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CONCLUDING THOUGHTS ON THE PRACTICAL AND COLLATERAL CONSEQUENCES OF *ANASTASOFF*

J. THOMAS SULLIVAN*

Judge Richard Arnold's concern that federal circuit rules precluding citation to unpublished decisions violate the power accorded the judiciary under Article III to the United States Constitution¹ implicates far more than policy considerations militating for or against publication of a court's decisions.² It suggests to the skeptical that there may be something troubling about the process by which some appellate opinions—the judicial work product that explains appellate decisions—are deemed less

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1. Article III of the United States Constitution provides, in pertinent part:

Section 1. The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

2. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc); Judge Arnold's panel opinion in *Anastasoff* was foreshadowed in an earlier essay. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999). Judge Arnold commended Professor Martha J. Dragich's article, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 Am. U. L. Rev. 757 (1995), in his essay. Arnold, *supra*, at 221 n. 3.

worthy of reliance than others. The panel opinion casts no aspersions on the quality of appellate decisionmaking that may be reflected in non-publication decisions. However, at a point in history when virtually all judicial decisions can be made readily available to litigants, counsel, and the public in an online format, the continuing viability of the non-publication rationale has obviously lost some force. Of course, publication is not the heart of the question addressed in *Anastasoff v. United States*. More precisely, the issue involves rules that bar litigants from formal reliance on unpublished dispositions, or “no-citation” rules.³

To the extent that the *Anastasoff* panel opinion addressed only the scope of authority granted judges by the United States Constitution,⁴ its rationale would affect only those federal circuits that have adopted rules proscribing reliance on unpublished decisions by litigants in their courts.⁵ State courts would have presumably remained free⁶ under the panel reasoning to continue to use existing rules or to adopt new rules limiting reliance on unpublished decisions as precedent.⁷

3. 223 F.3d at 904 (recognizing that a court may decide that some opinions do not warrant publication and distinguishing between the publication decision and rules limiting citation). For an interesting exchange concerning the merits of limiting citation to unpublished opinions, see Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177 (1999) and Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 Ohio St. L.J. 2025 (1999).

4. 223 F.3d at 900-04.

5. The circuits are not uniform in their view of the precedential value of unpublished opinions. See Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251 (2001); 2A Fed. Proc. § 3:827 (West 2000) (both detailing variation in citation rules in federal circuits).

6. State courts have readily adapted to the regime of unpublished opinions. See e.g. David M. Gunn, “*Unpublished Opinions Shall Not be Cited as Authority*”: *The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 St. Mary’s L.J. 115 (1992); Charles W. Adams & J. Michael Medina, *Recent Developments in Oklahoma Civil Appellate Procedure*, 26 Tulsa L.J. 489 n. 1 (1991) (cautioning reliance on unpublished orders and opinions mentioned in article that were without precedential value except in limited circumstances under Oklahoma rule).

7. Publication and citation practices apparently vary widely among jurisdictions, as the table published as the Serfass/Cranford research demonstrates. See Serfass & Cranford, *supra* n. 5. For example, the flip side of the *Anastasoff* panel’s cautionary language that publication and citation are not to be confused, might be found in Oklahoma practice. There, even published opinions of the intermediate Oklahoma Court of Appeals lack precedential authority until formally adopted by the Oklahoma Supreme Court. See e.g. *Cimarron Fed. Savings Assn. v. Jones*, 1992 OK 55, 832 P.2d 420, which adopted the opinion of the court of appeals, 1991 OK CIV APP 67, 832 P.2d 426 (holding court of appeals opinion in conflict with prior decision

The long-term impact of *Anastasoff* on the publication/citation debate or on our understanding of the parameters of the judicial power afforded federal courts by Article III is not clear. Yet, the panel opinion raises a number of significant questions about access to and reliance on the work product of the appellate courts that warrant discussion, irrespective of the constitutional question the panel opinion addresses.

I. NONPUBLICATION, “NO-CITATION” RULES, AND LOSS OF PRECEDENT

Judge Arnold’s critique suggests concern that in a legal system predicated on the application of prior decisions, no-citation rules effectively deprive appellate decisionmaking of its essential jurisprudential value. Clearly, whenever a court determines that not only do some decisions not warrant publication, but that they may not even be cited as precedent in their unpublished form, the decision not to publish may have significant consequences.⁸ It not only deprives the unpublished decision of its precedential value in many jurisdictions, but nonpublication may also tend to conceal the court’s position on important questions of law.⁹

As a practical matter, for individual litigants the constitutional question addressed by the *Anastasoff* panel ignores certain realities of both appellate decisionmaking and appellate argument. On the one hand, unpublished decisions seem to suffer in terms of quality in many cases, probably as a consequence of

requiring overruling of prior case). This practice is consistent with current court rule. *See* Okla. Sup. Ct. R. 1.200(c)(2) (2000).

