Counties, Indiana: Together with Biographies of Many Prominent Men of Northern Indiana and of the Whole State, Both Living and Dead, 18, 24 (1893).

> to Santa Fe, N.M., to serve as clerk of the Supreme Court and clerk of the U.S. District Court, having been thus appointed by the chief justice of that territory. . . . In 1888 he resigned his position as clerk at Santa Fe, and was thus complimented by Chief Justice E.V. Long: "Your duties as clerk have been ably and faithfully performed, and to my entire satisfaction, and better in my judgment than ever before in the territory." While clerk of the Supreme Court of New Mexico, the legislature, though Republican, appointed Col. Johnson reporter of the Supreme Court, and under that appointment he edited and published the third and fourth volumes of the Supreme Court Reports of that territory. Succeeding this, he opened a law office in Las Vegas, N.M., and also engaged in mining, but in May, 1890, he returned to Elkhart County, and has here since resided.[74]

Johnson served as Clerk of the Territorial Supreme Court and then the Fourth Judicial District when he was replaced as Clerk of Court by Robert M. Foree in 1887.[75]

In 1887, Johnson served as a special master for Chief Justice Long in the quiet title land grant case of *Moses Millhiser et al., v. Jose Leon Padilla, et al,*.[76] Professor G. Emlen Hall dismisses the importance of this role, explaining, "In line with the practice of the day, the case was assigned to a so-called special master, there the San Miguel County District Court clerk, R.M. Johnson."[77] Professor Hall notes that Johnson went beyond his appointed role of taking evidence to comment on the ultimate issue in the case, the legality of the conveyance of the Pecos Pueblo land grant, but that he "hopelessly confused two kinds of fiduciary duty" and Judge Long ignored his recommendation.[78]

As the District Court Clerk for the Fourth District, Johnson further distinguished himself, if in a less positive way: in 1889 he was named a knowing participant in court clerk fraud schemes by a Special Joint Committee of the Legislature.[79] The Joint Committee investigated official misconduct in the form of dividing court fees into "as many separate items as

---

74. *Id.*

75. 16 N.M. 21, listing the Clerks of the Supreme Court appointed by the Court, noting that Foree was appointed in 1887.

76. The Las Vegas Grant, Report of R.M. Johnson, Master (1888).

77. G. EMLEN HALL, FOUR LEAGUES OF PECOS: A LEGAL HISTORY OF THE PECOS GRANT, 1800-1933 184 (1984).

78. *Id.* at 185–86.

79. Report of the Special Joint Committee of the Council and House of Representatives of the 28th Legislative Assembly of New Mexico Upon the Conduct of the Courts and Court Expenses during 1886, 1887, 1888 (1889) [hereinafter Report 28th Legislative Assembly].

it was possible to make, with separate charges for each one, simply in order to increase the profits of those holding office, with, in most instances, not even a color of law for so doing."[80] Some of the primary evidence was presented by Santa Fe attorney F.W. Clancy who also acted as District Clerk of the First District.[81] The Report concludes:

> Taking all in all it seems incredible that such a system of open, palpable robbery of public money should have been allowed to continue for so long a period of time, without one of the offenders having been brought to justice or even an attempt to do so. The inevitable conclusion presents itself that this could have been only done by and with the consent of those parties occupying positions of the highest public trust. To the judges of the Third and Fourth Judicial Districts this is especially applicable . . . . In keeping with their actions has been that of Mr. R.M. Johnson and Mr. W.E. Gortner, of Las Vegas, although frequently having asserted that both himself and Mr. Gortner could give very damaging evidence in reference to the acts of certain Federal officials, yet when put to the test Mr. Johnson as well as Mr. Gortner stubbornly refused to offer a single word by way of explanation. Mr. Johnson knew that he could not satisfactorily explain the irregularities which have been practiced in this office and dared not undertake it.[82]

This legislative investigation was initiated based on the research of Neill B. Field, President of the New Mexico Bar Association, and conducted in 1887 and 1888. In Field's annual presentation at the 1888 Annual Meeting, he noted that Johnson was uncooperative with his request for information and that Johnson received US$6492.22 in 1887 from the territorial treasury, which represented compensation for "only one-half year's work."[83] He concluded with a call for legislative action and an observation that "it is in my judgment a reproach to the territory that four clerks should draw from the treasury US$25,833.92 in one year, while four judges receive but US$1,800 each. If US$1,800 per annum is enough for anybody, I submit it is enough for the clerks."[84]

Johnson's activity as a reporter for the Territorial Supreme Court stems, in part, from his role as Clerk of the Court. On Thursday, January 20, 1887, at an evening meeting of the Bar Association, Johnson, still the

---

80. *Id.* at 9.

81. *Id.*

82. *Id.* at 16–17.

83. Neill B. Field, Annual Address of Honorable Neill B. Field Jan. 3, 1888, Proceedings of the New Mexico Bar Association at Its Third Annual Session, 7 (Jan. 3,1888).

84. *Id.*

Clerk of the Supreme Court, volunteered to "place his Library at the disposal of the Territory" and asked the Bar Association to support a request to the Legislature to provide the room adjacent to the courtroom for a library and to allow a door to be cut between the courtroom and the proposed library.[85] The members approved the request and offered to fund the necessary carpentry.[86] The minutes do not mention that Gildersleeve was present at the meeting.

The Territorial Legislature accepted the Bar Association's recommendation, but added significantly to the request in the resulting act, entitled *An Act Fixing the Salary of the Territorial Librarian, and for Other Purposes* and approved on February 24, 1887.[87] The first section of the Act set the salary of the Territorial Librarian at US$50 per month and required that the Librarian be fluent in both English and Spanish.[88] The second section of the Act appropriated US$5,000 "for the purpose of filling up as far as possible, the law portion of the territorial library, specifically to purchase:

> Volumes and sets of the various law reports of the United States courts, and superior, supreme and appellate courts of the various states and territories, together with the digests and statutes, and indexes thereof and connected therewith, and also such of the reports of the courts of foreign countries as may be, in the judgment of said chief justice, of utility in this territory, and also such law periodicals and legal publications as the said chief justice may direct.[89]

The third section appropriated US$1,500 annually for two years "for the purpose of filling up and completing imperfect sets of law reports, and purchasing such new sets of reports and other law books as may be desirable and necessary for the completion of the law portion of said territorial library."[90] The fourth section instructs the territorial librarian to purchase two hundred copies of Gildersleeve's Volume Two of *New Mexico Reports* for not more than US$500.[91] This, of course, was a significant

---

85. Session of 1887, Minutes Constitution and By-Laws of the New Mexico Bar Association, 13 (1887).

86. *Id.*

87. 1887 Acts of the Legislative Assembly of the Territory of New Mexico Twenty-Seventh Session, 82–83 (1887) [hereinafter 1887 Acts].

88. *Id.*

89. *Id.* It is unclear from either the historical record or the collection of early reports in the Supreme Court Law Library whether Johnson sold his library to the court.

90. *Id.*

91. *Id.* at 83.

reduction in sales compared to Gildersleeve's first volume.[92] The fifth section went further, declaring that "the clerk of the supreme court of the territory of New Mexico, now in office, shall be, and he hereby is constituted and designated official reporter of the decisions and opinions of the supreme court of said territory."[93] The Clerk was to publish the decisions reported "during the period for which he is constituted such reporter," as soon as it could be conveniently done and there were a sufficient number of opinions.[94] There is only circumstantial evidence that Johnson was behind the legislative attempt to take the official reporter status away from Gildersleeve, but the evidence is strong. Section seven of the Act orders the new official reporter to print five hundred copies of each volume of at least 600 pages per volume with the "lowest reasonable bidder in this territory" and directs the territorial librarian to purchase the copies at US$3.00 a volume.[95] Section nine entitled the new official reporter "exclusive copyright of each volume of reports" and permits him to "sell copies of such reports to members of the legal profession and to others" for up to US$3.50 a copy. Thus, with aplomb, Johnson had secured official reporter status, a guaranteed sale of US$500, copyright, and the right to sell additional copies to both libraries and attorneys.

Johnson, however, failed to anticipate that his term as Clerk of Court would end in the same year. Consequently, his two competing volumes of *New Mexico Reports*, Volumes Three and Four, only cover the years from 1884 to 1889. Johnson further failed to follow provisions in section six requiring that the books be printed on "good paper and upon pages of large size" with type similar to Gildersleeve's Volume Two, and that they contain "an analysis or syllabus of the points decided, together with a synopsis of the briefs of attorneys filed therein" and a "concise statement of the facts of each case."[96] Additionally, section six requires an index; a table of cases; and a table of cases cited, affirmed, modified, or overruled, essentially creating a citator for each volume.[97] This level of detailed reporting is time intensive and, thus, expensive. In the Preface to his Volume Four, Johnson acknowledged that his volume "deviates in some minor particulars from the requirements contained in that act" but contended that "it is confidently believed that those minor deviations will be found to give strength and value to the publication, and will increase

92. *See* POLDERVAART, *supra* note 22.
93. 1887 Acts, *supra* note 87, at 82–83.
94. *Id.*
95. *Id.* at 84.
96. *Id.* at 83.
97. *Id.* at 84.

the number of its friends among the members of the profession."[98] He specifically acknowledged that "full notes and references have been added to the more important cases" rather than each case, as required by the Territorial Legislature.

The errors in the Johnson volumes caused him to lose the acceptance of his intended market: the New Mexico bench and bar. On the evening of January 19, 1891, the New Mexico Bar Association passed a unanimous resolution expressing annoyance at Johnson's volumes of *New Mexico Reports*:

> Mr. Clancy then offered the following resolution, which was unanimously adopted, viz:
>
> Whereas, It appears that there has been lately published two editions of volume three (3) of the New Mexico Reports, containing decisions made by the Supreme Court of this Territory, one reported by R. M. Johnson, Esq., and the other by C. H. Gildersleeve, Esq., as reporter; and
>
> Whereas, The volume reported by said Johnson does not comply with the law under which it purports to have been published, in that it does not contain the number of pages required by law, nor a synopsis of the briefs of counsel, nor was the same printed within this Territory as required by the law, and such book does not correspond in size with volumes one (1) and two (2) of New Mexico Reports, heretofore published, said volume so published by said Johnson being longer, wider and thinner than said volumes one and two; and
>
> Whereas, The publishers of the volume reported by said Gildersleeve, propose and intend to make their volume conform in all substantial points to the requirements of the Territorial statute; therefore,
>
> Be it resolved, by this Association, That we recommend that the members of the bar of the Territory adopt and use volume three (3) of New Mexico Reports reported by C. H. Gildersleeve, Esq., and that in referring to decisions of the Supreme Cotuit contained in either of said volumes three (3) in briefs in the Supreme Court, and otherwise, that said volume three reported by said Gildersleeve be referred to and cited.[99]

98. Ruel M. Johnson, New Mexico Reports, Vol. 4.
99. Minutes of the New Mexico Bar Association, Sixth Annual Session, 56 (1891).

