CALIFORNIA'S CURIOUS PRACTICE OF "POCKET REVIEW"

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I. INTRODUCTION

Just as the President has the power to veto without expressly saying so, the California Supreme Court has developed a practice of effectively overturning publishable appellate rulings by denying them publication, thereby consigning them to an uncitable oblivion. These "depublication" orders amount to review without reasoning, contrary to the most basic principles of the common law tradition. I call this the practice of "pocket review." As judges, scholars, and practitioners debate the questions raised by Judge Richard S. Arnold's opinion in *Anastasoff v. United States*,[1] they should be aware of this reductio ad absurdum of selective publication practices, and Judge Arnold's powerful indictment of the practice.

Because readers outside of California may question the existence of pocket review, let me start with a concrete (and recent) example. The Uniform Trade Secrets Act permits a court to enjoin "[a]ny actual or threatened misappropriation" of a trade secret.[2] The United States Court of Appeals for the Seventh Circuit, in a notable decision, held that an injunction was authorized where "new employment will inevitably lead [an

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1. 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc). Judge Arnold stated that the tax issue was moot on rehearing because the IRS had refunded the taxpayer the money that was at the heart of the dispute. *Anastasoff*, 235 F.3d at 1055-56.

2. Cal. Civ. Code § 3426.2 (West 1997).

employee] to rely on [a former employer's] trade secrets," even if there is no evidence that a misappropriation has taken place or that one is threatened.[3] Although at least twenty-two states have adopted the "inevitable disclosure rule,"[4] federal courts in California had repeatedly predicted that California would not join those states.[5] In November 1999 these predictions were proved false when the California Court of Appeal, in *Electro Optical Industries, Inc. v. White*,[6] characterized the inevitable disclosure rule as "rooted in common sense" and expressly adopted it.[7]

The California Rules of Court permit the majority of any appellate panel to certify an opinion for publication[8] so long as the opinion "establishes a new rule of law . . . or modifies . . . an existing rule . . . ."[9] The rules also permit the California Supreme Court to reverse the publication decision of the panel, *de*publishing an opinion originally designated for publication, or vice versa.[10] As with the Eighth Circuit rule overturned in *Anastasoff*, and nearly all other selective publication rules, an unpublished (including a depublished) opinion cannot be cited as precedent,[11] except insofar as it establishes law of the case,

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3. *Pepsico, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995).

4. The doctrine of inevitable disclosure protects an employer whose former employee goes to work for a new employer, and the new employment is likely or certain to result in disclosure of the former employer's trade secrets. Stephen L. Sheinfeld & Jennifer M. Chow, *Protecting Employer Secrets and the "Doctrine of Inevitable Disclosure"* 480 (PLI Litig. & Admin. Prac. Course Handbook Series No. H0-005O, 2000). A survey of state case law reveals that the rule is an old one that is seeing increased usage in the courts, yet remains controversial. *See id.* at 479-94.

5. *Bayer Corp. v. Roche Molecular Sys., Inc.*, 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999); *Danjaq, LLC v. Sony Corp.*, 50 U.S. Pat. Q. 2d 1638, 1640 n. 1 (C.D. Cal. 1999); *Computer Sci. Corp. v. Computer Assoc. Intl., Inc.*, 1999 WL 675446 at *16 (C.D. Cal. Aug. 12, 1999).

6. 90 Cal. Rptr. 2d 680 (Cal. App. 2d Dist. Div. 6 1999).

7. *Id.* at 684.

8. Cal. R. Ct. 976(c)(1) (West 2001).

9. *Id.* R. 976(b)(1). Publication is also permitted (1) under 976(b)(1) where an opinion "applies an existing rule to a set of facts significantly different from those stated in published opinions, or . . . criticizes with reasons given, an existing rule;" (2) under 976(b)(2) where the opinion "resolves or creates an apparent conflict in the law;" (3) under 976(b)(3) where the opinion "involves a legal issue of continuing public interest;" and (4) under 976(b)(4) where the opinion "makes a significant contribution to legal literature." *Id.* R. 976(b)(1)-(4).

10. *Id.* R. 976(c)(2).