8. “The fact that the Court of Appeals’ opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties as is a published opinion.” *Smith v. U.S.*, 502 U.S. 1017, 1020 n. * (1991) (Blackmun, J., dissenting).

9. An interesting counter-argument is made by George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 Mercer L. Rev. 477 (1988). Weaver argues that the concern that citizens be afforded an opportunity to “know” the law meant that non-published opinions should not be regarded as “precedent,” because non-publication of binding precedent deprives “the average person, even through his attorney,” of access to the law so that he can “take it into account in ordering his affairs.” *Id.* at 485-86. He concludes the unpublished opinions should retain their significance as persuasive authority, rather than as binding precedent. *Id.* at 490-93.

the non-publication decision.¹⁰ On the other, experienced appellate lawyers will not easily dismiss the suspicion that non-publication may serve to mask inappropriate personal agendas of appellate judges. But perhaps most interesting is the fact that the panel addressed limitation on citation of unpublished dispositions only from the perspective of the appellate court. A compelling argument can be made that individual litigants who might prevail—could they rely on unpublished opinions—will be deprived of their victories through the operation of “no-citation” rules. This line of argument suggests that in practice appellate courts will actually ignore prior decisions, which would otherwise be controlling but for their status as non-citable, unpublished opinions.¹¹

A. *The Accuracy of the Determination Not to Publish*

That publication is not the touchstone for the constitutional question is clear from the *Anastasoff* court’s rationale because it is not the publication decision itself that renders the unpublished decision valueless as precedent for litigants.¹² Rather, the court

10. Appellate judges are sensitive to criticism that unpublished opinions suffer from at least stylistic deficiencies, even in refusing to concede that they may reflect poor decisionmaking. Tenth Circuit Judge Holloway, dissenting from adoption of a limited citation rule in her circuit, observed:

[I]t may be suggested that in the rush of our business, we must prepare orders and judgments which are not written in the form of polished discourses which we wish to serve as citable opinions. This is the most untenable of the notions suggested for the no-citation rule. In light of our caseload, we are obviously driven to entering orders which are not the literary models that we would like to produce as opinions. Nevertheless, the basic purpose for stating reasons within an opinion or order should never be forgotten—that the decision must be able to withstand the scrutiny of analysis, against the record evidence, as to its soundness under the Constitution and the statutory and decisional law we must follow, and as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination.

Re Rules of U.S. Ct. App. for Tenth Cir., Adopted Nov. 18, 1986, 955 F.2d 36, 38 (10th Cir. 1992) (Holloway, C.J., dissenting).

11. As the Fourth Circuit noted in *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972):

We concede, of course, that any decision is by definition a precedent, and that we cannot deny litigants and the bar the right to urge upon us what we have previously done.

12. The panel quite deliberately rejected any suggestion that its decision concerned publication or the form of publication, or that its holding implicated concern that non-

was concerned with the constitutional and jurisprudential issues raised by court rules, including that of the Eighth Circuit,¹³ that unpublished decisions may not be cited as precedent.

Nevertheless, the publication decision is clearly significant to the overall appellate process. The determination not to publish suggests a decision by the issuing appellate court that the opinion is less valuable to the court and future litigants, for whatever reason, than other opinions that will be published. Therefore, perhaps most important for evaluation of the merits of the system where a majority of opinions are not designated for publication is whether the determination not to publish is correct.¹⁴ The process should work. Most courts have addressed the publication decision by formal rule that includes criteria for determining which opinions warrant publication.¹⁵ The decision to publish itself is presumably made by judges,¹⁶ assisted by staff attorneys and law clerks, who can be expected to apply the criteria correctly.¹⁷

publication of judicial decisions resulted in a secretive process. *Anastasoff*, 223 F.3d at 904. In fact, the court observed: "Indeed, most appellate courts now make their opinions, whether labeled 'published' or not, available to anyone on line. This is true of our Court." *Id.* The panel's attempt to distance the citation and publication policies, however, betrays a core truth: Once opinions are readily available from a court, part of the rationale for limiting citation to them—lack of general access—is removed.