Note that the sponsor of the resolution was F.W. Clancy, the District Clerk the Special Committee favorably compared against Johnson in the court fee corruption scandal in 1889.[100] Johnson was not in New Mexico to defend his publication, as he had returned to Indiana in December of 1890.[101] On January 6, 1892, the Territorial Supreme Court, in response to a motion from Thomas B. Catron, Gildersleeve's mentor and occasional business partner, ordered that Gildersleeve's volume was "the official reports of the opinions of this Court therein printed and contained and that all citations of authorities of opinions of this Court shall refer to said volume."[102]

The Bar's resolution notes an additional grievance that may go unnoticed: the fact that Johnson's volumes were printed out of the Territory rather than complying with the statutory requirement to use a local printer. Specifically, Johnson contracted with the West Publishing Company in St. Paul, Minnesota, (hereinafter West)[103] to print both volumes. This critique seems somewhat disingenuous in that Gildersleeve's original edition had been published outside of New Mexico by Bancroft Whitney, the large California legal publisher.[104] Because of the competition from Johnson, Gildersleeve failed to print enough copies of Volume Three and had to have it reprinted by E.W. Stephens in Columbia, Missouri, in order to meet the demand.[105] Unfortunately, they used a different type size; thus there are three versions of Volumes Three and Four.[106] Nonetheless, the New Mexico Bar Association's critique of Johnson's choice of printer may be partially responsible for the fact that despite West's rapid monopolization of case reports publication at the end of the nineteenth century, West did not again acquire the contract to print *New Mexico Reports* until Volume Thirty-six in 1933.

---

100. *See* Report 28th Legislative Assembly, *supra* note 79 and accompanying text.

101. POLDERVAART, *supra* note 66, at 14.

102. Supreme Court Record, January 25, 1892.

103. *See About Us*, THOMSON REUTERS WESTLAW, http://store.westlaw.com/about/default.aspx (last visited Oct. 13, 2012). West Publishing Company, the preeminent American legal publisher, was acquired by Thomson in 1996. Thomson and Reuters merged in 2008. The business is now branded as Thomson Reuters Westlaw. Because of the awkward subsidiary nomenclature, the remainder of this article will refer to West Publishing Company and its progeny simply as West, a name known and revered by generations of lawyers and law librarians.

104. POLDERVAART, *supra* note 66, at 19.

105. *Id.*

106. POLDERVAART, *supra* note 66, at 19. Poldervaart notes that "A complete citation to the case of *Chisum v. Ayers* would read as follows: 3 N.M. (Gild., B.W. 3d.) 538, 4 N.M. (Gild., E.W.S. ed.) 89, 4 N.M. (John.) 48, 12 Pac. 697 (1887)." *Id.* Westlaw currently lists the citations as "4 N.M. 89, 4 Gild. 89, 12 P. 697, 4 Johnson 48 (1887)," a somewhat more elegant format.

III. *NEW MEXICO REPORTS* SINCE STATEHOOD

New Mexico's move to statehood brought further changes to its judicial structure. The imperatives of statehood, the creation of the New Mexico Supreme Court, the growth of New Mexico's population, and the later addition of the New Mexico Court of Appeals, all had profound effects on the new State's system of reporting.

A. Creation of the New Mexico Supreme Court in 1912

In 1910 and 1911, the Territorial Supreme Court sought to complete the cases on its docket in order to give "the state supreme court and the federal court a clean slate."[107] Poldervaart explains that this goal was nearly prevented by a last minute action by Gildersleeve's former law partner, Acting Attorney General John H. Knaebel:

> The Territorial Supreme Court finished its business with the denial of rehearing in the Stoneroad case late in the evening on January 4, 1912, and the adjourned to January 10, leaving its docket clean. No business was to be transacted on the tenth, except to turn over to the State Supreme Court. On the night of January 5 statehood negotiated a last minute hurdle. Supreme Court Clerk Jose D. Sean was enjoying himself at a dance when he received this disturbing telegram from the nation's capital:
>
> Washington, D.C. January 5, 1912
> Clerk, Supreme Court
> Santa Fe, New Mexico
>
> Issue at once writ of error to review judgment rendered by district court, sixth judicial district, last month, dismissing bill of complaint in cause number 14, entitled United States against the Alamogordo Lumber Company, a corporation. Absolutely necessary writ should issue tonight to prevent delay in signing proclamation for admission of New Mexico as state. Answer tonight.
>
> KNABEL, Acting Attorney General
>
> Sena, of course, hustled over to the capital and prepared the writ. The statehood proclamation was signed shortly before noon the next day, January 6, 1912. The writ of error was the federal government's protection to its interest in certain public lands, which were involved in the suit, before the Territorial Supreme Court

107. POLDERVAART, *supra* note 66, at 202 (citing Santa Fe New Mexican, Sept. 2, 1910).

> passed out of existence and the status of the Territorial lands was changed by the statehood proclamation.[108]

On January 10, 1912, the Justices of the New Mexico Supreme Court, Chief Justice Clarence J. Roberts, Justice Frank W. Parker, and Richard H. Hanna, were sworn in and Ireneo Chaves, Deputy U.S. Marshal proclaimed, "Hear Ye! Hear Ye! The honorable Supreme Court of the Territory of New Mexico is adjourned sine die!"[109] Frank Clancy, Johnson's former nemesis, was the new Attorney General. Territorial Justice John R. McFie, who Poldervaart praises as "one of the hardest workers on the Supreme Court during the last two decades of the Territory,"[110] became the court's official reporter for Volume Seventeen of *New Mexico Reports* through Volume Nineteen.

Starting in 1930, the Clerk of Court for the New Mexico Supreme Court also served as the Reporter of Decisions.[111] Herbert Gerhart was the first Clerk of Court who also served as the Reporter of Decisions, releasing Volumes Thirty-five to Fifty-one of *New Mexico Reports*.[112] He was followed by Lowell Green (Volumes Fifty-two to Eighty), Rose Marie Alderette (Volumes Eighty-one to 113), Kathleen Gibson (Volumes One 114 to 149), and Joey Moya (Volume 150, forthcoming). While serving as both Clerk of Court and Reporter, these dedicated officers of the court shepherded the process of moving new opinions from manuscript to publication in *New Mexico Reports*.

B. West and New Mexico Reports

Unlike many the official reports for many states, *New Mexico Reports* includes the published cases of both the supreme court and court of appeals in one set of books; otherwise, the early history of the publication of *New Mexico Reports* tracks the general development of reporters in other states. As the United States began to develop an independent legal

---

108. POLDERVAART, *supra* note 22, at 211.

109. *Id.*

110. *Id.*

111. Prior to this, from 1912 to 1929, Jose Sena was predominantly the Clerk of Court, with John McFie (Volumes Seventeen to Nineteen); Ira Grimshaw (Volumes Twenty to Twenty-eight); John Sedillo (Volumes Twenty-nine to Thirty-one); Charles Catron, who was then appointed as a Justice in 1929 (Volume Thirty-two); and Frances Thompson (Volumes Thirty-three and Thirty-four) serving as the Reporter of Decisions.

112. Gerhart was ordered by the supreme court to offer free copies of Volume Thirty-five to various libraries, judges, and prosecutors and then authorized to sell the remaining for US$6.00 per volume. Order, C.J. Bickley, New Mexico Supreme Court Record (June 15, 1932).

identity from Great Britain, common law decisions from other states supplemented English case reports[113] and Blackstone[114] as sources for conceptual guidance and precedent for American attorneys. The increasing citation of opinions from many states made it impossible to rely on manuscript copies of state appellate decisions[115] such as *Opinions of the Justices of the Supreme Court of the United States for the Territory of New Mexico for the First Term of Said Court Beginning and Held on the 5th Day of January 1852 to the January Term A.D. 1879*. The Bar's desire for access to printed reporters encouraged entrepreneurial young attorneys, such as Gildersleeve, to fill this need, often bringing enhanced reputation and attention to the reporter.[116] In the antebellum period, the publications of these entrepreneurial volunteer reporters are referred to as nominative reports, as the reporter's name was often in the title of the reports.[117] Reporters often claimed copyright to their reports.[118] Consequently, there was an increasing trend toward the appointment of official reporters, who worked directly for the state courts and who were responsible for dutifully ensuring the ongoing reporting of each court's opinions.[119] The appointment of official reporters minimized volunteer reporting such as conducted by Gildersleeve.

In addition to the reporter's role, the content of nineteenth century case reports varied significantly. Some reporters only included important decisions whereas others sought to comprehensively publish all of the

---

113. Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 54 (1981).

114. Harry W. Jones, *The Common Law in the United States: English Themes and American Variations*, *in* POLITICAL SEPARATION AND LEGAL CONTINUITY 108 (Harry W. Jones, ed., 1976) ("The American Revolution was receding into the past, and Blackstone, the Dr. Spock of early American law, had exerted his incomparable influence on American legal thought. To a lawyer brought up on Blackstone's *Commentaries*, as practically all lawyers were in the frontier states, English law was almost the immutable law of nature, certainly nothing for a self-taught country lawyer to quarrel with.").

115. *See* Surrency, *supra* note 113, at 54–55.