11. *Id.* R. 977(a).

claim or issue preclusion, or it is relevant to a later criminal or disciplinary proceeding.[12]

The *Electro Optical* panel naturally designated its opinion for publication. It clearly established a new rule of California law, adopting a controversial extension of the Uniform Trade Secrets Act. The opinion was a contribution to the evolving law of trade secrets in California and merited publication by the standards of the Rules of Court. Nevertheless, the California Supreme Court, without any public consideration of competing views on the merits, ordered depublication.[13]

Electro Optical is a glaring example of pocket review, but by no means the only one. When the California legislature passed a determinate sentencing law in 1977,[14] different panels of the California Court of Appeal arrived at differing interpretations of the statute, and hence disparate sentences. The California Supreme Court simply depublished one side of the conflict, settling the interpretive questions without elaborating any rationale, and without reducing the sentences of the defendants whose cases had been depublished (and who received the longer sentences, as it turns out). One commentator observed that "depublication is a process by which legislative intent may be thwarted and the results of that thwarting are swept under the rug: the surface uniformity of published opinions hides a suppressed disparity in sentencing."[15]

II. "POCKET REVIEW" AS REVIEW

Members of the court have over the years freely admitted that pocket review serves a doctrinal function. Former Chief Justice Donald R. Wright, who presided over the court when it began issuing depublication orders in 1971, said that the court depublishes opinions that reach a correct result, but which contain "language which is an erroneous statement of the law and if left on the books would not only disturb the pattern of the

12. *Id.* R. 977(a)-(b).

13. *See Electro Optical Indus., Inc. v. White*, 90 Cal. Rptr. 2d 680 (Cal. App. 2d Dist. Div. 6 1999).

14. Cal. Penal Code § 1170 (West 1985).

15. Robert S. Gerstein, *"Law By Elimination": Depublication in the California Supreme Court*, 67 Judicature 293, 298 (1984).

law but would be likely to mislead judges, attorneys and other interested individuals."[16] His successor, Chief Justice Rose Elizabeth Bird, told a gathering of state bar delegates:

> [I]f the Supreme Court is confronted with a petition where the reviewing court has erred, it must take steps to ensure that the Court of Appeal opinion does not create confusion in the decisional law. In an effort to deal with this situation quickly and still fulfill its oversight function, the Supreme Court has come to rely increasingly on the nonpublication rule to decertify a published opinion with which the court does not agree in lieu of accepting the case for hearing.[17]

Former Associate Justice Joseph R. Grodin, in an article published while he was still on the bench, was equally blunt: "Depublication is most frequently used when the court considers the result to be correct, but regards a portion of the reasoning to be wrong and misleading."[18]

The exercise of pocket review in particular cases has a strong political correlation. One study of the liberal Bird Court found that three-quarters of its depublication orders were aimed at opinions with conservative outcomes.[19] After Chief Justice Bird and two liberal justices were defeated in their retention

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16. Julie Hayward Biggs, Student Author, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S. Cal. L. Rev. 1181, 1185 n. 20 (1977) (quoting private correspondence from Chief Justice Wright).

17. Stephen R. Barnett, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct*, 45 Hastings L.J. 519, 523 n. 18 (1994) (quoting remarks of Chief Justice Bird before the Conference of Delegates at the California State Bar Convention in San Francisco, California, on Sept. 10, 1978) (internal quotations omitted).

18. Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal. L. Rev. 514, 522 (1984).

19. *See* Phillip L. Dubois, *The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 Vill. L. Rev. 469 (1988). Dubois studied depublication orders in 569 cases depublished by the California Supreme Court from 1970 to 1984, as well as a random sample of 600 opinions from that time period. *Id.* at 482. He also used a comparison group of 600 published opinions issued from 1975 to 1983. *Id.* at 485. He classified an opinion as liberal if it resulted in (1) an outcome in a criminal case which favored a defendant, or (2) an outcome in a civil case which favored a debtor over a creditor, an employee over an employer, labor over management, a tenant over a landlord, a consumer over a seller or manufacturer, a plaintiff over a tortfeasor, or a claim arising under state laws protecting individual rights. *Id.* at 484. He found that 76.5 percent of the opinions ordered depublished by the Bird Court had conservative outcomes. *Id.* at 511.