13. 8th Cir. R. 28A(i). The *Anastasoff* panel held unconstitutional that portion of the rule which provides that "[u]npublished opinions are not precedent and parties generally should not cite them." 223 F.3d at 899.

14. Typically, non-publication practices have been linked to increased appellate filings, as the Fourth Circuit has explained:

Judge Haynesworth's report to the Federal Judicial Center demonstrates, we think, the compelling necessity for some abbreviation of normal procedures in the disposition of appeals that have now increased to 1,405 filed in fiscal year 1972, with a predictable rise in the years ahead. We believe that our screening procedures and disposition by unreported memorandum decisions accords with due process and our duty as Article 3 judges, but we confess its imperfection.

Jones, 465 F.2d at 1093-94.

15. See Serfass & Cranford, *supra* n. 5, for comprehensive review of publication rules.

16. This assumption is not without some doubt, particularly as to the precise role played by judges, as opposed to staff counsel and law clerks. See Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 Mich. L. Rev. 940, 953-54 (1989):

In fact, there is some reason to doubt whether judges have much to do with the publication decision in these areas [review of agency determinations in immigration and social security, Federal Torts Claims Act cases, criminal and habeas appeals, civil rights actions, and employment discrimination complaints against the federal government]. First, judges themselves do not usually do the initial screening that designates a case as a likely candidate for disposition without argument. That initial decision is made by staff, usually staff attorneys

When the determination not to publish is correctly made, the court properly assesses the significance and dispositional accuracy of its unpublished decision. Further review is unlikely precisely because the intermediate court authoring an unpublished decision has applied routine reasoning to unremarkable issues that should not warrant formal dissemination.¹⁸ In fact, however, unpublished decisions are reviewed and reversed. For example, in *Hughes v. Rowe*,¹⁹ the Supreme Court, per curiam, granted relief in part, noting:

The Court of Appeals disposed of the novel question presented by petitioner by affirming the fee award (taxing \$400 in costs against inmate for filing frivolous civil rights action) in an unpublished order.²⁰

or a circuit executive. . . . Some of the screening procedures used by the circuits identify entire categories of cases by subject matter as likely candidates for the expedited review that results in nonpublication. This suggests another reason why nonpublication may not be a good indication of the information value of an opinion: Decisions that result in nonpublication have been made in gross rather than individually, at least on the initial level, and judges have few incentives to examine these initial decisions closely. Existing data reveal that judges rarely disagree with the initial decision to decide an appeal on the briefs alone. This means that staff determinations about the relative merits of the cases almost always prevail, and as noted above, staff determinations may be guided largely by the subject matter of the opinion.”

Id. (citations omitted).

17. See Stephen H. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. App. Prac. & Process 325 (2001) (note especially Parts B and C).

18. See Andrew M. Low’s humorous, but thoughtful, essay, *Certworthy*, 24 Colo. Law. 271 (1995), depicting a retirement party conversation between a young associate and a professor of appellate practice at the local law school. The associate is concerned that opposing counsel’s certiorari petition will be granted when his client benefited from what he perceived to be an incorrect ruling by the court of appeals. After characterizing the difference between an unpublished and published decision of the intermediate court as the same as that “between night and day,” the professor is asked by the associate if he should assert the fact that the court did not publish the decision as grounds for denial of the cert petition.

“No, no, certainly not,” Stevens said, waving his hands. “You will mention that the decision below was unpublished. The Supreme Court knows the significance of that fact without your assistance.” *Id.* at 272. Stevens then proceeds to lecture the younger lawyer that the odds of certiorari being granted will increase if the lower court acts favorably on a motion to publish the opinion.

Low’s perception is shared by many practitioners as well, and undoubtedly, admitted by many judges, if only privately. Yet, when courts do review lower courts’ decisions rendered without publication of the opinion, the reviewing court often seems to consider it important to note the non-publication decision.

19. 449 U.S. 5 (1980).

20. *Id.* at 6-7.

The Court proceeded to consider the Seventh Circuit rule for publication²¹ and noted:

Although petitioner's appeal was decided in an unpublished order purportedly having no precedential significance, three members of the Court of Appeals, Chief Judge Fairchild and Judges Swygert and Bauer, nonetheless voted to rehear the case en banc. Judge Swygert filed a written dissent from the order denying the petition for rehearing en banc.²²

Including this information in the Court's per curiam disposition suggests its concern that the court below either failed to appreciate the significance of its decision or ignored it in deciding not to publish.

