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ACCESSING THE LAW

PREFACE

In this special section we feature articles that continue to address questions of access to the law initially raised in The Journal by Judge Richard Arnold[1] and that also address the related problems posed by the application of technological advances to appellate practice.[2] Judge Arnold's essay has spawned a major round of academic[3] and judicial[4] comment on the topics of access to and reliance on opinions not designated

1. *See* Richard. S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999).

2. We have considered this topic before. *See generally* 2 J. App. Prac. & Process 229-473 (2000) (including, among other articles, George Nicholson, *A Vision of the Future of Appellate Practice and Process*, 2 J. App. Prac. & Process 229 (2000); Lynn Foster & Bruce Kennedy, *Technological Developments in Legal Research*, 2 J. App. Prac. & Process 275 (2000); Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. App. Prac. & Process 305; J. Thomas Sullivan, *Redefining Rehearing: "Previewing" Appellate Decisions Online*, 2 J. App. Prac. & Process 435 (2000); and Henry H. Perritt, Jr. & Ronald W. Staudt, *The 1% Solution: American Judges Must Enter the Internet Age*, 2 J. App. Prac. & Process 463 (2000)).

3. *See e.g. Anastasoff, Unpublished Opinions and "No Citation" Rules*, 3 J. App. Prac. & Process 169-451 (2001) (including eleven essays and articles addressing the issues of publication and prohibitions on citation of unpublished opinions). The current state of the debate is cogently summed up by Stephen R. Barnett in his essay, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. App. Prac. & Process 1 (2002).

4. The best known discussion appears in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), in which Judge Kozinski took issue with Judge Arnold's historical analysis of Article III as a basis for elimination of "no citation" rules.

for publication by appellate courts. As with all important questions of policy, the use of publication as a determinant of the precedential or persuasive value of prior decisions opens the doors of the intellectual marketplace for consideration of widely divergent points of view and related subjects. In this marketplace, appellate specialists thrive, being trained in argument and reasoning by analogy.

The articles in this section expand the discussion initiated by Judge Arnold's essay and his subsequent panel opinion in *Anastasoff v. United States*.[5] They provide historical perspective and analyze contemporary phenomena that those seriously interested in the integrity of the appellate process should find compelling. The continuing attention paid to publication and "no citation" rules reflects the philosophical and practical importance appellate courts attach to publication decisions, which essentially rank their opinions in terms of their importance for future litigation.

As the historical sweep of Kenneth Ryesky's opening essay demonstrates, the uncertainty engendered by the debate over citation practice and the use of unpublished opinions is not without precedent. Intertwined as they are with the availability of online sources that have ended our dependence on the publication decisions of appellate courts, issues related to the use and citation of appellate opinions appear to the legal historian as only among the most recent in a continuing series of changes that improvements in technology have forced upon appellate practice and process.

Another important consideration for appellate advocacy and decisionmaking—the use of and reliance on data available from online sources—is examined by Coleen Barger, The Journal's developments editor, who documents the recurrent problem of disappearing and inaccurate data. She notes the actual and potential problems posed by judicial reliance on online sources of information that too often pose troubling consequences for the integrity of resolution when online data are inaccurate, altered, or subsequently deleted from an online source. Another aspect of the same problem is addressed by Deirdre Mulligan and Jason Schultz, who advocate the creation

5. 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

of digital archives to ensure that the sort of cultural and historic information often relied upon by appellate courts (and of course by others) is not removed from, or simply withheld in the first instance from, the public domain.

Finally, the decisionmaking process by which some opinions are credited as publishable and others are not, a process of principal significance to the operation of both no-citation rules and informal rules that operate to limit the precedential or persuasive value of unpublished opinions, is characterized by a flexibility that often draws fire from opponents. Eugene Anderson, Mark Garbowski, and Daniel Healy criticize a particularly curious aspect of the decisionmaking authority of appellate courts that permits the withdrawal, vacation, or depublication of previously issued statements of law.

The impact of technological change on both advocacy and decisionmaking at the appellate level appears unlikely to abate. As the articles in this mini-symposium suggest, that impact demands that practitioners and appellate judges alike give serious consideration to the ways in which traditional appellate process must change in order to accommodate the realities of a world in which the flow of digital information is not only accelerating, but changing the notions of stability that underlie our very understanding of the law.

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