elections in 1986, enabling a Republican governor to appoint conservative justices who immediately shifted the ideological makeup of the court, the same correlation continued—in the opposite political direction.[20]

The varying rate of depublication reflects the same political correlation. Under Chief Justice Bird, the Court averaged 78 depublication orders per year. Under her successor Chief Justice Malcolm Lucas, the rate was dramatically higher: an average of 117 depublication orders each year.[21]

"None of this should be surprising," observes Dean Gerald Uelmen:

> To the extent that depublication is part of a court's effort to maintain consistency in the law, it is not surprising that the divisions of the court of appeal, dominated by a political philosophy at odds with that of the supreme court, will see more of their opinions depublished.[22]

Professor Stephen Barnett argued that the "internal contradictions" of pocket review are causing it "to be gradually losing its law-making force."[23] He rested his conclusion on two arguments. First, in 1990, when the California Supreme Court established the first rules of court governing depublication,[24] it included a specific provision stating that a depublication order "shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion."[25] Three years later, in *People v. Saunders*,[26] a divided court stood by the rule and held that it meant what it said.[27] Second, Professor Barnett argued that

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20. *See* Gerald F. Uelmen, *Supreme Court Retention Election in California*, 28 Santa Clara L. Rev. 333, 335 (1988); Gerald F. Uelmen, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier than the Pencil?*, 26 Loy. L.A. L. Rev. 1007, 1017-20 (1993) [hereinafter Uelmen, *Publication and Depublication*].

21. Gerald F. Uelman, *Playing Center*, Cal. Law. 46 (July 1998).

22. Uelmen, *Publication and Depublication*, *supra* n. 20, at 1019.

23. Barnett, *supra* n. 17, at 522.

24. *Id.* at 523.

25. *Id.* at 522 (citing Cal. R. Ct. 979(e)).

26. 853 P.2d 1093 (Cal. 1993).

27. *Id.* at 1098-99 n. 8. Justice George, with four justices concurring, stated,

> To begin with, the dissent errs in concluding that by denying review in some cases and ordering depublication of the opinions in others, this court "endorsed" the decision in *Wojahn*. We recently reaffirmed "the well-established rule in this state that a denial of a petition for review is not an expression of opinion of the

both the California Supreme Court and the California Courts of Appeal are increasingly ignoring the rule against citing depublished opinions as precedent.[28] The combination of both arguments led him to conclude:

> The traditional understanding of depublication, which viewed a depublication order as a rejection of the court of appeal opinion and a sort of precedent in its own right—a "signal" sending "guidance" to the lower courts—no longer is tenable .... The result is that depublished opinions no longer bear a scarlet "D." Courts of appeal, and trial courts not bound by a published appellate opinion going the other way, have the supreme court's blessing to replicate both the result and the reasoning of a depublished opinion, as long as they do so without "citing" or "relying on" that opinion. Depublication thus retains only the "negative" effect of eliminating the court of appeal opinion as a published precedent.[29]

While Professor Barnett's illumination of the internal contradictions of pocket review as an institutional practice is useful, his conclusion that pocket review's impact on California law is thereby diminished does not follow. Depublication removes an opinion from the citable universe. Attorneys cannot cite depublished opinions without risking sanction. Busy trial court judges do not have the time to seek out pertinent depublished opinions. Nor can we expect appellate justices to often "replicate both the result and the reasoning of a depublished opinion" only to have that work itself depublished.[30] No justice will assume he or she has the high court's "blessing" to do so.[31] That appellate justices may

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> Supreme Court on the merits of the case ...." Consistently with the foregoing principles, rule 979(e) of the California Rules of Court, adopted in 1990, declares that "[a]n order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion."

Id. (internal citations omitted). Two justices dissented, stating, "This court's denials of review and orders of depublication in numerous cases following the decision in *People v. Wojahn* cannot simply be dismissed as meaningless." *Id.* at 1110 (Kennard, J., dissenting) (internal citations omitted).