116. Joel Fishman, *The Reports of the Supreme Court of Pennsylvania*, 87 LAW LIB. J. 643, 643 (1995).

117. The most famous of the nominative reporters was Henry Wheaton, the official reporter of the United States Supreme Court, whose *Wheaton's Reports* includes the decisions from 1816 to 1827. He subsequently, and unsuccessfully, sued his successor in office, Richard Peters Jr., for copyright violation, in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

118. *See id.* The 1887 New Mexico act governing *New Mexico Reports* gave copyright to the official reporter, rather than the supreme court. *See supra* note 87.

119. Surrency, *supra* note 113, at 55.

opinions of a court.[120] Gildersleeve struggled with the decision whether to selectively publish the "important cases" or to meet the desires of the territorial bench and bar by comprehensively publishing all of the available opinions.[121] Early American reporters often summarized both the facts of the case as well as the arguments of counsel.[122] In the prefatory Explanatory Note of Volume One of *New Mexico Reports*, Gildersleeve apologizes for the general lack of such summarization, explaining:

> As the clerks have taken no pains to preserve the briefs of counsel, it has been impossible to report the arguments except in a few instances. Indeed, it was only by great labor and care that even the names of attorneys could be ascertained in most of the cases, as no record of them was kept. So far as the counsels' briefs could be found, their arguments are given.[123]

Even ten years later, in 1891, the Bar saw fit to complain about Johnson's *New Mexico Reports* due, in part, to the lack of such a summary of argument.[124]

This discord over the format of case reports, the role of the official reporter vis-à-vis volunteer reporters, and the right to claim copyright for a state's appellate decisions are all odd concepts for the modern American attorney because of the influence of reporters published by West. Starting in 1876, West both revolutionized and, eventually, standardized American case reporting such that these issues, until the advent of digital case reporting, were settled when West largely monopolized the publishing of case reports. West's brand came to dominate the way in which the American bench and bar understand case reporters.

John B. West, a Minnesota-based printer and law book salesman,[125] began printing unofficial case reports in 1876 in an eight-page weekly newsletter called the Syllabi which published selected, newly released opinions of the Minnesota Supreme Court.[126] By the 1870s, litigation was increasing rapidly across the United States, taxing the efforts of official reporters to promptly publish appellate decisions.[127] Printers such as West

---

120. Robert C. Deal, *Fast-Fish, Loose-Fish: How Whalemen, Lawyers, and Judges Created the British Property Law of Whaling*, 37 ECOL. L Q. 199, 229 (2010).

121. New Mexico Reports, *supra* note 42.

122. Surrency, *supra* note 113, at 56.

123. *Supra* note 58 and accompanying text.

124. New Mexico Bar Association, *supra* note 99 and accompanying text.

125. West's biographical information is collected in Robert M. Jarvis, *John B. West: Founder of the West Publishing Company*, 50 AM. J. LEGAL HIST. 1 (2008).

126. COHEN, BERRING, & OLSON, HOW TO FIND THE LAW 18 (9th ed. 1989).

127. *Id.* This also is readily apparent in New Mexico, where Volume 1 of *New Mexico Reports* containing all of the decisions from 1852 to 1879, twenty-seven years,

saw the opportunity to sell legal publications that more quickly disseminated appellate decisions than official case reports. West's first unique insight was that lawyers wanted a reporter with cases from multiple surrounding jurisdictions, so in 1879, he published the *North Western Reporter*, containing the Supreme Court decisions from Iowa, Michigan, Minnesota, Nebraska, Wisconsin, and the Dakota Territory.[128] This innovation was so successful that West, by 1887, had published the complete National Reporter System covering every state, organized in regional reporters, plus the federal appellate opinions.[129] Thus, when Johnson contracted with West to publish his Volumes Three and Four of *New Mexico Reports*, he chose to use what was, at the time, a trendy and increasingly powerful but still relatively new legal publisher.

Although West failed to secure the contract to print *New Mexico Reports*, it did receive the court's permission to include the New Mexico opinions in the *Pacific Reporter*, the regional reporter covering the expansive territory from Kansas and Oklahoma to the Pacific Ocean. In 1894, the court ordered the Clerk of Court to prepare two certified copies of each opinion "as soon thereafter as such opinions shall be filed in this Court and transmit the same forthwith to the West at St. Paul, Minn."[130] Presumably, this standing order was instituted at the request of West to ensure that all of New Mexico's opinions were included in the *Pacific Reporter*, which West began to publish in 1884.

John West was, initially, most interested in the prompt and comprehensive publication of all appellate opinions. In 1889, the editor of the *American Law Review*, a key national journal of the day, invited legal publishers to submit articles for a "Symposium of Law Publishers."[131] In his submission, West vigorously defended his new National Reporter System:

> All opinions are now published promptly and systematically, and are no longer dependent upon professional courtesy or vanity for their appearance in advance of official reports. One can today more readily and far more economically secure the printed copy of any territorial decision, than was possible a few years ago, even in the case of the New York Court of Appeals. The profession have now the immense advantage of being able to turn to a single set of reports and digests, and be sure of finding everything which

---

followed by Volume 2, which contains only three years of opinions, from 1880 to 1882, yet is about the same length.

128. Jarvis, *supra* note 125, at 6.

129. COHEN, BERRING, & OLSON, *supra* note 126, at 19.

130. C.J. Thomas Smith, Record of the New Mexico Supreme Court, 232 (1894).

131. Symposium, *A Symposium of Law Publishers*, 23 AM. L. REV. 396 (1889).

> the courts have said on any given subject up to the last decision just rendered. A lawyer can compare the decisions, and advise his client with a nearer approach to certainty. He can see what precedents are available for himself, and also what will probably be cited by his opponents and so thoroughly prepare himself to meet them. This service is rendered by the National Reporter System, which, strange to say, has been wrought out entirely by private enterprise, not through the intervention of any bar association, State or national, or by subsidy from any government.[132]

West identified most of the key elements of the modern system for publishing appellate opinions: prompt dissemination, comprehensive coverage, and private publication.

West's vision, however, was not free from contemporary criticism. James E. Briggs, the President of Lawyers' Co-op. Co. of Rochester, New York, presented the primary opposition to West in the Symposium. His company, which eventually was named the Lawyers Cooperative Publishing Company, is best known for creating *American Law Reports*, the *American Jurisprudence* encyclopedia, and the *United States Supreme Court Reports, Lawyer's Edition*.[133] Briggs was a champion of selective case reporting rather than comprehensive reporting. In the Symposium, he asserts:

> Much is said by certain cotemporaries about "*completeness*," referring simply to the agglomerations of all the opinions of the various jurisdictions of the United States into masses of what are, in fact, largely made up of useless repetitions. We prefer to consider completeness in the sense of presenting the most *useful things*, in a form the most useful and complete.[134]

Even more cutting, he implies that West's primary motive for comprehensive publishing was profit, not service:

> While publishers wish to sell lots of books at high prices, the object of this company has always been to constitute a connecting link between commercial houses, which publish law books for profit only, and the consumers who read them and need them.[135]

The exemplar of selective law publishing is *American Law Reports*, which originally was made up of articles that focused on a representative case for a topic and then gave analysis and long lists of annotations for similar

132. *Id.* at 403.
133. COHEN, BERRING, & OLSON, *supra* note 126, at 28, 391.
134. *A Symposium of Law Publishers*, *supra* note 131, at 411.
135. *Id.* at 414.

cases across the nation. Eventually, however, the analysis and annotations grew to be more important than the selected cases, as selected publication of appellate opinions lost to West's strategy of comprehensive publication.[136] Finally, West purchased Lawyers Cooperative Publishing in 1989,[137] representing the final victory of a long rivalry.

Comprehensive publication had profound impacts on the common law. The most obvious is the exponential growth in the number of opinions available as precedent. Professor Bob Berring contends:

> Whether the gigantic growth in published cases was a response to an existing demand or the product of a stimulated demand is, in the end, not relevant. By the middle of the twentieth century, an enormous structure of standardized case reporting had evolved. Far too many cases for any individual to master were now available and the subjective element of case reporting was gone. No longer could memory serve as the lawyer's main tool.[138]

At the beginning of the nineteenth century, in 1810, there were only eighteen volumes of American reports; by 1910 there were 8,208 plus another several thousand reprints.[139] A corollary impact was that the sheer volume of law both heightened and undermined the importance of precedence—with that many published cases, certainly there must be a "case on point."[140] Paradoxically, "the publication of thousands of contradictory and unenlightened opinions undercut the theoretical basis of the common

---

136. COHEN, BERRING, & OLSON, *supra* note 126, at 116.

137. Company History, WESTLAW STORE, http://store.westlaw.com/about/history/ (last visited February 15, 2012).

138. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 22 (1987).

139. Bryon D. Cooper, *The Role of Publishing Houses in Developing Legal Research and Publication; The United States*, 38 AM. J. COMP. L. SUPP. 611 (1990); Danner, *supra* note 6, at 197 ("In the early and mid-nineteenth century, the volume of American reports remained small enough that practitioners could still read and retain what was necessary to practice.").

140. Cooper, *supra* note 139, at n.48 (citing J.L. High, 16 AM. L. REV. 429, 439 (1882)) ("In the labyrinth of cases through which a lawyer is thus obliged to grope his way in the preparation of a case, there is constant temptation to forget the underlying principle in the search for a precedent exactly in point. The tendency is to try our cases upon precedent rather than upon principle, and it is matter of common remark among the elder school of lawyers and judges that the younger men at the bar rely too much upon books and too little upon the elementary doctrines by which all cases should be decided."). West defended his publication strategy, explaining that

> It is the one of the greatest merits of the National System that it gives all the cases. Some of our critics call it the 'Blanket System,' and we are disposed to accept the analogy . . . . No policy of insurance is so satisfactory to the insured as the blanket policy; and that is the sort of policy we issue for the

law,"[141] as multiple inconsistencies over multiple jurisdictions led to contradictory doctrines. By the early twentieth century, "readily apparent divergences in doctrine led to demands for uniform state laws, especially in commercial matters, and to efforts to restate the common law."[142]

West's second great innovation, a digest integrating case headnotes and corresponding key numbers for each opinion, was a detailed subject index made critically necessary by the volume of cases unleashed through comprehensive publication. West did not invent the law digests; *Statham's Abridgment*, the first English digest of the common law with case summaries organized alphabetically by subject heading, was first published around 1490.[143] In 1887, West purchased the first comprehensive American digest, the *United States Digest*, which had first been published in 1848.[144] West retained the seven major categories from the *United States Digest*—Persons, Property, Contracts, Torts, Crimes, Remedies, and Government—when it published the *American Digest* and its progeny, the *Century Digest*, the *General Digest*, the *Decennial Digest*, the *Federal Digest*, and the various digests accompanying each West reporter series. The great innovation that West made was to key the digest to particular ideas contained in each case, thus allowing a more "scientific" approach to legal research reminiscent of Christopher Columbus Langdell's reformation of legal education:

> Since the Langdellian library was built on the reading of judicial decisions, and since a Volume of judicial reports contains many cases, the card catalog was of little use. Finding tools that penetrated deeper into the Volume, indeed into the cases within the books, were needed. The West Publishing Company's American Digest System met this need. The Digest System created a subject index that was not keyed to the Volume but that was instead keyed to the points of law discussed in each case. Editors at the West Publishing Company matched the headnote in each case to the subject index, which was called the Key Number System. The resulting Digest System allowed the legal researcher to go to a specific paragraph in the desired Volume. This level of specificity in indexing, at least in a large database, was unknown to other fields in the age of paper . . . . While the Digest System would not have pleased Langdell because it abandoned the organic reading

---

lawyer seeking insurance against the loss of his case through ignorance of the law as set forth in the decisions of the highest courts.

