INVISIBLE SHACKLES: THE MONOPOLIZATION OF PUBLIC ACCESS LEGAL RESEARCH DUE TO GOVERNMENT FAILURES

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I. INTRODUCTION

It is the world that has been pulled over your eyes to blind you from the truth.[1]

There is a certain irony that public data access services appear to be neither public nor accessible. While the common law right to inspect and copy judicial records remains intact in the United States,[2] it is heavily circumscribed in fact.[3] Case law and other court documents are ostensibly open to the public; yet, severe deficiencies in official recordkeeping databases, PACER and CM/ECF, impede this goal. In part, these shortcomings are due to how the United States legal system has developed since its founding and more recently, the advent of the Internet.

The creation of a system that relies on past decisions, or precedent, such as case law, without providing an opportunity to meaningfully organize such information has circumvented the principle of public access to the law. In fashioning such a flawed scheme, the government has relinquished responsibility and vested in private parties the power to structure significant portions of the legal system on their own. Now, more than two centuries after the inception of the United States legal system, sophisticated corporations have captured the market for legal research[4] and the government has provided no viable alternative that serves the public interest.

This comment argues that the current paradigm for legal research, particularly for free information such as state and federal case opinions and statutes, federal agency regulations, and many law review or journal articles, is one that inhibits rather than promotes public access to the law. The core problem is that properly organized and intelligible legal data is sealed away behind paid, proprietary software while official government sources remain archaic, unintuitive, and disordered.

Part I describes the necessity of case precedent in United States law and how private corporations have become immersed in the process of organizing case law. Part II explains the origins

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1. THE MATRIX (Warner Bros. 1999).

2. Nixon v. Warner Comm., Inc. 435 U.S. 589, 597–99 (1978) (indicating the scope and the limits of the common law right to inspect judicial records in the wake of the Watergate scandal).

3. *See* Brian Carver, *What is the "PACER Problem?"*, FREE LAW PROJECT (Mar. 20, 2015), https://free.law/2015/03/20/what-is-the-pacer-problem/.

4. *See* Robert Ambrogi, *For Paid Legal Research, WestlawNext is Most Popular, ABA Survey Says*, LAWSITES (August 22, 2013), https://www.lawsitesblog.com/2013/08/for-paid-legal-research-Westlawnext-is-most-popular-aba-survey-says.html (summarizing the data from an ABA research paper discussing market share of legal research companies).

of this problem by exploring the history of Westlaw and LexisNexis and their contributions to the legal community. Part II also introduces the PACER and CM/ECF systems and their respective shortcomings. Part III analyzes whether Westlaw and LexisNexis represent a duopoly, which may indicate an antitrust violation. Part III also explores the copyright aspects of case opinions, statutes, and law journal articles. Lastly, Part IV explores alternatives to the current system by comparing public and private databases. The paper will conclude by articulating difficulties in changing the current legal research paradigm.

II. PREFACE AND HISTORY

> *Knowledge is of two kinds. We know a subject ourselves, or we know where we can find information upon it.*[5]

It is perhaps a unique feature of the United States that, almost since the beginning of the country, the government has allowed private parties to manage key functions of its legal infrastructure. The paramount illustration is West's National Reporter System, a method of organizing case law by volume, reporter, and page number.[6] Before 1876, the United States had no single standard for organizing case information, a fact that severely limited legal research.[7] Yet, a salient feature of United States federal and state case law is the doctrine of *stare decisis*, in which a court "abide[s] or adhere[s] to decided cases."[8] Consistent with principles of federalism, *stare decisis* is based on court hierarchies and the precedential value of case law decided by

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5. JAMES BOSWELL, LIFE OF SAMUEL JOHNSON 253 (Charles Grosvenor Osgood, ed., Charles Scribner's Sons 1917) (1791), https://archive.org/details/boswellslifejoh01boswgoog.

6. *E.g.*, N. Y. UNIV. SCHOOL OF LAW, *Case Law Research: State and Regional Case Law Reporters*, N.Y.U. LAW LIBRARY, http://nyulaw.libguides.com/content.php?pid=362576&sid=2971775 (last updated Mar. 27, 2018) [hereinafter *Case Law Research*] (describing each of the West regional reporters and the case reporter format).

7. *See* Shelly Albaum, *Features – Legal Research – Past, Present and Future: The National Reporter System Celebrates Historic Anniversary*, LLRX (Oct. 15, 2002), https://www.llrx.com/2002/10/features-legal-research-past-present-and-future-the-national-reporter-system-celebrates-historic-anniversary/ (relating on the development of West's innovations as an improvement that "allowed the U.S. legal system to fulfill its promise of equal justice under law, applied in a timely and consistent manner based on court precedents").

8. John Bouvier, *Bouvier's Law Dictionary, 1856 edition – Letter S: Stare Decisis*, A LAW DICTIONARY, https://www.1215.org/lawnotes/bouvier/bouvier_s.htm (last visited Oct. 10, 2018).

judges.[9] Therefore, knowing whether a particular law is valid or whether it has been reversed is an important task for a practicing attorney.[10] Judicial decisions have come to be called the "common law," an uncodified body of law based on precedent that is determined and applied by judges.[11]

In contrast, the civil law is based on statutes or legal codes, which are compilations of law that subdivide and specify the procedure, penalty, and punishment for legal violations.[12] Fundamental to this system are certain core principles that ensure the law's application, those of *promulgation* and *imputation*.[13] Promulgation is the concept that the law must be declared before it takes effect, thus giving the public notice that it is in force.[14] Once promulgated, it is assumed, or imputed, that citizens have constructive knowledge of all laws within a jurisdiction.[15] Accordingly, the common law concept that "ignorance of the law [is no excuse]" is a natural extension of the principle of imputation.[16]

> No presumption exists that all men know the law. The maxim 'a man is presumed to know the law,' is a trite, sententious saying, 'by no means universally true.' Ignorance of the law does not excuse persons so as to exampt [sic] them from the consequences of their acts, such as punishment for criminal offenses. Government could not be carried on if men were permitted to excuse their misconduct by pleading ignorance of the law. Speaking broadly, we may say that all persons are treated as if they knew the law in passing on the character of their acts. In

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9. H. Campbell Black, *The Principle of Stare Decisis*, 34 AM. LAW REG. 745, 745–46 (1886). *But cf.* DEAN SWIFT, GULLIVER'S TRAVELS 308 (Phildelphia, New York, John Wanamaker 1800) ("It is a maxim among these lawyers that whatever has been done before, may legally be done again; and therefore they take especial care to record all the decisions formerly made against common justice, and the general reason of mankind.").