28. *See generally* Barnett, *supra* n. 17, at 548-65.

29. *Id.* at 566-67.

30. *Id.* at 567.

31. *Id.*

sometimes in extreme cases ignore the noncitation rule does nothing to change the practicalities of pocket review. *Electro Optical* illustrates these practicalities with clarity. Having depublished an opinion adopting the inevitable disclosure rule against the background of three federal court predictions to the contrary,[32] the California Supreme Court sent the strongest of signals that it concurred with the federal courts and disapproved the doctrinal stance adopted by the California Court of Appeal.

III. *ANASTASOFF*'S CRITIQUE OF "POCKET REVIEW"

The practice of pocket review is not a necessary consequence of California's selective publication standards. Rather, it is a consequence of the conjunction of two additional rules: (1) the denial of precedential value to unpublished opinions (including depublished ones), and (2) the power of the California Supreme Court to summarily review and reverse publication rulings of the subordinate appellate courts.[33] While the latter rule is best known in California,[34] Judge Arnold's opinion in *Anastasoff* speaks powerfully to the former.

At the heart of *Anastasoff*'s analysis is the notion that reasoned elaboration is the central principle of common law decisionmaking:

> Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. . . . This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties.[35]

Because this principle (which *Anastasoff* calls "the doctrine of precedent") was already "the historic method of judicial decision-making"[36] by the time the great pre-revolution English

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32. *See supra* n. 5.

33. Ironically, the California Supreme Court lacks that power over its own opinions, all of which must be published. *See* Cal. R. Ct. 976(a) (West 2001) ("All opinions of the Supreme Court shall be published in the Official Reports.").

34. *See* J. Clark Kelso, *A Report on the California Appellate System*, 45 Hastings L.J. 433, 496 (1994) ("California appears to be the only jurisdiction in the country to permit its highest court to control the development of the law by depublishing court of appeal opinions.").

35. *Anastasoff*, 223 F.3d at 899-900 (citations omitted).

36. *Id.* at 900.

commentators (Sir William W. Blackstone, Sir Edward Coke, and Sir Matthew Hale) wrote,[37] it was central to the Framers' understanding of what the judicial power was (and is).[38] Thus, the *Anastasoff* court concluded:

> [I]n the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III.[39]

The force of *Anastasoff*'s common-law argument has already been rejected by the California courts. Earlier this year, in *Schmier v. Supreme Court*,[40] the Court of Appeal sustained California's selective publication system against challenge by holding that "[t]he broad constitutional and legislative authority granting the Supreme Court selective publication discretion"[41] supersedes any received common law.[42] Although the court did not focus specifically on the elements of California's selective publication rules that make pocket review possible, it nevertheless offered a justification for them by linking this "broad constitutional and legislative authority" directly to "a policy that California's highest court, with its supervisory powers over lower courts, should oversee the orderly development of decisional law."[43] The *Schmier* court offered no authority, or even elaborated reason, to connect the California

37. *Id.* at 900-901.

38. *Id.* at 902-903.

39. *Id.* at 903.

40. 93 Cal. Rptr. 2d 580 (Cal. App. 1st Dist. Div. 5 2000), *cert. denied*, 121 S. Ct. 382 (2000).

41. *Id.* at 584.

42. *Id.* at 584-85.

43. *Id.* at 584.

Supreme Court's general "supervisory powers" to the extraordinary practice of pocket review.[44]

The "broad constitutional and legislative authority" to which the *Schmier* court appealed turns out to be not quite as broad as one would think.[45] The court cited two bases for this authority.[46] The first was Article VI, section 14 of the California State Constitution:

> The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.[47]

The second was section 68902 of the California Government Code, entitled *Publication of Official Reports*:

> Such opinions of the Supreme Court, of the courts of appeal, and of the appellate divisions of the superior courts as the Supreme Court may deem expedient shall be published in the official reports. The reports shall be published under the general supervision of the Supreme Court.[48]