A Symposium of Law Publishers, *supra* note 131, at 406–07.

141. Berring, *supra* note 138, at 23.

142. Cooper, *supra* note 139, at 620.

143. COHEN, BERRING, & OLSON, *supra* note 126, at 83.

144. *Id.*

> of cases and broke each judicial opinion into small components, it was nevertheless a natural offspring of his ideas. Cases remained the heart of the system. Because West Publishing Company also published statutory materials and a wide variety of practice tools, the headnote system could cross-reference into them as well.[145]

West's indexing system brought such a level of specificity to legal research and was so widely accepted that many commentators[146] have suggested that it actually changed the way lawyers think, creating a "universe of thinkable thoughts"[147] consisting of ideas readily found in West's various digests.

Even in a state like New Mexico, with a relatively low volume of appellate decisions published locally in an official reporter, rather than one published by West, there was an early twentieth century clamor for digests. The two digests in New Mexico were local entrepreneurial ventures, much like Gildersleeve's *New Mexico Reports*. In 1901, attorney George P. Money[148] published the *Digest of the New Mexico Supreme Court Reports, with Index* on the presses of the Las Vegas Optic. Money's Digest indexed Volumes One to Nine of *New Mexico Reports*.[149] In 1925, Herbert F. Raynolds, a Justice of the New Mexico Supreme Court from 1919 to 1925 and the judge elected at statehood to the Second Judicial District in Albuquerque,[150] published *Digest New Mexico Reports, Vols. 1-28, Inc.* using Thomas Hughes of Albuquerque as the printer.[151] Both the Money and Raynolds digests loosely follow the basic format established by West. The third New Mexican digest, *Courtright's New Mexico Digest*, from 1932, covers *New Mexico Reports* Volumes One to Thirty-five.[152] It

---

145. Robert C. Berring, *Deconstructing the Law Library: The Wisdom of Meredith Wilson*, 89 MINN. L. REV. 1381, 1397 (2005).

146. *See, e.g.*, Daniel Dabney, *The Universe of Thinkable Thoughts: Literary Warrant and West's Key Number System*, 99 LAW LIBR. J. 229 (2007).

147. Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 311 (2000).

148. George P. Money was yet another lawyer emigrant who came to New Mexico from Mississippi in 1893 to work as an assistant U.S. attorney for the Territory. In November 1904, he unsuccessfully ran as a Democrat to the Territorial Delegate to Congress. He returned to Mississippi in 1905 and continued his career as an attorney and newspaper editor. Ray L. Bellande, Ocean Springs Archives, http://oceansprings archives.net/node/144 (last visited February 15, 2012).

149. George P. Money, Digest of the New Mexico Supreme Court Reports, with Index (1901).

150. Comm'n Pub. Records-State Records Ctr. And Archives, New Mexico's Statehood: 100 Years of Enchantment, *available at* http://www.newmexicohistory.org/centennial/Delegates/Bio-Raynolds-Herbert-F.html (last visited Feb. 15, 2012).

151. Herbert F. Raynolds, Digest New Mexico Reports Vols. 1–28 (1925).

152. William E. Courtright, Courtright's New Mexico Digest (1932).

was published by a Colorado legal publisher, William H. Courtright, the publisher of the 1929 *New Mexico Code*, who explicitly notes in this preface that he followed, with permission from West, the classification and section headings of West's *American Digest*, suggesting that by late 1920s and 1930s West's digest format had dominated the field.[153]

In 1930, without fanfare, the New Mexico judiciary shifted publication strategy and followed Johnson's original tactic from 1887, contracting with West to serve as the printer for *New Mexico Reports*, starting with Volume Thirty-six. There is no official indication in the records of the supreme court suggesting why this change was made, but perhaps it was because Herbert Gerhart inherited the combined jobs of both Clerk of Court and the Reporter of Decisions in 1930. After producing Volume Thirty-five, he may have decided that it made sense to reduce his workload by contracting with West to produce *New Mexico Reports*. West has continued to publish *New Mexico Reports* for more than eighty years. The court, however, retained control over the sale of the volumes, directing the Clerk of Court to purchase the entire run and to resell it to New Mexico's bench and bar.[154] This task was transferred to the New Mexico Compilation Commission, the agency that serves as the legal publisher for state government, in 1982.[155] West's most recent contract with the New Mexico Compilation Commission extends through the publication of Volume One Hundred Fifty, expected to contain the cases from the end of 2011 and early 2012.

West's publication of the 115 volumes of *New Mexico Reports*, complete with full West headnotes and the accompanying *New Mexico Digest*, set the twentieth century standard for publication of New Mexico's legal information. It drew New Mexico into the mainstream for case reporting, defined by West's *National Reporter System*. Nevertheless, West's control of the publication of America's appellate opinions has not been free from controversy. Even John West himself raised some troubling critiques regarding West's domination of American legal publishing.

In 1899, West left West Publishing Company.[156] In 1908, he was invited to speak at the third annual meeting of the American Association of Law Libraries, giving a talk titled, "A Possible Solution to the Problem of the Multiplicity of Law Reports."[157] West began by noting that "No one who has to do with the profession in connection with the purchase or use

153. *Id.* at 8.

154. New Mexico Supreme Court Record, June 15, 1932, *supra* note 112.

155. 1982 N.M. Laws, Chap. 7, amending N.M.S.A. 1978 § 34-4-2 (1966).

156. Jarvis, *supra* note 125, at 11 (noting that it is unclear whether West was "pushed out or walked out").

157. John B. West, *Multiplicity of Reports*, 2 LAW LIBR. J. 4 (1909).

of books, can fail to notice the continual complaint of increasing cost, of lack of shelf room, of confusing citations and other complications arising from multiplicity of reports."[158] He critiqued private publication of appellate opinions, suggesting that the only reason private publishers ever entered the market was the slow publication rate of official reporters. Most importantly, "Only the official publication has the sanction of the state, and represents the court" and "nearly every practitioner in your state keeps up his set of state reports . . . he buys the official volumes as they appear because he knows he must have the authentic and permanent record of his local court. He knows that whenever the publications differ, the court will recognize the official and not the other."[159] John West then proceeded to critique the idea of permanent digest topics, such as those used by West, as the "classification of today will be as inadequate in the future as the classification of the past is at this time."[160] Even today, West's list of 415 digest topics includes antiquated concepts such as Action of Assumpsit, Audita Querela, Detinue, Factors, Hawkers and Peddlers, Scire Facias, and Seduction. John West himself criticized the idea that the digest system could possibly contain a static list of topics that would forever be the organizing framework for American law. John West's castigation of West's two greatest innovations, comprehensive publication of appellate reporters by private publishers and a static topical index keyed to each appellate decision, foreshadows today's key legal research debates.

C. Creation of the New Mexico Court of Appeals in 1966

Publication of New Mexican appellate cases grew more complex as the state gained population in the years following World War II; more people substantially increased the number of trial court decisions that were appealed. In 1965, the New Mexico Legislature approved a constitutional amendment, allowing the people of New Mexico to vote for the creation of the New Mexico Court of Appeals on September 28, 1965.[161] The primary impetus behind the creation of an intermediate appellate court in New Mexico was the backlog in the supreme court of thirty to thirty-six months.[162] The court of appeals was first created to be a four

158. *Id.*

159. *Id.* at 4–5.

160. *Id.* at 7. West uses Piracy as an example of a digest topic that was no longer needed

161. Thomas A. Donnelly & Pamela B. Minzner, *History of the New Mexico Court of Appeals*, 22 N.M. L. REV. 595, 595 (1992).

162. *Id.* at 596.

judge court, with judges hearing cases in three judge panels.[163] The first judges appointed by Governor Campbell were E.T. Hensley, Jr., from Portales; Waldo Spiess, from Albuquerque; LaFel E. Oman, from Las Cruces; and Joe W. Wood, from Farmington.[164]

The creation of the court of appeals had a direct impact on *New Mexico Reports* by dramatically increasing the number of publishable cases, even though a majority of the cases were not selected for publication. Martin suggests that this was the national trend for publication of intermediate appellate case opinions:

> 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 . . . . Kansas did so in 1977. By the dawn of the digital age, approximately three-quarters of the states had intermediate appellate courts. 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.[165]

The volume of cases handled by the court of appeals increased from 235 in 1972[166] to over 800 in 1989.[167] Due to this rapid increase, the court of appeals grew progressively to the current ten judges by 1991.[168]

The partial publication of court of appeals cases, with some selected for *New Mexico Reports* while others are disposed of as unpublished Memorandum Opinions, is indicative of the problems inherent in relying on print publication of appellate opinions over the past few decades. In 2011, the New Mexico Court of Appeals issued 508 Memorandum Opinions which are now published on the Compilation Commission's web page[169] and 121 Opinions which are available both online[170] and in *New Mexico Reports*. Some of the Memorandum Opinions are merely a sen-

163. *Id.* at 598.
164. *Id.* at 599.
165. Martin, *supra* note 35, at 16.
166. Donnelly & Minzner, *supra* note 161, at 606.
167. *Id.* at 612.
168. *Id.* at 612–13.
169. New Mexico Compilation Comm'n, *New Mexico Court of Appeals—Prior Year Unreported Memorandum Opinions*, http://www.nmcompcomm.us/nmcases/NMCAUnreportedPrior.aspx (last visited Jan. 16, 2012).
170. *Id.*

tence or two long, usually referring to the proposed disposition and the lack of a memorandum opposing summary disposition.[171] Others are more substantive, involving the application of existing law to complicated facts and procedural scenarios.[172] The supreme court published forty-five opinions in 2011[173] and released nine unpublished opinions[174] pursuant to Rule 12-504. The Compilation Commission currently posts the published and unpublished opinions for the current year as well as the immediately prior year. West[175] and LexisNexis both keep the unpublished opinions in their New Mexico case law databases. The precedential weight of these Memorandum Opinions, the "publication" of unpublished opinions on the Internet, and the competing forums for publication of opinions are all direct challenges to the West's dominance as the primary publisher of American case law.