In a similar vein, in his memorandum opinion denying the petition for writ of certiorari in *Taylor v. United States*,²³ Justice Stevens noted an apparent lack of consistency in the application of the Fifth Circuit's publication rule. The circuit court had affirmed in an unpublished opinion issued two days after a published opinion in another case reached a different conclusion. Petitioner Taylor's case had not been designated for publication based on the circuit rule that permits nonpublication of "opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law."²⁴ Justice Stevens concluded that there existed "a conflict within the Fifth Circuit on both the answer and the importance of the question" presented.²⁵

Theoretical support for nonpublication and no-citation policies must rest on the assumption that appellate courts are able to accurately assess what dispositions warrant publication and precedential value. When appellate courts err in this regard, confidence in the work of the appellate bench is undermined. The problem is accentuated when counsel and litigants are able to access judicial work product in the form of unpublished opinions through online services or judicial Web sites, but are unable to rely

21. *Id.* at 7 n. 3. The Court observed, "Rule 35(c)(1) of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit identifies those decisions warranting publication: A published decision will be filed when the decision . . . (i) establishes a new, or changes an existing, rule of law." *Id.*

22. *Id.* at 7.

23. 493 U.S. 906, 110 S. Ct. 265 (1989) (table).

24. 110 S. Ct. at 265 (citing 5th Cir. Ct. App. R. 47.5).

25. *Id.*

on a court's prior decisions in predicting outcomes or fashioning appellate arguments.

B. The Impact of Loss of Precedent on Individual Litigants

The *Anastasoff* panel opinion does not take into consideration the impact of the no-citation rule on the individual litigant, except by implication. For at least some litigants, loss of a prior holding as precedent significantly disadvantages their likelihood of obtaining a favorable holding on appeal.²⁶

This resulting disadvantage suggests additional constitutional issues that might be raised both in state and federal court. State court litigants could presumably challenge no-citation rules limiting reliance on otherwise favorable prior judicial holdings on Fourteenth Amendment grounds. The question might be framed in terms of a due process issue similar to that raised in *Fiore v. White*.²⁷ In holding that state courts were bound to apply existing principles of state law to pending appeals, the Court suggested that certain aspects of state appellate process be governed by due process guarantees.²⁸ The suggestion that a litigant's inability to rely on favorable prior decisions is not new. In her dissent from the adoption of a circuit rule limiting citation to unpublished opinions in the Tenth Circuit, then-Chief Judge Holloway argued:

No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have the overtones of a constitutional infringement because

26. Some commentators argue that non-citation rules compromise the individual litigant's right to petition the courts for redress of grievances. See Salem M. Katsh and Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. App. Prac. & Process 287 (2001).

27. 531 U.S. 225 (2001), *rev'g*, 149 F.3d 221, 222 (3d Cir. 1998) (in which the circuit court held that "state courts are under no constitutional obligation to apply their decisions retroactively").

28. *Id.* at 228-29 (holding that Pennsylvania was required to apply its law as previously interpreted).

of the arbitrariness, irrationality, and unequal treatment of the rule.²⁹

Judge Holloway observed that on two occasions the United States Supreme Court had apparently declined to rule on challenges to the constitutionality of no-citation rules in force in other circuits.³⁰ She concluded that if the court were aware that an issue would be controlled by a prior, unpublished decision, the court would have a “duty, as a matter of basic justice” to rely on it and that “logic would demand citing the earlier ruling.”³¹

Alternatively, consider the Court’s interesting reliance on the Equal Protection Clause of the Fourteenth Amendment to justify intervention in Florida’s state electoral process in *Bush v. Gore*.³² A state litigant might argue successfully that denial of access to an unpublished opinion as binding precedent due to a state’s no-citation rule would deny the litigant or class of litigants equal protection by frustrating their opportunity to assert unpublished “authority” as authority.³³

Not only does the limitation on citation and access to prior decisions frustrate the expectations of individual litigants and their counsel on appeal, but it retards the development of the law. Often, nonpublication may shield an appellate court from a general appreciation of its reasoning or approach to a particular problem or issue.