10. *See Cite Checking*, LAWSHELF, https://lawshelf.com/courseware/entry/cite-checking (last visited Oct. 21, 2018) (indicating the importance of cite-checking to ensure cited sources are still good law and defining good law as "law on which one may base a legal argument").

11. *See* UNIV. OF CAL., BERKELEY, SCHOOL OF LAW, *The Common Law and Civil Law Traditions*, THE ROBBINS COLLECTION, https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html (last visited Oct. 21, 2018).

12. *Id.*

13. The Cotton Planter, 6 F. Cas. 620, 620–22 (C.C.D.N.Y. 1810) (describing the legal prerequisites of promulgation and imputation through the embargo of the Cotton Planter).

14. *See The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jun. 22, 2016), https://plato.stanford.edu/entries/rule-of-law/#RuleLawRuleLaw.

15. Hermes Consol., Inc. v. United States, 58 Fed. Cl. 409, 416–17 (2003), *rev'd sub nom* (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947)).

16. Mun. Metallic Bed Mfg. Corp. v. Dobbs, 171 N.E. 75, 76 (1930) (alteration in original).

> that qualified sense is knowledge of the law imputed to every one.[17]

In the famous words of Justice Marshall, "enumeration presumes something not enumerated."[18] In order for promulgation and imputation to be effective, that is, for the public to know the law exists, there must be some form of access to it, i.e., public notice.[19] Statutes are published and organized by the states and the federal government and are, by default, more accessible than case law.[20]

For case law, the process is more difficult due to the length of case opinions compared to statutes coupled with the interpretive skills required to extract legal standards from opinions.[21] Legal research is further complicated by the fact that reading many cases on the same legal topic is required to ensure precedent exists and the common law has not been reversed.[22] This right, as with all rights, has limitations. Nevertheless, the average citizen should not be inhibited from accessing general court records, regardless of their ability to understand them.[23]

Prior to the internet and personal computers, access to the common law consisted of either purchasing expensive and voluminous sets of case reporters[24] or enduring a lengthy visit to the local courthouse.[25] Personal trips to the courthouse were costly, requiring a fifty cent per-page photocopying fee and a large

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17. *Id.*

18. Gibbons v. Ogden, 22 U.S. 1, 195 (1824).

19. Banks & Bros. v. West Pub. Co., 27 F. 50, 57 (C.C.D. Minn. 1886) ("But it is a maxim of universal application that every man is presumed to know the law, and it would seem inherent that freedom of access to the laws, or the official interpretation of those laws, should be co-extensive with the sweep of the maxim. Knowledge is the only just condition of obedience.").

20. Munroe Smith, *State Statute and Common Law*, 2 POL. SCI. Q. 105, 111 (1887) (relating that codification of the law, e.g., statutes, makes the law more accessible); *see also Statute*, THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/statute (last visited Oct. 21, 2018) (indicating that statutes are published by state and local governments).

21. *See* Smith, *supra* note 20, at 112 (arguing for a codification of the common law due to the "chaos of cases that we must search for the rule of our law").

22. Hart v. Massanari, 266 F.3d 1155, 1168–70 (9th Cir. 2001) (describing the development of binding precedent since the founding as well as its use via case reporter publications).

23. *See generally* William Ollie Key, Jr., *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 GA. L. REV. 659, 686–87 (1982) (delimiting the scope of the common law right to inspect judicial records via examples of what has been allowed and forbidden by courts).

24. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 308 (1950).

25. Dru Stevenson & Nicholas J. Wagoner, *Bargaining in the Shadow of Big Data*, 67 FLA. L. REV. 1337, 1359 (2016).

amount of time looking through physical records.[26] Since the 1990s, there has been a significant shift towards digitization. However, the law is a broad field and extends over two centuries; the non-indexed databases of Westlaw and LexisNexis. In 2001, these databases were more than two and twelve terabytes respectively.[27] One can imagine how the size of such repositories has increased as technology has become more sophisticated and new law has been created in more than a decade. It is difficult to search through ever-expanding amounts of data to find lines of precedent in an efficient manner.[28] Further, this information is hard to organize intelligibly in a way that lends itself to understanding the specific body of law as it pertains to a relevant legal issue.[29] The 9th Circuit aptly summarized this difficulty in a resounding opinion reflecting the nature of case law and precedent: "The more cases were reported, the harder became the task of searching for relevant decisions."[30] *Hart v. Massanari* also indicated the importance of case reporters:

> The concept of binding precedent could only develop once two conditions were met: The development of a hierarchical system of appellate courts with clear lines of authority, and a case reporting system that enabled later courts to know precisely what was said in earlier opinions. As we have seen, these developments did not come about—either here or in England—until the nineteenth century, long after Article III of the Constitution was written.[31]

Due to this need, case reporting substantially emerged as an industry after the adoption of the Constitution, mostly in the eighteenth century.[32] Today, the only official reporter is the United States Reports, and it only contains codifies decisions issued by the United States Supreme Court.[33]

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26. *Id.*

27. Michael K. Bergman, *White Paper: The Deep Web: Surfacing Hidden Value*, 7 J. ELECTRONIC PUB. (2001), https://quod.lib.umich.edu/j/jep/3336451.0007.104?view=text;rgn=main.

28. Richard A. Danner, *Cases and Case-Lawyers*, LEGAL REFERENCE SERVS. Q., Aug. 2016, at 25–26 (pointing out the crisis in the increasing amount of case knowledge due to the nature of the legal profession).