IV. PARADIGM SHIFT AND THE FUTURE OF APPELLATE CASE PUBLICATION IN NEW MEXICO

To this point, the majority of this article has been a detailed examination of the development of a dominant paradigm[176] for the publication of appellate opinions; a paradigm that lasted from the 1880s to, perhaps, the mid-1990s. The conclusion, however, focuses on the degradation of this paradigm and the impact on New Mexico. Professor Berring poses the issue starkly:

> The confluence of Blackstone's categorization structure, the American Digest System, legal education, and all of those trained

---

171. *See, e.g.*, Charter Bank v. Rayson, LLC, No. 31,564 (Dec. 28, 2011).

172. *See, e.g.*, Montoya-Marlow v. Montoya, No. 29,928 (Mar. 24, 2011).

173. Published online at New Mexico Compilation Comm'n, *New Mexico Court of Appeals—Prior Year Unreported Memorandum Opinions*, http://www.nmcompcomm.us/nmcases/NMCAUnreportedPrior.aspx (last visited Jan. 16, 2012) and also in *New Mexico Reports*.

174. New Mexico Compilation Comm'n, *New Mexico Court of Appeals—Prior Year Unreported Memorandum Opinions*, http://www.nmcompcomm.us/nmcases/NMCAUnreportedPrior.aspx (last visited Jan. 16, 2012).

175. As of January 16, 2012, Westlaw includes 1,293 unpublished Memorandum Opinions, starting from the beginning of 2009. At the top of the opinion, they give the warnings "Not Reported in P.3d" and "UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING."

176. The concept of shifting paradigms is rooted in Thomas Kuhn's STRUCTURES OF SCIENTIFIC REVOLUTIONS (1962). Although Kuhn limited his analysis to the work of scientists, his central theme, that dominant paradigms exist until enough anomalies force the creation of competing and conflicting paradigms, certainly extends beyond the borders of the history of science. Bintliff, *supra* note 8, at 254–57.

> within it have created a conceptual universe of thinkable thoughts that has enormous power. Indicative of its real strength is the fact that those using it do not perceive it; the classification of legal concepts appears inevitable. The manner in which legal ideas are sorted out does not present itself as the product of the work of an eighteenth-century scholar as modified by a series of successors. It presents itself as the law. This conceptual universe has ruled legal thinking for more than a century. But it is dying. Technology, or more properly the capacities of technology, is killing it. The really profound question is what will replace it.[177]

The four critical threats to the dominant paradigm, organized chronologically, are: (1) the creation, and, later, the publication of, "unpublished" or non-precedential appellate opinions; (2) keyword searching of digital opinions; (3) adoption of universal citation formats; and (4) governmental publication of authenticated documents on the Internet. Professor Martin correctly contends that the outcome of these threats has resulted in the formation of a new paradigm, digital publication of appellate opinions:

> 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. 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. 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.[178]

177. Berring, *supra* note 147, at 311.
178. Martin, *supra* note 35, at 9.

The New Mexico Supreme Court's choice to cease publication of New Mexico Reports constitutes an early adoption of the new paradigm.

A. The Impact of Unpublished Appellate Case Decisions on the Dominant Paradigm

In the 1970s, in the face of near exponential growth in litigation without a commensurate increase in the number of judges, the federal Judicial Conference of the United States requested each United States Court of Appeals to develop rules allowing for the non-publication of cases and prohibiting the citation of non-published cases in their respective circuits.[179] Thus, each court developed independent standards for deciding whether particular cases warranted precedential status, and thus publication in West's *Federal Reporter*.[180] Because citation of unpublished opinions would unfairly benefit institutional litigants, such as federal prosecutors, who had knowledge of the contents of particular opinions, some of the courts adopted the Conference's proposed ban on citing unpublished cases.[181] Many states followed suit,[182] including New Mexico, as the New Mexico Court of Appeals started issuing unpublished Memorandum Opinions in 1973.[183] The New Mexico Supreme Court banned the citation of these opinions, adopting Rule of Appellate Procedure 12-405 which mandated "All formal opinions shall be published in the New Mexico Reports. An order, decision, or memorandum opinion, because it is

---

179. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1170 (1978).

180. *Id.* at 1173–81.

181. *Id.* at 1185.

182. Cooper, *supra* note 139, at 624 ("For the most part, American court reporting remains fairly comprehensive, at least compared to British practices. In an effort to reduce the volume of court reports, however, several courts have undertaken programs of limited publication to control the publication of decisions that have little or no precedential value. A number of state supreme courts have adopted 'depublication' or decertification programs, primarily in order to prevent the publication of lower court opinions that fail to state the law accurately. These programs have generated considerable controversy.").

183. Donnelly & Minzner, *supra* note 161. The court of appeals currently employs a Summary Calendar system by which all appeals are vetted with the assistance of staff attorneys in the Prehearing Division. Cases are then either placed on the General Calendar for full briefing and, perhaps, oral argument or the parties are sent a proposes summary disposition, with the requirement that they write a memorandum in opposition to the summary disposition if they wish the case to be reconsidered for placement on the General Calendar. Memorandum Opinions are decisions made on the Summary Calendar. Bridget Gavahan, *History of Court of Appeals Prehearing Division* (manuscript on file with author).

unreported and not uniformly available to all parties, shall not be published nor shall it be cited as precedent in any court."[184] Thus, selection for publication in *New Mexico Reports* made a case precedential and part of New Mexico's common law.

The impact of unpublished opinions on the development of case law has been thoroughly debated elsewhere.[185] The salient point is that by the 1970s, due to sheer volume, the federal and state appellate courts were unable to continue producing precedential opinions for comprehensive publication in West's reporters. The various courts, rather than private legal publishers, instituted a version of selective publication as a matter of institutional preservation. The publishers, however, did not honor the selection decisions. Both West and LexisNexis began including unpublished decisions in their online case databases starting in the 1970s.[186] Consequently, non-precedential opinions were now partially published and available to some legal researchers. The resulting angst of finding opinions that were otherwise on point but non-precedential, and even uncitable in many jurisdictions, led to significant criticism from scholars and the Bar. In response, in 2006 the Federal Appellate Rules Committee proposed, and the United States Supreme Court adopted, Federal Rule of Appellate Procedure 32.1 requiring the release of unpublished opinions by all circuits and allowing the citation of such opinions for persuasive value.[187] Thus, aside from the murky question of precedential weight,[188] the selective process instituted by the courts was rendered null,

---

184. Rule 12-405(C) NMRA (2011).

185. William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35 (2011).

186. The earliest "Table of Decisions Without Reported Opinions" citation found in Westlaw is from 1970. Several older citations appear to exist but are typographical errors in the date. *See also* Martin, *supra* note 35, at 34.

> 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. 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. 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.

Id.

187. Fed. R. App. P. 32.1.

188. *See, e.g.*, David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 62 (2009) ("Do American courts have the authority to render decisions not binding on

in part because of online comprehensive publication by private legal publishers.

Recently, the New Mexico Supreme Court amended Rule 12-405 to allow the citation of non-precedential New Mexican opinions: "Non-precedential dispositions may be cited for any persuasive value and may also be cited under the doctrines of law of the case, claim preclusion, and issue preclusion."[189] Parties are required to note that the opinion is "non-precedential or unpublished" in a parenthetical after the citation and are also required to file and serve a copy of any cited unpublished opinion that is "unavailable in a publicly accessible electronic database."[190]

B. Keyword Searching and the Unraveling of the Dominant Paradigm

The publication of otherwise unpublished opinions had relatively minimal impact on West's dominant paradigm in comparison to the introduction of keyword searching in caselaw databases, which fundamentally altered the way most attorneys conduct research and has rendered West's digest and key number system increasingly irrelevant. In April 1973, Mead Data Central introduced LEXIS, the precursor to today's Lexis-Nexis, beginning the revolution of computer-assisted legal research[191] and directly challenging West's hegemony in legal publishing. West responded with a competing product, Westlaw, released two years later in April, 1975.[192] From the earliest stages, Westlaw included the digest system's headnotes and key numbers,[193] West's primary content-based competitive advantage over other full-text databases of American case law.

Prior to the ascendency of the Digest as the primary method for finding relevant law, lawyers typically kept common-place books and

---

future courts, and, even if they do, should they issue such decisions?"); Lee Faircloth Peoples, *Controlling the Common Law: A Comparative Analysis of No-Citation Rules and Publication Practices in England and the United States*, 17 IND. INT'L & COMP. L. REV. 307 (2007); William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 WASH. & LEE L. REV. 1723, 1724 (2005) (discussing proposed rule's treatment of unpublished decisions); J. Lyn Entrikin Goering, *Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27 (2005) (considering the then-proposed language to the rule); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1236 (2004) (discussing precedential value of unpublished opinions).

189. Rule 12-405 NMRA (2011) (amended by Supreme Court Order No. 11-8300-031, effective for cases pending or filed on or after September 12, 2011).