An example of this problem is presented by the unpublished decision of the Texas Court of Criminal Appeals in *Reed v. State*.³⁴ On direct appeal, Reed had asserted a number of claims similar to

29. *Re Tenth Cir. Rules*, 955 F.2d at 37 (Holloway, C.J., dissenting). The dissenting opinion of then-Chief Judge Holloway, joined by circuit Judges Barrett and Baldock, was published six years after the adoption of the rule.

30. The two cases involved the Seventh Circuit’s rule in *Do-Right Auto Sales v. U.S. Ct. App. for Seventh Cir.*, 429 U.S. 917 (1976), and *Bowder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257 (1978), *rev’g*, 534 F.2d 331 (7th Cir. 1976). The circuit cases are discussed in 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, 1180 n. 74 (1978).

31. 955 F.2d at 37.

32. 121 S. Ct. 525, 530 (2000).

33. In its treatment of the equal protection claim, the Court in *Bush v. Gore* did not articulate what constituted the “class” of voters whose “right of suffrage” would be denied or define its parameters, suggesting that any single voter has standing to challenge an election practice compromising his right to vote.

34. No. 69,292 (Tex. Crim. App. Mar. 29, 1995).

those raised in *Batson v. Kentucky*,³⁵ even though the objections made at Reed's 1983 trial antedated *Batson* by three years. *Reed* was submitted for decision following oral argument on April 23, 1986; *Batson* was issued one week later. The court of criminal appeals did not dispose of the appeal for several years following argument; it finally remanded the cause for a "retrospective" *Batson* hearing in 1992. Following the hearing on the claims, the court permitted supplemental briefing. In his supplemental brief, Reed relied on the court's intervening decision in *Young v. State*,³⁶ which permitted the defendant to advance, for the first time on direct appeal, a comparative analysis of jurors excluded by the prosecution through the use of peremptory challenges. The comparative analysis contrasted the backgrounds and responses of minority jurors peremptorily challenged against those of comparable or similarly situated majority jurors accepted by the prosecution for jury service.³⁷

Despite *Young*'s approval of the procedure, the court refused to consider Reed's comparative analysis, basing its refusal on *Tompkins v. State*,³⁸ which held that a comparative analysis had to first be presented to the trial court in a capital prosecution.³⁹ Critical to Reed's position was the fact that *Young* regarded the *Tompkins* preservation rule as dicta.⁴⁰ Petitioning for rehearing, Reed asserted due process and equal protection claims under the Fourteenth Amendment. He based these arguments, first, on the court's application of a less favorable standard for preservation of error in capital cases, as opposed to non-capital cases, and second,

35. 476 U.S. 79 (1986).

36. 826 S.W.2d 141, 143-44 (Tex. Crim. App. 1991) (en banc). The *Young* court reviewed a court of appeals decision holding that trial counsel's failure to advance a comparative analysis of majority jurors accepted and minority jurors excluded from the trial jury through the prosecutor's use of peremptory challenges at the hearing in the trial court essentially waived reliance on this type of analysis on appeal. The court of criminal appeals reversed.

37. See *Yancey v. State*, 2001 WL 32834 (Ala. Crim. App. Jan. 12, 2001) (finding disparate treatment where minority jurors peremptorily challenged for having committed traffic and misdemeanor offenses, while six majority jurors having similar records were empanelled).

38. 774 S.W.2d 195 (Tex. Crim. App. 1987).

39. *Reed*, No. 69,292, slip op. at 25-27.

40. In *Young*, the Court of Criminal Appeals held that the controlling footnote in *Tompkins*, 774 S.W.2d at 202-03, n. 6A, in which the court had concluded that failure to first present the comparative analysis to the trial court precluded its consideration on appeal was "not a holding of this Court, and we decline to adopt it as one." 826 S.W.2d at 144. The court further observed, "As is generally true with footnotes, we regard this footnote as dictum even though we are not in complete disagreement with some of its observations." *Id.* n. 5.

on the court's failure to apply *Young* in pending appellate litigation. Reed relied on the general principle advanced by the Supreme Court in *Teague v. Lane*⁴¹ that appellate litigants should have the benefit of existing precedent in the resolution of their claims on appeal. The court declined to rehear the case, and the Supreme Court denied certiorari.⁴²

Nonpublication of the Texas Court of Criminal Appeals' decision only served to obscure the distinction it drew between precedent authorizing comparative analysis in *Batson* arguments raised initially on appeal in non-capital cases and precedent requiring the analysis to be raised at the trial-court level in capital prosecutions.⁴³ Although the decision is not subject to citation as precedent, the Attorney General's office is undoubtedly aware of the holding, while lawyers not having access to the unpublished decision may not be. The decision was apparently never released for even online dissemination.