29. *Id.* at 26–27 (describing a debate over the necessity and merits of using case law in practice at the turn of the twentieth century).

30. Hart v. Massanari, 266 F.3d 1155, 1169 (9th Cir. 2001).

31. *Id.* at 1175.

32. *Id.* at 1169.

33. OXFORD UNIVERSITY, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, 847–849 (Kermit L. Hall et al. eds., 2nd ed. 2005); *see also Case Law Research*, *supra* note 6 (dividing federal case law between district courts, appellate courts, and the Supreme Court on the Federal Case Law Reporters tab).

A. *Private Research: Westlaw and LexisNexis*

West Publishing Company began what would eventually become its National Reporter System in 1876.[34] By 1888, West was the last man standing, having outmaneuvered and eliminated a multitude of competitors.[35] West's National Reporter System (NRS) was almost universally superior to official reporters, providing "uniform[ity] and high quality editing, fast publication, low cost, and national coverage."[36] Indeed, John West himself indicated "that there would have been no need for his or his competitors' reporters if the official state reporters had been properly doing their jobs."[37] Mr. West's entrepreneurialism did not end with reporters; he also created the American Digest System (ADS), a method of indexing and searching through the NRS, which reduced the difficulty of perusing the growing case law.[38] The NRS and the ADS eventually became the standard in the United States and therefore, the default in the legal community.[39]

An additional and crucial addition to legal research was Shepard's Citations, invented in 1875 by Frank Shepard.[40] Shepard's Citations tracked case citations, allowing an attorney to verify whether a case was still good law.[41] The core of Shepard's Citations was its corroboration with West's ADS, listing subtopics and key numbers while also referencing cases that cite a particular decision.[42] Yet, West's innovation and Shepard's Citations were only useful for so long, as the ever-increasing amount of case information began to make print forms increasingly cumbersome and unmanageable.[43] As computer usage became more widespread, West Publishing was sold to Thompson Publishing Group in 1995 and Shepard's Citations was acquired by Reed Elsevier, parent company of LexisNexis in 1996.[44] In 1975, LexisNexis was the first to provide an online system of citation

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34. Thomas A. Woxland, *Forever Associated with the Practice of Law*, LEGAL REFERENCE SERVS. Q., Oct. 2008, at 116.

35. *Id.*

36. *Id.* at 119.

37. *Id.*

38. *Id.* at 120.

39. Robert Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L.J. 189, 192–93 (1997).

40. *See* Patti Ogden, *"Mastering the Lawless Science of Our Law": A Story of Legal Citation Indexes*, 85 LAW. LIBR. J. 26–29 (1993) (following the development of Shepard's Citations from its beginning).

41. *Id.* at 35–36; *see also* Woxland, *supra* note 34, nn.25–26.

42. *See* Ogden, *supra* note 40, at 34–35.

43. *See* Berring, *supra* note 39, at 197.

44. *See id.* at 198–199.

called Auto-Cite.[45] In 1983, LexisNexis added Shepard's Citations to their online service as an upgrade.[46] Today, this arms race between LexisNexis and Westlaw continues with the relatively recent addition of Westlaw's topic headings for bodies of law called KeyCites.[47]

B. Public Research: PACER and CM/ECF

Due to the growing digital demand for legal research, the Government Administrative Office created the Public Access to Court Electronic Records system (PACER), a nationwide case law repository, via an appropriations act in 1990.[48] This service was taken up with a fee, by many federal courts over the following ten years.[49] PACER's first incarnation was limited by jurisdiction and was used almost exclusively by attorneys and the government.[50] The E-Government Act of 2002 prescribed a framework and further guidance for online distribution of case law, primarily geared towards individuals who had "existing or potential business before a federal court."[51] Later, PACER was extended to nationwide coverage and included all federal courts.[52] Additionally, the Administrative Office created a localized network for each federal district and appellate court called Case Management/Electronic Case Files (CM/ECF)[53] to handle local queries for cases.[54] CM/ECF, unlike PACER, does not charge a fee for accessing written opinions but is limited by the jurisdiction in which it is situated.[55] Every district has its own CM/ECF system, creating a lack of uniformity that further hinders public access to

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45. *See* Ogden, *supra* note 40, at 37.

46. *Id.*

47. *See* Stevenson & Wagoner, *supra* note 25, at 1363 (describing in part, the immense issues represented by PACER and the LexisNexis-Westlaw duopoly, in order to address the big data problems facing attorneys in the modern day).

48. Peter W. Martin, *Online Access to Court Records – From Documents to Data, Particulars and Patterns*, 53 VILL. L. REV. 855, 860–861 (2008).

49. *Id.* at 861.

50. *Id.*

51. *Id.* at 862.

52. *Id.*

53. *See* ADMIN. OFFICE OF THE U.S. COURTS, *Case Management/Electronic Case Files*, PACER, https://www.pacer.gov/cmecf/ (last visited Oct. 21, 2018).

54. *See* Tanya White Cromwell, *Electronic case filing saves space, time, improves access to documents*, KANSAS CITY BUS. J. (Mar. 2, 2003) https://www.bizjournals.com/kansascity/stories/2003/03/03/focus3.html.

55. *See* ADMIN. OFFICE OF THE U.S. COURTS, *Frequently Asked Questions*, PACER, https://www.pacer.gov/psc/efaq.html#CMECF (last visited Oct. 21, 2018); *see also* ADMIN OFFICE OF THE U.S. COURTS, *Local Court CM/ECF Information Links*, PACER, https://www.pacer.gov/cmecf/ecfinfo.html (last visited Oct. 21, 2018).

case law.[56] State and local governments do not use CM/ECF and in general, significantly lag behind the federal system.[57] However, some states have developed systems similar to CM/ECF, and others have taken different approaches to online record keeping.[58] Independent development, decentralization, and the number of state and local courts pose an immense problem for uniformity.[59] Regardless of the issues present at the state level, at the time of their inception, PACER and CM/ECF were heralded as immense improvements over paper records.[60] However, it became increasingly apparent that there were significant shortcomings with PACER, which have only become exacerbated with time.[61]

III. ANTITRUST AND COPYRIGHT ISSUES REPRESENTED BY WESTLAW AND LEXIS

We don't have a monopoly. We have market share.[62]

Two legal problems arise with Westlaw and Lexis: first, the issue of copyrighting public judicial records by private entities, and second, the antitrust problems posed by the size and breadth of Westlaw and LEXIS operations in the legal research market.