190. Rule 12-405(D) NMRA (2011).

191. William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 LAW LIBR. J. 543, 553 (1985).

192. *Id.*

193. *Id.* at 554.

notebooks where they would write quotes from key cases they read, often organized by subject for quick reference.[194] The practice of common-placing began to decline after the Civil War[195] in the same period that the number of case reporters was increasing rapidly. West's Digests allowed lawyers to find controlling or persuasive opinions through a system organized by legal concept, regardless of the number of volumes of reporters.[196] Professor Barbara Bintliff explains that "the digest system worked well for many years. It guided our thinking and analysis of the law by providing us with a structure used across the country. Lawyers in Florida and South Dakota, Ohio and Nevada, consulted the same books, used the

---

194. *See generally* M. H. Hoeflich, *The Lawyer as Pragmatic Reader: The History of Legal Common-Placing*, 55 ARK. L. REV. 87 (2002).

195. *Id.* at 122; *see also* THE MISCELLANEOUS WRITINGS, LITERARY, CRITICAL, JURIDICAL, AND POLITICAL OF JOSEPH STORY, LL.D., NOW FIRST COLLECTED 321–22 (1835) ("Indeed, the general auxiliary of most students used to be a common-place book, in which the various readings and accumulations of their learned hours were collected, sometimes with, and sometimes without method . . . it has been gradually lessening, only because the press has, in the principal departments of learning, by means of indexes, digests, compends, concordances, dictionaries, and other abridgments, supplied their place, and brought within a reasonable compass the mass of those references, which are most useful to the scholar, the professional gentlemen, and the scientific student.").

196. Barbara Bintliff, *From Creativity to Computerese: Thinking Like a Lawyer in the Computer Age*, 88 LAW LIBR. J. 338, 341, 343 (1996).

> For well over a hundred years, our "thinking like a lawyer" skills have been shaped by—and some would argue even determined by—the simple device of the case digest. While there are a number of digests in existence today, and there were many others in the past, the most influential system is the American Digest System, developed by John West and the West. It is recognized as the comprehensive digesting system for all reported cases in America. The classification scheme used by West has organized the law, and guided our thinking, since 1896 . . . . The West digest system is, and has been, a tightly controlled method of organizing American case law despite its size; it has over 100,000 separate key numbers, digesting close to 3,000,000 cases. It is comprehensive, covering all published cases (which generally means appellate level cases). Its outlines of topics provide a syndetic structure for each area of law, allowing researchers to understand the relationship, context, and hierarchy of identified rules. To use the digest, you have to think in terms that match its organization; you have to think of rules and hierarchies.

Id.

> The massive numbers of case reports undoubtedly present lawyers with problems of space and finance. Certainly reports that are merely duplicative and add nothing either in speed of publication or in improved access—such as the official versions of state reports—serve no purpose. But in terms of access to their contents, the great numbers of reports cause very few problems. The prevalence of looseleaf services, digests, indexes, citators, and online full text databases has made researching the mass of published case law manageable."

Cooper, *supra* note 139, at 626.

same organizing framework, found the same cases."[197] Attorneys likely found it much more convenient to use a set subject index rather than create their own common-place book.

The advent of full-text searchable caselaw databases, most notably LexisNexis and Westlaw, but also more recent competitors such as Lois-Law, Casemaker, Fastcase, and GoogleScholar, undermined the Digest search process by providing an easier way to find relevant cases.[198] Professor Bintliff illuminates the thought process of users of keyword searching: "And the best part is that searching for this information is so easy! Just plug in a couple of words, maybe add a date or a judge's name or some other specific identifier, and the computer does the rest. No muss. No fuss. No book dust."[199] A number of legal scholars have noted that keyword searching encourages legal researchers to look for cases with similar facts rather than relying on the intellectual superstructure of West's digests to identify general theories of law that apply to the case.[200] Consequently, especially in this period of tight budgets, many libraries are cancelling print digests.[201] In 1990, law book historian Professor Erwin C. Surrency predicted the death of the digest, noting that "the digest in the form it is now printed may become obsolete, much to the regret of the legal bibliophile."[202]

Studies of the research habits of attorneys and law students suggest that Surrency's prediction has come to pass. In a study of attorneys in Kansas, Professor Joseph Custer found that" a majority of lawyers don't even use the digest in their research" and that those who still do, "don't appear to be paying any attention to the structure when scanning most or

---

197. *Id.* at 343–44.

198. It is important to note that easier does not necessarily mean better. Subject indexing of the level conducted by West can often lead to far superior results than simply tapping keywords into a database. *See*, Patrick Meyer, *Law Firm Legal Research Requirements for New Attorneys*, 101 LAW LIBR. J. 297, 313 (2009).

199. Bintliff, *supra* note 196, at 344.

200. *Id.*; F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 575 (2002) (keyword searching "promotes a view of the subject matter as a depthless congeries of facts and doctrines rather than the hierarchically organized system"); Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What Is the Modern Legal Researcher to Do?*, 97 LAW LIBR. J. 661, 675 (2005) ("[M]odern legal researchers well trained in Boolean searching can discover rules without the structure of the print digest system."); Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 U.C.L.A. L. REV. 27, 59 (2010) ("[C]omputers have created a generation of researchers who are better at searching for facts than they are at finding legal concepts.").

201. Peoples, *supra* note 200, at 663.

202. ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 127 (1990).

all of the cases under several key numbers when researching." He concluded:

> In the end, the digest is a minor player in a legal culture where lawyers will go everywhere to find the law . . . . Free-text searching brings the flexibility that lawyers need to effectively research in today's legal culture. Lawyers will look at the localities, practices, languages, symbols, and images surrounding legal society to find and gain an understanding of the law.[203]

Professor Lee Peoples, in a study of Oklahoma law students, found that a "vast majority of students ranked the print digest at or near the bottom for effectiveness" and found the digest "cumbersome and unwieldy to use," even though they were successful in using it.[204] He concluded that for law students who grew up using computers and keyword searching, "For all practical purposes, the print digest is dead to these students before they learn it exists."[205] The database developers at West may contend that Digest topic and key number searching is alive and well in its online Westlaw and WestlawNext products, but even on these proprietary databases, digest searching is now but one of several ways to look for cases, rather than the dominant methodology. This is a drastic change, even from the early 1990s, when most attorneys would use print digests and case reporters to do most of their research.[206]

C. Vendor and Medium Neutral Citation Reflects the Rejection of the Dominant Paradigm

The third critical erosion of West's hegemony in American case reporting started in 1994, when the Technology Resource Committee of the Wisconsin Bar Association advocated that the Wisconsin Supreme Court create a vendor and medium neutral citation format for opinions residing

---

203. Joseph A. Custer, *The Universe of Thinkable Thoughts versus The Facts of Empirical Research*, 102 LAW LIBR. J. 251, 265 (2010); *see also* Bintliff, *supra* note 8 at 251–52 ("We know that fewer and fewer legal researchers are consulting the digests, either in print or online, for their research needs. Instead, they turn first to full-text databases or Google, eschewing the hierarchical organization of digest for the free-for-all of the electronic realm.").

204. Peoples, *supra* note 200, at 674–75.

205. *Id.* at 675.

206. Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1637, 1696 (2000) ("Three spikes were driven into the heart of traditional legal information in the 1990s: a changing user environment, corporate consolidation, and the Internet."); *see also* Bintliff, *supra* note 8 at 251–52.

in digital archives.[207] The Wisconsin Bar's suggestion directly challenged one of the primary advantages that West held over competing print and digital case reporters: the fact that the volume and page numbers of the National Reporter System constituted the accepted format for citing American case law:

> The seemingly insignificant legal citation is a linchpin of the law. Citations enable lawmakers to legitimize their actions by linking their rulings to established legal authority. Citations also lead citizens to the laws they are expected to obey. Our citation conventions have weathered exponential increases in litigation, legislation, and regulation. Their quiet success is attributable to congruence between generally accepted citation standards and the structure of our legal literature. This congruence, however, is disintegrating as computer technology reshapes our legal record.[208]

Volume and page citation makes little sense online where Internet pages are not constrained by the traditional format and space limitations of books.[209] Consequently, technology-savvy law librarians and lawyers in the mid-1990s suggested that courts prepare for a new type of citation that is both medium and vendor neutral.

This suggestion ignited a confrontation that put West in a position of defending the primacy of the National Reporter System right when the Internet was becoming widely accessible, in essence defending their print products against the threat of online publishing. Because of West's "heated resistance,"[210] the Wisconsin Supreme Court held a hearing on March 21, 1995, to determine whether to implement a vendor neutral citation system. Law librarians, who, along with law review editors, are among the few who are deeply invested in legal citation,[211] split and aligned with both sides in this dispute. Professor Berring defended the National Reporter System, explaining to the court, "Your current system is powerful. There is no need to sacrifice it."[212] The Wisconsin Supreme Court deferred their decision on the matter. The American Association

---

207. Peter W. Martin, *Neutral Citation, Court Web Sites, and Access to Authoritative Case Law*, 99 LAW LIBR. J. 329, 329–30 (2007).

208. The Universal Legal Citation Project: *A Draft User Guide to the AALL Universal Case Citation*, 89 LAW LIBR. J. 7 (1997).

209. Carol Billings & Kathy Carlson, *Universal Citation and the American Association of Law Libraries: A White Paper*, 103 LAW LIBR. J. 331, 336 (2011).

210. Martin, *supra* note 207.

211. The Universal Legal Citation Project: A Draft User Guide to the AALL Universal Case Citation, *supra* note 208, at 7, 8.

212. Martin, *supra* note 207.

of Law Libraries formed a Citation Formats Committee to further study the issue and make recommendations.