Not only was Reed denied the benefits of *Young*, but the reviewing court rejected his arguments in an unpublished decision that failed to inform other capital defendants' counsel of the need to preserve error in strict compliance with the prior decision in *Tompkins*. The unpublished decision in *Reed* reflects an appellate court not only hiding its inaccurate decisionmaking, but also failing to afford future litigants notice as to exactly what preservation of error rules would apply in capital, as opposed to non-capital, cases.

II. PRACTICAL CONSEQUENCES OF ABANDONING NONPUBLICATION, NO-CITATION POLICIES

Several authors in this issue have argued forcefully for and against the holding and rationale of the *Anastasoff* panel, in examining its support for democratization of judicial decisionmaking. However, in practice, the panel's approach is likely to be troubling, particularly in jurisdictions whose citation rules might be altered to reflect its underlying thesis. The decision

41. 489 U.S. 288, 304-05 (1989).

42. *Reed v. Texas*, 516 U.S. 1050 (1996).

43. Moreover, the court seems to have basically gotten the decision wrong in light of its prior rejection of *Tompkins* as controlling in its intervening decision in *Young*. See *supra* n. 40.

implicates two important considerations for practitioners that are not discussed by the symposium authors. First, the reality is that many decisions not designated for publication provide precious little in the way of legal reasoning or factual development, which may guide a subsequent court in relying on the decision as precedent. Frankly, many are poorly reasoned and superficial in their treatment of both the facts presented in the case⁴⁴ and the applicability of precedent relied on in disposing of the case. Second, practitioners face an additional problem of access to these opinions. That problem implicates professional norms governing effective representation.

For all litigants, nonpublication makes access to the body of existing case law difficult and more expensive, even if nonpublication does not limit precedential value within the jurisdiction. When nonpublication does not correlate with a prohibition on citation, some litigants will be advantaged by their ability to locate the unpublished authority. Those who are not able to access unpublished authority, whether because of lack of resources for research, counsel's lack of research ability, or just because of a failure of dumb luck, will be disadvantaged. Changes in publication practice and no-citation rules affect litigants in one unquestionable way: Expansion of publication or citation authority necessarily will increase the volume of judicial opinions which must be researched in order to properly determine the existence of controlling authority on a given issue. One of the realities of nonpublication is that this policy places some practical limitations on research demands for appellate practitioners.⁴⁵

44. Not uncommonly, litigants or their counsel find factual errors in judicial opinions, which are sometimes corrected by the appellate court on motion. See e.g. *American Community Servs., Inc. v. Indiana Ins. Co.*, 1999 WL 239912 (Tex. App. Apr. 23, 1999) (modifying opinion and issuing corrected judgment to reflect omitted name of an appellant on motion for rehearing); *Texas & P. Ry. Co. v. Taylor*, 126 S.W. 1200 (Tex. 1910) (correcting factual error in published opinion on motion to correct filed by defendant in error).

45. The sheer numbers of pages of judicial opinions published annually affect not only appellate lawyers, but also trial judges and trial lawyers, whose work is shaped by appellate decisionmaking. See e.g. D. Brock Hornby, *From the Bench: Appellate Judges: Think Before You Publish*, 22 Litig. 3 (1996). United States District Judge Hornby opened his essay most cogently: "As one who must consume thousands of appellate opinions each year, I wish to make some 'quality control' suggestions for this ever-multiplying and potentially hazardous product." *Id.* at 3.

A. *The Threat to Litigants Posed by Poorly Reasoned, Unpublished Opinions*

It is difficult to quarrel with so esteemed a jurist as Judge Richard Arnold. Indeed, if Judge Arnold were personally responsible for the creation of all judicial opinions, it would solve a primary concern for practitioners now threatened, at least in the Eighth Circuit, with the eventual need to consider unpublished decisions as authority. Regrettably, not all jurists are as skilled and conscientious as Judge Arnold. The truth is that many unpublished decisions are delivered in opinions that include neither a careful discussion of facts nor a sophisticated application of the controlling authority on which the court relied.