A. *Copyright*

Copyright law originates from the Copyright Clause of the United States Constitution which grants "Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[63] The history of the first copyright case before the Supreme Court and its amusing origins stemming from a dispute between case reporters has been thoroughly studied and analyzed.[64] However, its importance for this article is laying the foundation for how the law views the ownership of case opinion publications.[65] *Wheaton v.*

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56. *See generally* ADMIN. OFFICE OF THE U.S. COURTS, *Individual Court Sites*, PACER, https://www.pacer.gov/psco/cgi-bin/links.pl (last visited Oct. 21, 2018).

57. *See* Martin, *supra* note 48, at 872.

58. *See id.*

59. *See id.* at 875.

60. Stevenson & Wagoner, *supra* note 25, at 1359.

61. *See id.*

62. Nimish Dubey, *"We Don't Have a Monopoly, We Have Market Share . . .": The Best of BallmerSpeak*, TECHPP (Aug. 25, 2013), http://techpp.com/2013/08/24/steve-ballmer-quotes/.

63. U.S. CONST. art. I, § 8, cl. 8.

64. *E.g.*, Craig Joyce, *"A Curious Chapter in the History of Judicature":* Wheaton v. Peters *and the Rest of the Story (Of Copyright in the New Republic)*, 42 HOUS. L. REV. 326, 362–63 (2005).

65. *Id.* at 364–65.

Peters held that a reporter may not possess copyright in the written opinions delivered by a judge, nor can a judge grant ownership of the opinion.[66] Today that sentiment is reflected in the Copyright Act of 1976, found in section 105 of the United States Code.[67] Section 105 states that copyright protection is unavailable for "any work of the United States Government."[68] Simply put, no one owns the law, not even the state. Ownership would vest in the owner the ability to deny publication, and thus affect promulgation, imputation, and the common law right to inspect judicial records.

Nevertheless, Westlaw and LexisNexis demand a fee for use of their services; they do not purport to own the case law, only the system that organizes it.[69] This is possible thanks to the proprietary works of authorship that legal research companies have placed upon their products: e.g., Shepard's Citation, the ADS, NRS, and other organizational tools.[70] Section 103 of the Copyright Act includes "compilations and derivative works" as part of "the subject matter of copyright."[71] Further, section 101 of the Act includes collections of pre-existing materials that can be considered "original work[s] of authorship."[72] Additionally, there is an extraordinarily low bar for something to be considered an original work.[73] Not even fair use,[74] the refuge of sinners, can pierce a reporter's copyright in his work.[75] *West v. Mead* aptly lays out this dynamic; West, and by implication other legal research companies, have labored to add original material to cases, which make them independently copyrightable.[76] When original material is added in a specific format to case opinions, the entire opinion is an original work of authorship. This concept is almost reduced *de minimis*, down to the volumes, numbering and paging, the table of cases, the indices, and so on.[77]

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66. Wheaton v. Peters, 33 U.S. 591, 668 (1834).

67. 17 U.S.C.A. § 105 (West, Westlaw through Pub. L. No. 115-223).

68. *Id.*

69. Timothy B. Lee, *The case against PACER: tearing down the courts' paywall*, ARS TECHNICA (Apr. 8, 2009, 11:30 PM), https://arstechnica.com/tech-policy/2009/04/case-against-pacer/ (stating that private services like Westlaw and LexisNexis are superior to PACER, yet cost a premium).

70. *See* West Pub. Co. v. Mead Data Ctr., Inc., 799 F.2d 1219, 1223–24 (8th Cir. 1986).

71. 17 U.S.C.A. § 103 (Westlaw).

72. *Id.* § 101.

73. *See West Pub. Co.*, 799 F.2d at 1223 (citing M. Nimmer, 1 *Nimmer on Copyright* §§ 1.08[C][1], 1.06 (1985)).

74. 17 U.S.C.A. § 107 (Westlaw).

75. *See West Pub. Co.*, 799 F.2d at 1226–27.

76. *See id.*

77. Callaghan v. Myers, 128 U.S. 617, 647–49 (1888).

Even as copyright appears to be a non-starter in challenging legal research companies, the outcome of court decisions on the topic are unsettling and problematic in their implications. A case opinion fresh from the court is unedited and disorganized and requires extraordinary effort to extract the useful aspects for case law.[78] Ordinarily, providing such value is the proper aim of any business and of capitalism itself.[79] The problem arises when the principles of promulgation and imputation are considered along with the overall goal of public access to the law.[80] Simply put, marketed legal research services from private firms do not satisfy the principle of promulgation that applies to the government. If public access is truly the objective, the court system only does half the job because it serves an unfinished product to the public, which is ill-equipped to extract useful information from case opinions.[81] Moreover, in creating a precedent, and subsequently in reading them, many cases are required.[82]

The outcome of copyright law as it applies to case reporters is thoroughly unsatisfying; enterprising companies may freely edit and require fees for their modified (and understandable) case opinions, while the original product available to the public is practically useless.[83] Thus, the court system's decision not to develop its own case reporter has unfortunate, but foreseeable, consequences decades later.[84]

It would be mere conjecture to argue what would happen had the government decided to establish stricter copyright protections on case opinions. Perhaps John West would have never developed the ADS or NRS, and perhaps there would not be the large legal research companies we know today. What would arguably remain

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78. *See* Theodor H. Herman, BEYOND WORDS ALONE: THE POWER OF WEST GROUP'S EDITORIAL ANALYSIS IN THE ELECTRONIC ERA 3–5 (1998) (asserting that proper organization of case law is crucial for the practice of law in the internet age).