The Citation Formats Committee released its recommendations in 1995, followed by the publication of a Universal Citation Guide in 1999.[213] The Committee strongly advocated for the adoption of vendor and medium neutral citations.[214] The dissenting argument from West was strident in tone and desperate in content.[215] Bergsgaard and Lindberg began their argument contending that the "radical proposals" of the Committee's recommendations would "cause serious disruption to the legal profession and reduce access to the law in printed form" and "would cause serious inefficiencies for users of print publications."[216] Their argument was premised on a 1995 Wisconsin survey finding that "98% of all lawyers conduct research in books; that 45% of Wisconsin lawyers use no computers at all to perform legal research; and that 89% think the current system of citation works well."[217] Additionally, they contended that Internet publication of cases by courts was too expensive[218] and that adding paragraph number to opinions for purposes of pinpoint citation was both too expensive and cumbersome for court staff who might "circumvent" the process when difficulties arouse[219] and "too burdensome for judges themselves to apply paragraph numbers to opinions," because word processing software automatically adds page but not number paragraphing and judges would need to be "trained to use a set of rules for determining what to number."[220]

West's best argument against vendor and medium neutral citation was that citations are supposed to "help the reader locate the cited authority."[221] Because vendor and medium neutral citations are not to a specific publication, West dubbed them "nowhere cites" that failed to help

---

213. American Ass'n of Law Libraries, *Universal Citation Guide* (2009), http://www.aallnet.org/Archived/Publications/AALL-Publications/universal-citation-guide.pdf.

214. The Final Report of the Task Force on Citation Formats, 87 LAW LIBR. J. 577 (1995)

215. Donna M. Bergsgaard & William H. Lindberg, *The Final Report of the Task Force on Citation Formats: Dissenting View*, 87 LAW LIBR. J. 607 (1995)

216. *Id.* at 608.

217. *Id.* at 616.

218. *Id.* at 613 ("The majority further concedes that the State Bar and Judicial Council in Wisconsin are unique in their apparent willingness to fund a centralized electronic archive of judicial opinions (though we question the TAXPAYERS' willingness to do so, both in Wisconsin and elsewhere").

219. *Id.* at 619.

220. *Id.* at 620.

221. *Id.* at 613.

the reader find the cited document.[222] Combined with their assertion that "[t]here is absolutely no reason to believe that documents with legal effect will cease carrying page numbers, at their inception, anytime in the fore-seeable future,"[223] they cast derision on vendor and medium neutral citations, ignoring the immediately impending future of state courts publishing their own decisions directly to the Internet, with easily added paragraph numbering instead of page numbers. Neutral citation is a necessary ingredient of digital publication.

West's apparent motivation in preventing such a future, by stopping or slowing the adoption of a new citation system, illuminates the rapid pace of the paradigm shift away from West's case reporters. They advocated for no citations rules, allowing attorneys to cite opinions from whatever source they found them. West was even candid about their view of ownership of appellate opinions:

> We must say we have been disappointed with the manner in which the Task Force accomplished its work. From the start, these dissenters sought to introduce a modest framework for due process into the workings of the Task Force. We urged the leadership of the Task Force to clearly state a set of vendor-neutral goals and objectives rather than engaging in direct attacks on the property rights of West Publishing Company (as those rights have been determined through the federal courts). Regrettably, the final report still consists of a thinly-veiled attack on West Publishing and its National Reporter System—the one system that American lawyers, judges, and law librarians have trusted and relied upon for more than century. Of course, members of AALL, like attorneys representing clients across the land, have every right to argue in good faith for changes in the law that AALL believes will advance public access to the law. But because more than a century of experience suggests that the majority is arguing against the interests of AALL's membership—and the entire legal profession—we cannot join in the majority's Task Force report.[224]

West's interest in maintaining the status quo preference for books that they publish is clear and they conclude that "the majority's radical proposals would cause serious disruption to the legal profession and will reduce access to the law in printed form by making books unnecessarily cumbersome to use."[225]

---

222. *Id.* at 612.
223. *Id.* at 609.
224. *Id.* at 621–22.
225. *Id.* at 622.

The supreme courts in some states were unsympathetic to West's arguments. In New Mexico, the supreme court provisionally adopted medium neutral citation as the court's official citation format on August 15, 1997.[226] The court made the adoption permanent on January 12, 1998, changing the name to "vendor neutral citation" instead of "medium neutral citation," but requiring citation to either *New Mexico Reports* or the *Pacific Reporter* in addition to the official vendor neutral citation.[227] The Supreme Court Law Library posted a database on the Internet of all appellate decisions from 1996 to the present.[228] By 1998, the courts in Arizona, Louisiana, Maine, Mississippi, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming had adopted universal citation.[229] Arkansas joined the list in 2009 and Illinois in 2011.[230] Professor Martin:

> Most U.S. jurisdictions now release decisions to the Web. More than a dozen states have demonstrated that a shift to neutral citation is neither costly nor a serious burden on lawyers and judges. A few have shown how this reform can be combined with an open archive of decisions in final form.[231]

Despite West's contention that state taxpayers are unwilling to fund the infrastructure needed to host free access to appellate opinions on court websites,[232] the combination of Internet publication and vendor and medium neutral citation gives the bench, bar, and general public open access to the law wherever there is access to the Internet,[233] at a small

---

226. Order 97-8500 (August 15, 1997), published in the New Mexico Bar Bulletin Vol. 36, No. 34, P. 16.

227. Order 98-8500 (January 12, 1998).

228. NEW MEXICO SUPREME COURT, APPELLATE DECISION DATABASE–1996 TO PRESENT, http://www.supremecourtlawlibrary.org/Casefund.htm (last visited Feb. 15, 2012).

229. BILLINGS & CARLSON, *supra* note 209, at 346.

230. *Id.* at 337.

231. Martin, *supra* note 207, at 363.

232. *See* Bergsgaard & Lindberg, *supra* note 215.

233. Billings & Carlson, *supra* note 209, at 335.

> Unfortunately, current citation standards serve to limit access to government information. These standards require the reference to a book to identify individual court opinions. Furthermore, more often than not, the book is published and owned by a private company, not the government entity that produced the opinion. In the past, such practices probably made the law more accessible to the people. However, with changing technologies, such standards no longer adequately address the objective of improving access to government information. A physical book as the unit of citation no longer best meets the goals of increased access. As a result of new technologies, public entities no longer need to rely on private entities to provide effective organization of

fraction of the cost of purchasing access to the law from a private publisher.

D. Authenticated Digital Publication as the New Paradigm for Appellate Case Publication

The final threat to West's continued dominance of American case reporting is the decision by some state supreme courts to officially publish their opinions as authenticated digital images on the Internet rather than in printed case reports; a trend which may become the new dominant paradigm for appellate case reporting. As in New Mexico, many state supreme courts began producing official state reports in the nineteenth century to provide an authoritative source for court opinions and fulfill constitutional or statutory obligations to write and publish opinions.[234] Inability to compete with West's quality and the comprehensiveness of the National Reporter System led many states in the mid-twentieth century to either cancel their official reports or, like New Mexico, contract with West to produce a high quality official reporter.[235] These decisions "reduced public payrolls and moved states out of the business of storing and distributing law books"[236] but it also put state judiciaries in 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."[237] The costs of printing and storing large runs of reporters combined with the discomfort of dependence on a private publisher's price decisions, are prime motivators for states like to New Mexico to consider on-line, official dissemination of appellate opinions.

Such dissemination is not, however, universally accepted. The Association of Reporters of Judicial Decisions (ARJD) released a Statement

---

> their documents. Therefore, new citation standards that do not require citation to a specific format or that do not require citation to a privately owned item should be adopted. Universal citation practices promote accessibility because they are vendor and medium-neutral.

Id.

234. Martin, *supra* note 35, at 10–11.

235. *See also* Martin, *supra* note 35, at 15–18 (2008) ("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.")

236. *Id.* at 18 (The storage of reporter back stock is not an insignificant cost as it requires both warehouse space and staff salaries.).

237. *Id.* at 18.

of Principles: "Official" On-Line Documents in 2008.[238] The ARJD noted that "serious issues have arisen regarding the preservation, authenticity, and certification of official government documents, especially with regard to on-line and electronic versions of those documents"[239] and warned that "unauthenticated and impermanent 'official' documents . . . may unwittingly result in the adulteration or loss of valuable and irreplaceable primary government source materials."[240] For these reasons, they concluded in 2008 that, "[p]rint publication, because of its reliability, is the preferred medium for government documents at present."[241] They further warned that only one medium, print or digital, should be identified as the official document, to avoid discrepancies between official sources, and that official digital images should be "authenticated by encryption, digital signature, or some other computerized process to safeguard them from illegal tampering."[242]

While the ARJD's interest in protecting the integrity of appellate opinions is laudable, their intent to protect print as the official storage medium is probably fighting against the inevitable. Law librarians, typically strong advocates of print collections, have largely conceded that most attorneys now conduct most of their research using various legal databases:

> The debate about whether print or electronic resources are better for legal research ended essentially because the consumers of the resources made a decision. Electronic resources are now used so overwhelmingly for legal research that their relative merit seems almost irrelevant. Faculty, attorneys, and law students voted with their feet, and their feet led them to the computer terminal.[243]

Consequently, the primary clientele for print reporters are buying fewer and fewer volumes; the subscriber base to *New Mexico Reports* is now below 500.[244] Relying on print volumes as the official source for opin-

---

238. Association of Reporters of Judicial Decisions, Statement of Principles: "Official" On-Line Documents (2008), *available at* http://arjd.washlaw.edu/ARJD_Statement%20of%20Principles_May2008.pdf (visited February 15, 2012).

239. *Id.* at 1.

240. *Id.*

241. *Id.*

242. *Id.* at 1–2.

243. Bintliff, *supra* note 8, at 249 (footnote omitted); *see also* Martin, *supra* note 35, at 9 ("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.").

244. Interview with Brenda Castello, Exec. Dir., N.M. Comp. Commn. (Feb. 13, 2012).

ions makes less and less sense as lawyers are increasingly relying on unofficial databases of republished caselaw, such as Westlaw or Fastcase.[245] Additionally, some of the technical questions posed by ARJD about the permanency of archival quality digital files are being adequately answered by information technologists.[246] For example, the federal National Archives and Records Administration now accepts digital files in PDF/A-1 format for permanent storage, in part "because it has fewer "bells and whistles" than traditional PDF and should minimize future migration requirements."[247] Courts are increasingly willing to consider changing paradigms, and using the Internet, rather than books, to store and disseminate opinions.[248] This is due, in part, to increased costs for printing and storing books,[249] but at a more fundamental level, many jurists believe that "ac-

245. *See* Martin, *supra* note 35, at 27.

> 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.

Id.

246. Jason Eiseman, *Time to Turn the Page on Print Legal Information*, LEGAL INFORMATION INSTITUTE, Sept. 15, 2010, http://blog.law.cornell.edu/voxpop/2010/09/15/time-to-turn-the-page-on-print-legal-information/.