This does not mean that many unpublished decisions reflect wrongly decided cases, but it does mean that the court issuing the decision concluded it did not warrant publication. For that reason alone, the tendency of authoring judges to engage in less rigorous examination of facts or application of precedent is inherent in the culling process undertaken for cases warranting general dissemination.

In areas with large and often increasing numbers of appeals, such as criminal and workers' compensation matters, a number of factors may lead to less precision in the disposition of cases ultimately designated as not for publication. For instance, in criminal matters, even meritorious claims do not require reversal unless some degree of prejudice can be shown or inferred, even under the most generous test of *Chapman v. California*.⁴⁶ As a consequence, many criminal appeals presenting otherwise colorable or attractive claims are easily rejected because overwhelming evidence of guilt eventually dooms them, regardless of their theoretical appeal or the sophistication of counsel's argument.

The sheer caseload demands placed upon appellate defenders and the often low compensation offered to appointed counsel also likely result in less sophistication in the development of argument. Similarly, many criminal appeals presenting arguable claims must be affirmed because a failure to preserve error at trial prevents the

46. 386 U.S. 18, 24 (1967) (requiring reversal for constitutional error unless error can be shown to be harmless beyond a reasonable doubt).

appellate court from reviewing those claims without resorting to doctrines of plain or fundamental error. To the extent that unpublished decisions follow poorly preserved or poorly argued claims, the quality of the appellate opinion expressing rejection of those claims can hardly fail to be adversely affected by the way in which the claims have been procedurally defaulted. This suggests that poor advocacy may well result in a less rigorous review by the appellate court and that less rigorous review is often concealed by a determination not to publish the decision.

Counsel faced with researching unpublished decisions, which would be controlling but for a prohibition against citation to unpublished authority, are likely to find precious little support for their clients. Unpublished cases often reflect an almost mechanistic application of general principles to facts or arguments that would demand greater analytical precision if the reviewing court's reasoning were targeted for publication.⁴⁷ The beneficiary of imprecision in precedent is generally the appellee, who enjoys a strong presumption of regularity in the proceedings below once the case is reviewed by the appellate court. Moreover, doctrines such as harmless error,⁴⁸ application of the abuse of discretion standard,⁴⁹ and preservation rules that foreclose consideration of procedurally defaulted claims enhance the position of the appellee

47. The most obvious example lies in the issuance of decisions that provide merely the notation that the case has been affirmed, a practice criticized by William C. Smith in *Big Objections to Brief Decisions*, 85 ABA J. 34 (Aug. 1999). The Eleventh, Third and Eighth Circuits led the federal circuit courts in the number of decisions disposed of merely by the notation "Affirmed," with 16.6, 23.4, and 20.9% of cases disposed of summarily by those circuits, respectively. The percentage of cases disposed of by all federal circuits in such fashion during 1998 was 6.1%, in contrast to the 68.7% of all cases disposed of during that year by unpublished opinion. *Id.* at 36.

48. In civil cases, for example, reversible error typically occurs only when the substantial interests of a party are implicated by the error. Even in criminal cases, the most rigorous test faced by appellees is generally the harmless error test of *Chapman v. California*, 386 U.S. 18, 24 (1967), which requires the prosecution to disprove beyond a reasonable doubt that constitutional error contributed to conviction. However, the Supreme Court has recognized that some error in criminal proceedings, denominated "structural," as opposed to "trial error," cannot be remedied without reversal. *Arizona v. Fulminante*, 499 U.S. 279, 280 (1991). This rule of automatic reversal results from the fact that the criminal defendant could never demonstrate that the error actually prejudiced him. An example of this type of error lies in the exclusion of a single *Witherspoon*-qualified juror from service in a capital trial in which the death penalty is sought. *Davis v. Georgia*, 429 U.S. 122, 122 (1976) (*per curiam*).