79. *See id.*

80. *See* Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, 51 FORDHAM L. REV. 255, 255–57 (1982) (noting that recent trends in the volume of new law and problems with distribution give rise to little-explored due process issues).

81. *See* Smith, *supra* note 20 at 109–12 (arguing that codification only lends itself to accessibility, not understandability by the public and that case law by itself is already almost incomprehensible to non-lawyers at large).

82. *See* Hart v. Massanari, 266 F.3d 1155, 1169 (9th Cir. 2001).

83. Steve Schultze, *PACER, RECAP, and The Movement To Free American Case Law*, LEGAL INFO. INST. (Feb. 3, 2011), https://blog.law.cornell.edu/voxpop/2011/02/03/pacer-recap-and-the-movement-to-free-american-case-law/ (showing step by step the futility of searching PACER for useful information).

84. *See* Herman, *supra* note 78, at 6–8 (emphasizing the importance of West's inventions to legal research while conspicuously omitting any reference to PACER and CM/ECF).

consistent is the demand for understandable case law.[85] In effect, the government took the easy way out; it allowed private entities to take the labor and cost in organizing case law.[86] Minimal organizational steps on the part of the government may have paid vast dividends as case law grew.[87] The fundamental issue is that case opinions are open to the public, but to acquire anything meaningful from them one must resort to using private companies, paid or unpaid, spending potentially ruinous amounts of time and effort reading unedited opinions, or paying an attorney to do it.[88]

This is not to undermine the reputations and achievements of John West or Frank Shepard, or even Westlaw or LexisNexis.[89] Like any enterprising individual or business, they each saw a market need and filled it. Private ingenuity has made an incomprehensible body of law more accessible and understandable through highly structured organizational schemes.[90] Public access, like many government activities, is not a concept that is particularly conducive to the free market. All too often, the benefit a government provides society is generated at a net loss regardless of its social utility.[91] Moreover, pursuit of profit is inappropriate when certain public policy objectives are the aim.[92] The result is that the law is accessible only to practicing lawyers and scholars, whether inadvertently or by design.

It is worth exploring the finer points of the accessibility argument because it is easy to criticize. Naturally, the legal profession is built upon having skilled and knowledgeable individuals who, by their calling, practice law.[93] It is also easy to

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85. *See id.* at 3–5 (noting that private developments were necessary for the legal profession to advance into the digital age).

86. *See id.* (detailing briefly the accomplishments of Westlaw and LexisNexis in electronic case organization).

87. *See* Schultze, *supra* note 83 (remarking that the difficulty with PACER and case law from the courts generally is a "bottleneck" that is self-defeating for research purposes).

88. *Id.* ("This led to the inevitable conclusion that there is simply no way to know federal case law without going through a lawyer, doing laborious research using print legal resources, or paying for a high-priced database service.").

89. *See Herman, supra* note 78, at 2–8 (laying out the basics of indexing via electronic searches).

90. *See id.* (expanding upon the possibilities of computer assisted legal research).

91. John T. Harvey, *Why Government Should Not Be Run Like A Business*, FORBES (Oct. 5, 2012, 2:20 PM), https://www.forbes.com/sites/johntharvey/2012/10/05/government-vs-business/#515832552a54 ("The problem in a nutshell, is that not everything that is profitable is of social value and not everything of social value is profitable.").

92. *Id.* (arguing that the proper role of government is first and foremost the pursuit of social value, not profit).

93. Sam Glover, *Why Are Lawyers So Expensive? I'll Tell You Why*, LAWYERIST (Feb. 12, 2016), https://lawyerist.com/lawyers-expensive-ill-tell/ (pushing back on the notion that lawyers are too expensive by arguing that there is a considerable amount of hidden costs to lawyers as well as hidden benefits that lawyers provide their clients).

idealize the notion of accessibility as a sort of cure-all; particularly, in ascribing malfeasance to what are, at worst, profit-seeking companies and a terminally short-sighted government bureaucracy. It is also true that ignorant or inept pro se plaintiffs invariably slow down the court system.[94] Providing public access, however, would not eliminate the need for lawyers and could potentially alleviate the problems courts face with pro se cases.[95] In truth, practitioners and interested companies fear greater accessibility because the market for their products and services would shrink if resourceful individuals could solve certain legal matters by themselves.[96] These arguments are primarily made in bad faith, or are at least not entirely honest; they do little to diminish the point that, had the government acted more proactively in organizing its case data, accessing the law could be potentially cheaper and less complicated for all users.

B. Antitrust

The definition of a monopoly is "a type of commercial advantage enjoyed by one business entity that lets it determine to a significant extent the terms on which products or services may be obtained in a given region."[97] Since the original 1890 Sherman Act, contracts or trusts that restrain "trade or commerce" in the United States are forbidden.[98] Trusts in the nineteenth-century sense were business agreements meant to restrain commerce for the benefit of the trust.[99] Standard oil and banking trusts were the most common of these trusts. The Clayton Antitrust Act of 1914 gave more specificity to the provisions of the Sherman Act and expanded its scope.[100] Particularly, the Clayton Act was intended to prohibit anti-competitive practices in price discrimination[101],

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94. *See* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 449–50 (2009) (describing the growing volume of pro se litigants and listing issues that are associated with such cases).

95. *Cf. id.* at 448 (stating that pro se reform is resisted by rule makers, bar leaders, and judges).

96. *Id.*

97. CORNELL LAW SCHOOL, *Monopoly*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/monopoly (last visited Oct. 17, 2018).

98. 15 U.S.C.A. §§ 1–7 (Westlaw through Pub. L. No. 115-223) (modern codification of the Sherman Antitrust Act).

99. Harold Evans, *The Supreme Court and The Sherman Anti-Trust Act*, 59 U. PA. L. REV. & AM. L. REG. 61, 66–67 (1910).

100. The modern codification of the Clayton Antitrust Act is found in both Title 15 and Title 29 of the U.S. Code. *See* 15 U.S.C.A. §§ 12–27 (Westlaw through Pub. L. No. 115-223); *see also* 29 U.S.C.A. §§ 52–53 (Westlaw through Pub. L. No. 115-223).