While both of these provisions clearly authorize selective publication of appellate decisions and the promulgation of court rules that define criteria for publication, neither provides any clear warrant to limit the precedential value of nonpublished opinions, let alone link such a limitation with the California Supreme Court's traditional function of "oversee[ing] the orderly development of decisional law."[49] This is the link that forges the practice of pocket review. Indeed, the second clause of Article VI, section 14, requiring that all determinations of "causes" be in writing, implies disapproval of any practice by which the court fulfills this function by means other than the sort

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44. *Id.*
45. *Id.*
46. *Id.*
47. Cal. Const. art. VI, § 14.
48. Cal. Govt. Code § 68902 (West 1997).
49. *Schmier*, 93 Cal. Rptr. 2d at 584.

of reasoned elaboration that has always been associated with the practice of determining a cause in writing.[50]

Defenders of pocket review will rejoin that when the California Supreme Court depublishes an opinion it is not determining a cause—rather, it is simply exercising its "general supervision" powers to determine when publication is "appropriate."[51] Moreover, it does so "in writing"—the court issues a written order directing depublication.[52] While these rejoinders are correct (although the latter is only trivially so, since the California Supreme Court never elaborates, in a depublication order, the reasons for its decision), they miss the point. It does not follow that because neither Article VI, section 14 of the California Constitution nor Government Code section 68902 *forbid* pocket review, they must therefore *permit* it. In fact, they neither permit nor forbid the practice of pocket review. As *Anastasoff* teaches, the principle of reasoned elaboration was firmly part of the English (and eighteenth century American) common law.[53] While California positive law may depart from that principle, the *Schmier* court's elaboration of how it has done so is not well taken. The practice of pocket review stands sorely in need of a justification.

IV. "POCKET REVIEW" AS A NECESSARY EVIL

The only justification that has been advanced for the practice of pocket review is a practical one: the California Supreme Court cannot assert adequate control over the development of California law through direct review alone. In an essay dedicated to explaining "the reasons for the practice and its continuance," Justice Grodin defended "the dominant view within the court that the selective exercise of the depublication option is both practical and proper."[54] He described the daunting workload of the court and the administrative techniques used to cope with it.[55] Largely

50. Cal. Const. art. VI, § 14.
51. *Schmier*, 93 Cal. Rptr. 2d at 584.
52. Cal. Const. art. VI, § 14.
53. *See generally Anastasoff*, 223 F.3d at 899-904.
54. Grodin, *supra* n. 18, at 515.
55. *See id.* at 515-20.

dismissing the alternatives to depublication,[56] he arrived at a lesser-of-evils justification:

> Winston Churchill once said of democracy that it is the worst form of government except for all the others. Though I would scarcely liken depublication to democracy, the same logic applies. . . . [I]f the choices are to grant a hearing or to deny and leave published an opinion that could lead to compounded error, the depublication alternative is preferable, though certainly not ideal.[57]

By "published . . . opinion that could lead to compounded error,"[58] Justice Grodin meant to refer to situations in which "permitting the appellate opinion to stand as citable precedent may result in building ultimately reversible error into a large number of trials."[59] Justice Grodin never explained how it could be that such an opinion is not worthy of direct review. The implication is that there are simply too many such opinions to all be reviewed by the court.[60]

V. CONCLUSION

In the end, perhaps pocket review is the only practical means for the seven justices of the California Supreme Court to deal with the doctrinal torrent rushing forth from the pens of ninety-three justices in eighteen autonomous districts or divisions of the Court of Appeal. But reasoned elaboration is the soul of our common law tradition. And the discipline of the written page has always been central to reasoned elaboration on the appellate level.

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56. *See id.* at 523-28.

57. *Id.* at 528.

58. *Id.*

59. *Id.* at 520.

60. This conclusion is also an implication of Justice Grodin's endorsement of selective review as a practice that "would eliminate the need for depublication in a substantial number of cases." *Id.* at 528.

To paraphrase the Gospels,[61] how does it profit the court to gain control over the "orderly development of decisional law"[62] through a means by which it loses its own soul?

61. *See Matthew* 16:26 (New Intl.); *Mark* 8:36 (New Intl.); *Luke* 9:25 (New Intl.).

62. *Schmier*, 93 Cal. Rptr. 2d at 584.