247. Frequently Asked Questions (FAQs) about Transferring Permanent Records in PDF/A-1 to NARA, NAT'L ARCHIVES, http://www.archives.gov/records-mgmt/initiatives/pdf-faq.html (last visited Feb. 15, 2012). PDF/A is an archiving standard managed by the International Organization for Standardization that was "developed to enable the long-term preservation of electronic documents and provides specifications for the creation, viewing, and printing of PDF documents, with the intent of preserving final documents of record as self-contained documents . . . that makes it possible to reproduce the visual appearance of the document in the exact same way in the future." *PDF/A Archiving Standard*, ADOBE, http://www.adobe.com/enterprise/standards/pdfa/ (last visited April 22, 2012); *but see*, Peter W. Martin, *Abandoning Law Reports for Official Digital Case Law,* 12 J. APP. PRAC. & PROC. 25, 81–82 (2011) (advocating the XML instead of PDF as a superior archival format).

248. Martin, *supra* note 207, at 335 ("The environment has changed so radically that the question for a jurisdiction's high court has shifted from 'Why undertake such novel measures?' to 'Why shouldn't the court's Web site be used in this way?'").

249. Ian Gallacher, *"Aux Armes, Citoyens!:" Time for Law Schools to Lead the Movement for Free and Open Access to the Law*, 40 U. TOL. L. REV. 1, 13 (2009)

> It is possible to imagine a cynical corporate publisher milking the last possible penny from book sales while simultaneously seeking to end book production to force everyone to use its subscription databases. But an alternative, less nefarious reason for the increase in law book prices might be more persuasive. Put simply, maybe the books cost more to buyers because they cost more to produce. In addition to the financial cost, producing books has a substantial environmental cost, consisting not just of the paper use, but also the toxic

cess to the law increasingly depends on one's ability to pay for information that should be accessible to everyone in a democracy."[250] Making digital opinions on the Internet the official opinion better serves this goal than storing the law only in books or fee-based databases.[251] Because of the proliferation of secondary republishers of legal information, such as Fastcase or Google Scholar, it is critical that courts provide authenticated copies of opinions on the Internet so that when republishers scrape or "harvest" court websites, they get accurate copies of opinions.[252]

Several states have declared digital versions of their appellate opinions to be the "official" version. Arkansas began the trend in 2009:

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

---

> nature of paper and ink manufacture and the fuel expended to transport paper through its various stages from timber to book on the shelf. These costs make the production of books, which are apparently not used to any great degree, increasingly more difficult to justify.

Id.

250. *Id.* at 4.

251. Martin, *supra* note 207, at 62

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

Id.

252. Martin, *supra* note 207, at 76–77 (footnotes omitted).

> diction in the nation to switch from law report publication to official legal data distribution.[253]

Most states release their new appellate opinions on the Internet,[254] but only Illinois,[255] and now, New Mexico,[256] have followed Arkansas's lead and declared the digital version of the case to be official. The Illinois Supreme Court's press release on May 31, 2011, declared "the publication and purchase of official printed Volumes unnecessary and a waste of money and resources."[257] Illinois adopted vendor neutral citation[258] and has an archive of appellate opinions back to 1996.[259]

E. New Mexico's Response to the New Paradigm for Appellate Case Publication

On March 1, 2012, the New Mexico Supreme Court announced that *New Mexico Reports* would conclude with Volume 150. Instead of relying on a contract with West to produce an official print reporter, the authenticated digital opinions released by the Compilation Commission will constitute the official opinion of both the Supreme Court and Court of Appeals:

> The New Mexico Supreme Court announced today the adoption of a new format for the official opinions of the New Mexico appellate courts effective March 1, 2012. The 160 years of use of printed books for official court opinions has come to an end, complementing recent electronic advances in court case file management and filing of court papers. The new format of official opinions is an authenticated PDF with digital signature . . . The designation of the digital version as the official court opinion is a natural evolution in the Court's recent developments in leveraging technology for public access, court transparency, and efficiency.[260]

Additionally, the Compilation Commission will eventually post all of New Mexico's appellate opinions, back to 1852, on the Commission's

---

253. *Id.* at 27–28.

254. *Id.* at 34–35.

255. Press Release, Ill. Supreme Court, Illinois Supreme Court Announces New Public Domain Citation System, Ending Era of Printed Volumes (May 31, 2011) (on file with author).

256. Press Release, N.M. Supreme Court, New Mexico Supreme Court Announces New Era of Digital Official Court Opinions (March 1, 2012) (on file with author).

257. Ill. Supreme Court Press Release, *supra* note 255.

258. *Id.*

259. *Supreme & Appellate Court Opinion Archives*, ILLINOIS COURTS, http://www.state.il.us/court/Opinions/archive.asp (last visited Feb. 15, 2012).

260. N.M. Supreme Court Press Release, *supra* note 256.

website, complete with new vendor neutral citations and paragraph numbers to allow for uniform official citation of New Mexico law.[261] These opinions will be "openly accessible and retrievable by citation."[262] For libraries and other collectors of books, the Compilation Commission will print an unofficial version of the case reports, tentatively titled *New Mexico Appellate Reports*,[263] but all citations will be solely to the official vendor neutral citation rather than the volumes and pages of the new series.

Professor Martin correctly forecasted that New Mexico was a prime candidate for switching to digital official opinions:

> Moreover, the commission is charged by statute with contracting for the production of the *New Mexico Reports* in print, a responsibility it currently discharges by contracting with West for quantities that are comparable to the *Arkansas Reports* print run prior to 2009. Consequently, substitution of the electronic version of New Mexico case law, which the commission already publishes, for the "official" print volumes might well save the commission, and through it New Mexico, substantial sums. As an established electronic publisher, it has already had to put in place systems designed to provide adequate assurance of data authenticity and permanence. In addition, the New Mexico courts have been applying non-print dependent citations to appellate decisions since 1997. For these reasons following Arkansas's lead would, in all likelihood, entail fewer system and work-process challenges than Arkansas itself has had to face.[264]

Professor Martin further praises the Commission's authentication of decisions[265] as well as the Commission's ability to compete with commercial legal publishers.[266] In essence, the Commission provides the court with an in-house legal publisher capable of providing the technical and marketing abilities necessary to make the transition to digital publication a reality.

The high quality work of the Compilation Commission will serve New Mexico well should the Legislature choose to enact the Uniform Electronic Legal Material Act (UELMA), approved by the National

---

261. *Id.* By 2002, Oklahoma was the first state to provide free Internet access to the entirety of the state's appellate opinions back to 1890. Martin, *supra* note 207, at 86. This task, while daunting, should be entirely replicable for other states wishing to follow the lead of Arkansas and Oklahoma.

262. N.M. Supreme Court Press Release, *supra* note 256.

263. *Id.*

264. Martin, *supra* note 207, at 60–61.

265. *Id.* at 78–79.

266. *Id.* at 87.

Conference of Commissioners of Uniform State Laws in July, 2011.[267] Section 4 of the UELMA requires that electronic-only government publications are designated as "official" and meet the requirements of Sections 5, 7, and 8.[268] Section 5 requires an authentication method for the "user to determine that the record received by the user from the publisher is unaltered from the official record published by the publisher."[269] Section 7 regards preservation and security and requires backup and disaster recovery plans for electronic-only records.[270] Section 8 requires reasonable public access availability on a permanent basis.[271] New Mexico's appellate opinions are currently authenticated and freely available to the public via the Compilation Commission's webpage. The master files are backed up daily and authenticated copies are stored both in the archival vault at the State Records Center as well in off-site storage outside of New Mexico. In essence, New Mexico is already fully compliant with the UELMA requirements.

V. CONCLUSION

As the paradigm shifts from print to digital publication in law, it is helpful to examine the historical antecedents of our legal publication system in order to understand the overarching needs of legal researchers. During the territorial period, New Mexico lawyers needed access to appellate decisions in order to institute both an Anglo-American common law system and a more professional appellate judiciary. This need was perceived and fulfilled by Gildersleeve through publication of *New Mexico Reports*. This new reporter was in line with national publication trends of the time, including the competition Gildersleeve faced from Johnson. As the New Mexico bench and bar developed during the early statehood period through the end of the twentieth century, *New Mexico Reports* was folded into the national norm of reporter publication, as defined by West's *National Reporter System* and Digest headnote and key number indexing. In essence, the New Mexico Supreme Court acceded to a new paradigm, based on West's quality and dominant market share, when it contracted with West to publish *New Mexico Reports*.

---

267. Uniform Electronic Legal Material Act, *available at* http://www.uniformlaws.org/Shared/Docs/AM2011_Prestyle%2]0Finals/UELMA_PreStyleFinal_Jul11.pdf (last visited Feb. 15, 2012).

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

As New Mexico increasingly integrated into the national economy, the State's legal publications followed suit. The development of the Internet sowed the seeds for a new model for legal publication, rendering West's print-based system increasing obsolete for anything but archival preservation.[272] With the development of authenticated, professional Internet publication, New Mexico has taken the opportunity to help institute a new model for publication of appellate cases,[273] where access to opinions can happen with any Internet connection, with no profit motivation or grounds for an assertion of a "property right" to publically-created law by private publishing companies.[274] The standard of excellence and access to the law was set first by nominative reporters like Gildersleeve and then perfected by West's print paradigm. Law must be both fully accessible to the people and of consistent, trustworthy quality; the duty of state governments who wish to publish their own primary law materials using the Internet will be to meet or exceed these historical and contemporary standards.

272. Mills, *supra* note 5, at 919 ("[D]emise of the West paradigm can be attributed, in large measure, to factors that flow directly from the computerization of American law and the rise of the Internet."); Bintliff, *supra* note 8, at 264 (West's Digest's "role in providing a shared context for legal research, is diminished if not ended. Law's paradigm has changed").

273. Martin, *supra* note 207, at 88 ("The underlying free public resources will at once provide a no-fee option to anyone doing legal research, encourage competition among those redistributing primary law, and provide authenticated copies of critical legal texts against which the accuracy of versions drawn from other sources, print or electronic, can be checked.").

274. *See supra* text accompanying notes 215–25.