101. 15 U.S.C.A. § 13 (Westlaw).

certain sales,[102] mergers and acquisitions,[103] and certain forms of corporate directorships.[104] Lastly, the Federal Trade Commission (FTC) Act is aimed at preventing "unfair methods of competition" and "unfair or deceptive acts or practices."[105] Incidentally, breach of the Sherman Act also breaches the FTC Act.[106] Violations of the Sherman Act are split between per se violations[107] and violations of the rule of reason.[108]

To classify as a per se violation, the restraint on trade must be strictly characterized as unreasonable[109] under section 1 of the Sherman Act.[110] Under a per se review, neither the intention nor the effects of a business's alleged misconduct are reviewed.[111] Rule of reason violations, by comparison, are viewed through the totality of the circumstances in order to determine whether a restrictive practice is an unreasonable restraint on competition.[112] This reasonableness inquiry can be simplified through what has become known as a "quick look,"[113] which involves a less burdensome market and economic analysis.[114] However, in order for quick look review to be available, "the conduct at issue and context in which it arises must have likely anticompetitive effects

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102. *Id.* § 14.

103. *Id.* § 18.

104. *Id.* § 19.

105. *See Guide to Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws (last visited Nov. 1, 2018).

106. *Id.*

107. *See* Edward D. Cavanagh, *The Rule of Reason Re-Examined*, 67 BUS. LAW. 435, 436 (2012) (articulating the advantages and disadvantages of the rule of reason and per se violations as applied by the courts).

108. Standard Oil Co. v. United States, 221 U.S. 1, 66–67 (1911) (laying out for the first time the rule of reason in lieu of the previous direct or indirect rules).

109. *See* Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 835–36 (2016) (defining unreasonable restraints in technical terms of market power without offsetting efficiencies, reducing overall wealth).

110. *Id.* at 842–443.

111. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (defining per se unreasonableness as "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

112. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977); *see also* Board of Trade v. United States, 246 U.S. 231, 238 (1918) (listing relevant factors for a rule of reason inquiry: "The court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.").

113. *See* WILLIAM HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK 210–11 (2017–2018 ed. 2017).

114. *Id.*

that are so intuitively obvious as to be clear without a detailed market analysis."[115]

Westlaw and LexisNexis could be classified as monopolies, or together, a duopoly, due to their significant market power and arguably exclusionary business practices, which are difficult to prove.[116] The legal research industry has certain barriers to entry in the form of cost, both in terms of money and organizational effort. Westlaw and LexisNexis have also had decades to defend themselves against competition via their pre-existing databases, proprietary technology, and representation in the market. However, most antitrust suits require proof of actual or likely market power or monopoly power acquired through improper conduct.[117] The Justice Department has synthesized from case law the definition for market power as the power to price profitably above competitive levels.[118]

Any challenge to Westlaw or LexisNexis on antitrust principles would require a rule of reason inquiry as neither company's business model is an obvious example of restraint of trade under a per se analysis.[119] Determining whether the restraint is undue or unreasonable can be difficult.[120] It is particularly challenging due to the history, usefulness, and labor requirements of legal research, which inhabit a peculiar market. In theory, a section 1 Sherman Act violation could be found after an inquiry into tacit collusion between legal research companies via circumstantial evidence.[121] As difficult as it is for a violation to

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115. *Id.*; *see also* California Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 757 (1999) (abbreviating the quick look doctrine as one in which an observer with even a "rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.").

116. *See Monopolization Defined,* FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined (last visited Oct. 24, 2018) (explaining that "[o]btaining a monopoly by superior products, innovation, or business acumen is legal; however, the same result achieved by exclusionary or predatory acts may raise antitrust concerns."); *see* William H. Page, *Tacit Agreement Under Section 1 of the Sherman Act,* 81 ANTITRUST L.J. 593, 597–98 (2017) (explaining the difficulty in showing evidence of collusion such as price fixing).

117. Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law,* U.S. DEP'T OF JUST., https://www.justice.gov/atr/monopoly-power-and-market-power-antitrust-law (last visited Nov. 1, 2018).

118. *See id.* (reviewing the relevant case law to clarify the goals of antitrust law and create a workable definition for future cases).

119. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (listing several explicit per se violations such as price fixing, group boycotts, and tying arrangements).

120. *See The Creation of A Separate Rule of Reason: Antitrust Liability for the Exchange of Price Information Among Competitors,* 1979 DUKE L.J. 1004, 1006 nn.13–14.

121. *See* Michael Freed et. al, *The Detection and Punishment of Tacit Collusion,* 9 LOY. CONSUMER L. REV. 152, 155–57 (1997) (framing four different types of coordination scenarios and how circumstantial evidence plays into each).

be discovered, any remedy from a successful suit is not likely to solve the public access problem on the government end. However, breaking up Westlaw and LexisNexis could promote more competitive prices and encourage further development in legal research technology.[122]

Fundamentally, both copyright and antitrust laws are inadequate tools with which to address the unique form of control legal research companies exert over the market. Retroactive copyright laws or hypothetical versions of the original Copyright Act would be respectively disruptive or useless at present. Similarly, an antitrust suit against legal research companies is likely to be an incomplete remedy because it would not rectify the existing impracticality of organizing and disseminating case law. If there is a solution, it lies with altering case law organization at its genesis in the court system.

IV. PROBLEMS WITH PACER AND MODERN ALTERNATIVES FOR CASE RESEARCH

Now, here, *you see, it takes all the running* you *can do, to keep in the same place.*[123]

A. *Problems with PACER and Big Data*

It is easy to criticize decisions with the benefit of hindsight. A complicated system is imperfect and prone to deficiencies, especially where the purpose for which it was created changes or grows beyond the original scope of the solution. Further, in a free market, staying economically viable requires constant change and staying power that can resist disruptive innovation.[124] Once established, such organizational schemes are hard to alter and, when they are changed, can become disruptive. Highways are an excellent example—they are semi-permanent, time-intensive, and costly.[125] A highway sufficient for the traffic of the past is not likely

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122. Deborah Platt Majoras, *Antitrust Remedies in the United States: Adhering to Sound Principles in A Multi-faceted Scheme*, U.S. DEP'T OF JUST. (Oct. 4, 2002), https://www.justice.gov/atr/speech/antitrust-remedies-united-states-adhering-sound-principles-multi-faceted-scheme.

123. LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE 23 (Selwyn H. Goodacre ed., Pennyroyal Press 1983) (1871).

124. *See* Darin Stewart, *The Red Queen's Deadly Effect on Innovation*, GARTNER BLOG NETWORK (Aug. 6, 2012), https://blogs.gartner.com/darin-stewart/2012/08/06/the-red-queen-effect/ (describing what has been termed the "Red Queen effect" in business industries where companies "must exert ever more effort just to maintain [their] current position.").

125. *See* Anthony Downs, *Traffic: Why It's Getting Worse, What Government Can Do*, BROOKINGS INSTITUTION (Jan. 1, 2004), https://www.brookings.edu/research/traffic-why-

to endure the traffic of the present.[126] Keeping up with current demands places great strain on finite resources.[127] Similarly, providing a database service on a vast, continuously changing body of law requires a titanic investment of time, effort, and money.[128]

Yet, all such systems, whether they are highways or databases, are governed by simple principles.[129] The benefit of legal research, unlike a highway, is that it is on the internet, a non-rivalrous resource[130] accessible to everyone with an internet connection.[131] However, the inherent, compounding problem with organizing the law lies in its immensity, its breadth, and its scope.[132] Professors Stevenson and Wagoner astutely characterize the law as Big Data, an immense and ever-increasing repository of digital information.[133] They observed that Big Data must also be paired with a means to organize, search, and analyze to serve human ends.[134] Westlaw and LexisNexis allow such organization and search functionalities, akin to Google results, where a user inputs keywords that are processed by an algorithm and search results are returned.[135] The first and foremost problem with the government alternative, PACER, is that it does not allow this sort of search functionality.[136]

In terms of utility, Westlaw and LexisNexis are best appraised by their additions to online legal research; in effect, how

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its-getting-worse-what-government-can-do/ (labeling this difficulty as a "triple convergence" of factors during peak hour traffic congestion and the problems associated with expanding transit capacity).

126. *See id.* (arguing that only creating more road capacity would be "totally impractical and prohibitively expensive").

127. Freed et al., *supra* note 121, 154–156.

128. *See* Stevenson & Wagoner, *supra* note 25, at 1363 (depicting the high cost of retaining large databases by private firms).

129. *See* Peter Fryer, *What are Complex Adaptive Systems?*, TROJANMICE, http://www.trojanmice.com/articles/complexadaptivesystems.htm (last visited January 20, 2018) (stating that among the properties of complex adaptive systems is simplicity: "Water finds its own level.").

130. Peter Suber, *Knowledge as a Public Good*, SPARC (Nov. 2, 2009), http://sparc.arl.org/resources/articles/knowledge.

131. *The rivalrous parts of non-rivalrous digital forms*, MARTIN PAUL EVE (Jan. 1, 2017), https://eve.gd/2017/01/01/the-rivalrous-parts-of-non-rivalrous-digital-forms/.

132. *See* Herman, *supra* note 78, at 6.

133. *See* Stevenson & Wagoner, *supra* note 25, at 1349–51 (depicting the uses of organized big data in disparate fields).

134. *See id.*

135. Jonathan Strickland, *How Google Works*, HOWSTUFFWORKS, https://computer.howstuffworks.com/internet/basics/google1.htm (last visited Jan. 20, 2018).

136. *See* Stevenson & Wagoner, *supra* note 25, at 1359–60 (describing the shortcomings of PACER once initial excitement over its release had faded).

they correct the problems presented by the PACER and CM/ECF systems. These private databases, as commercial enterprises, add a vastly superior user experience through their interfaces including the ability to rapidly cross-reference, compare, and specifically identify case opinions and statutes. This editing and organizational process is complicated and geared specifically towards legal research, unlike fresh case opinions from the courts themselves.

The primary issue with the interfaces of PACER and the federal circuit subsidiaries, CM/ECF, is that the search functions for each are inexplicable and difficult to use.[137] PACER lacks what is called a "full-text searching option" and instead requires knowing the result before searching.[138] In order to search, a researcher must already know the parties involved or the case number itself.[139] Although case opinions are free, a 10-cent per page fee is imposed by the system for other documents like pleadings and motions.[140] As such, one can accumulate charges without knowing whether the document is relevant.[141] This issue is compounded because the difficult interface increases the likelihood of unnecessary and unhelpful searches and unfortunate costs.[142] The idea of public access to the law, at least through the government itself, is virtually nonexistent for an average citizen.[143] Statutes are easier to look up than cases, but unless clear and explicit, they tell a researcher little without context.

In contrast to PACER and CM/ECF, the Electronic Data Gathering, Analysis, and Retrieval database (EDGAR) utilized by the Securities and Exchange Commission (SEC) is a government-owned database that is effective for research.[144] First and foremost, unlike the court databases, EDGAR boasts a useable search field.[145] In addition, EDGAR has numerous helpful

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137. FREE LAW PROJECT, *Using PACER: What Could Possibly Go Wrong? (HD)*, YOUTUBE (Aug. 24, 2014), https://www.youtube.com/watch?v=HA4Z9LEJSBw.

138. *Everything Wrong With PACER*, AMERICAN LEGALNET (Mar. 2, 2016) http://www.alncorp.com/everything-wrong-with-pacer/.

139. *See id.* (highlighting search issues even where the user knows the name of a party to the action).

140. Brian Browdie, *Why Pacer should (and should not) be like Edgar*, QUARTZ (Nov. 24, 2014), https://qz.com/283772/why-pacer-should-and-should-not-be-like-edgar/.

141. *See* Stevenson & Wagoner, *supra* note 25, at 1360.

142. *See id.* at 1359–60 (detailing the costly inefficiency of PACER searches for research).

143. *See* Carver, *supra* note 3.

144. *See Important Information About EDGAR*, U.S. SEC. AND EXCHANGE COMM'N, https://www.sec.gov/edgar/aboutedgar.htm (last modified Feb. 16, 2010).

145. *See* U.S. SEC. AND EXCHANGE COMM'N, *Using EDGAR – Researching Public Companies*, INVESTOR.GOV https://www.investor.gov/research-before-you-

guides,[146] including definitions[147] and lists of forms.[148] EDGAR is also a single portal for all corporate filings,[149] whereas PACER and CM/ECF are subdivided.[150] A comparison of a random CM/ECF page[151] to the simple elegance of the EDGAR search terminal[152] is striking. Ironically, the current incarnation of EDGAR was once a private creation meant to circumvent the tyrannical and inefficient government version.[153] Only consistent complaints and the clear superiority of the private system motivated the SEC to change course.[154] However, much like PACER and CM/ECF, the delegation of EDGAR to the government has resulted in mounting inefficiencies and vastly reduced capabilities in providing legally required public access.[155]

Alternatively, free legal resources can provide easier access to bodies of law.[156] A few organizations such as the Cornell Legal Information Institute,[157] Free Law,[158] and Harvard's Caselaw Access Project[159] endeavor to make the law more accessible and understandable. However, these resources can be incomplete and unilaterally lack the authority case opinions provide;[160] thus, expanding the risk of error in practice.

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invest/research/researching-investments/using-edgar-researching-public-companies (last visited Oct. 18, 2018).

146. *See Filings & Forms*, U.S. SEC. AND EXCHANGE COMM'N, https://www.sec.gov/edgar.shtml (last modified Jan. 9, 2017); *see also How Do I Use EDGAR?*, U.S. SEC. AND EXCHANGE COMM'N, https://www.sec.gov/edgar/quickedgar.htm (last modified July 19, 2007).

147. *See EDGAR Filer Manual (Volume II): Index to Forms*, U.S. SEC. AND EXCHANGE COMM'N, https://www.sec.gov/info/edgar/forms/edgform.pdf (last updated July 2018).

148. *See Forms List*, U.S. SEC. AND EXCHANGE COMM'N, https://www.sec.gov/forms (last visited Oct. 20, 2018).

149. *See Using EDGAR to Research Investments*, U.S. SEC. AND EXCHANGE COMM'N, https://www.sec.gov/oiea/Article/edgarguide.html (last modified Sept. 5, 2018) [hereinafter *Using EDGAR*].

150. *See generally*, ADMIN. OFFICE OF THE U.S. COURTS, *Filing an Adversary Case*, PACER, https://www.pacer.gov/cmecf/bc/adversary_v1/adversary0.html (last visited Nov. 4, 2018).

151. *Id.*

152. *See Using EDGAR*, *supra* note 154.

153. *Back to the Drawing Board*, RANKED AND FILED, http://rankandfiled.com/ (last visited Oct. 18, 2018) (noting a timeline of the development of the EDGAR service).

154. *Id.*

155. *Id.*

156. *See, e.g.*, JUSTIA, https://www.justia.com/ (last visited Oct. 20, 2018).

157. *Who We Are*, LEGAL INFOR. INST., https://www.law.cornell.edu/lii/about/who_we_are (last visited Jan. 20, 2018).

158. *About & Mission*, FREE LAW PROJECT, https://free.law/mission/ (last visited Jan. 20, 2018).

159. *Project: Caselaw Access Project*, LIBRARY INNOVATION LAB, https://lil.law.harvard.edu/projects/caselaw-access-project/ (last visited Dec. 30, 2018).

160. *See* Joyce, *supra* note 64, 362–63.

V. CONCLUSION

Man errs, till he has ceased to strive[161]

True access to the law requires something more fundamental than simply retrieving a case or reading a statute. Access means being able to understand all that is corollary, timely, and relevant to what is being read. PACER and CM/ECF lack these qualities and are insufficient for modern needs. Conversely, the high prices of Westlaw and LexisNexis effectively prevent access by indigents and low-income plaintiffs. No legal remedy exists to ensure public access to legal data, nor would it solve the inherent problem. A solution will require delving into an organizational nightmare beginning in the nation's incipiency.

On the government end, a lack of organizational purpose and bureaucratic ennui has resulted in an almost entirely useless product.[162] The private sector, on the other hand, has taken advantage of the vacuum and filled the gap with efficient but costly services.[163] The struggle for public access to the law appears intractable, yet solutions exist that range from the government starting anew with a free and modern organizational system to innovative third-party models.[164]

On the public side, increasing government involvement through funding and development of court record services would be the most helpful step towards advancing the principle of public access to the law. Alternatively, encouraging competition and promoting the visibility of free legal research alternatives over high-cost private legal research services would more practically advance the interests of the public in the short term.

Mackenzie Arthur

161. JOHANN WOLFGANG GOETHE, FAUST: PART ONE line 317 (David Luke, ed., 2008) (1790).

162. *See* Herman, *supra* note 78, at 3–5.

163. *See Pricing Guidelines for Commercial Plans: Quick-Reference Guide*, THOMSON REUTERS WESTLAW (July 1, 2018), https://static.legalsolutions.thomsonreuters.com/static/pdf/commercial_plans_pricing.pdf; *Lexis Advance Price Guide for Commercial Markets*, LEXISNEXIS, https://www.lexisnexis.com/pdf/lexis-advance/Pricing-Guide-Commercial.pdf, (last visited Nov. 4, 2018).

164. Brian Carver, *Why Should Congress Care About PACER?*, FREE LAW PROJECT (Mar. 23, 2015), https://free.law/2015/03/23/why-should-congress-care-about-pacer/ (listing many different solutions that Congress could implement to alleviate the problems with PACER); Brian Carver, *What Should Be Done About the PACER Problem?*, FREE LAW PROJECT (Mar. 24, 2015), https://free.law/2015/03/24/what-should-be-done-about-the-pacer-problem/ (listing what regular citizens can do about the problems with PACER).