49. See generally Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 48-49 (2000) (describing the "abuse of discretion" standard for appellate review).

in any system of appellate review recognizing those standards of practice.⁵⁰

As a consequence, criminal practitioners are likely to find few unpublished decisions of significant aid for their clients.⁵¹ In criminal appeals this means that the prosecution's arsenal will be strengthened significantly once the State or government is permitted to search not only published, but unpublished, decisions to find support for the verdict. To the extent that the imprecision will generate additional affirmances, the overall picture is somewhat bleaker than the current landscape in "no-citation" jurisdictions.⁵²

Arguably, the same line of analysis will hold for dispositions in civil contexts, in which case volume is characterized by a substantial number of "routine" affirmances. For instance, the abuse of discretion standard of review results in many affirmances on issues that might be resolved by reversal, were *de novo* review appropriate. These dispositions appear routine because the controlling question is not the underlying legal question, but merely whether the initial decisionmaker abused its discretion in ruling unfavorably to the appellant. The "routine" nature of these appeals results in unpublished decisions because the disposition, rather than the underlying legal issue, is, in fact, "routine." Over the long run, the increasing numbers of unpublished affirmances will create a body of case law in which similar issues are buried in

50. See Elizabeth M. Horton, Student Author, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. Rev. 1691 (1995):

[H]igh rates of nonpublication may be justified in many of these areas. Many of these areas (immigration, social security, prisoner petitions, labor and civil rights) have high rates of frivolous appeals because the benefits to be gained if the appeal succeeds are so high and disincentives to appeal are so low, especially when the appellant is not bearing legal fees. Moreover, in some areas the standard of review is deferential. Most unpublished dispositions are summary affirmances of the district court's holding, suggesting that not much new precedent is being developed.

Id. at 1702 (emphasis added, citations to notes omitted).

51. This likelihood is also reflected in the fact that reversals comprise a greater percentage of published opinions in criminal cases than unpublished opinions. See Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeal*, 3 J. App. Prac. & Process 199, 218-21 (2001); Wasby, *supra* n. 17, at 338.

52. The practice of affirming without opinion may actually inure to the criminal defense bar's benefit in some jurisdictions. This judicial tack of convenience has been criticized, *supra* n. 47, but in fact, an affirmance without formal opinion may be preferable to a more developed disposition that will come to serve as precedent.

the application of the abuse of discretion standard of review. Appellants will find little favorable precedent in these decisions, while the court will discover a lengthy history of treatment of similar issues as “routine.” Ironically, in the long run, “no-citation” rules may actually serve to insulate appellants, along with the reviewing courts, from the consequences of less rigorous appellate review.

In the best of all worlds, the most skilled jurist would decide each case and render an opinion that reflect well on her skills and does justice. In the world of resource limitations, this is less likely to happen, as staff attorneys and law clerks decide more cases and the appellate bench becomes less attractive to lawyers capable of performing at the highest levels of professional expertise.

*B. The Impact on Litigation of Changes in Access
to Unpublished Opinions*

The availability of many courts’ unpublished opinions in an online format suggests that arguments citing access problems—which may justifiably have prompted “no-citation” rules when only some opinions were deemed to warrant publication in printed form—have lost their force.⁵³ To a very important extent, this suggestion is true. Online publication, cost-effective when compared with distribution of printed texts, does provide broader access to the work of those courts authorizing online publication of opinions not otherwise selected for publication. However, it also suggests additional problems and burdens for counsel.

Most significantly, the elimination of the publish/do-not-publish distinction in assigning precedential value to the work of an appellate court means that an attorney must review the entire body of the court’s work. Lawyers would be obliged to research

53. See Robel, *supra* n. 16, at 945 (citations omitted):

By forbidding citation, the courts hope to conserve the presumed savings of nonpublication. First, if cases could be cited and therefore would be used by a wide audience seeking authority, judges might feel compelled to do a better job writing them, and so the assumed savings in judicial time would be lost. Second, savings in consumption costs would be lost because litigants would feel the need to research these opinions, if they could be cited, and publishers would publish them. Finally, because the courts’ distribution rules assure that access to these opinions will not be uniform, the no-citation rules supposedly insure that those litigants who have unusually large access to unpublished opinions will have no incentive to make use of that access in unfair ways.

unpublished, but available, opinions as well as published opinions in order to bring appropriate authority to the attention of the appellate court. Lawyers practicing before courts in which unpublished opinions may be cited as precedent already bear the burden of researching those decisions, a burden made doubly hard because courts may not find themselves duty-bound to make their unpublished opinions available in a readily researched form. For example, the Fifth Circuit, which treats unpublished opinions as theoretically retaining precedential value, does not authorize their publication by online services.⁵⁴

In fact, Model Rule of Professional Conduct 3.3(a)(3) directs appellate counsel to provide the court with adverse authority.⁵⁵ This means, of course, that a lawyer might intentionally fail to research unpublished opinions in order to insulate himself from liability for a knowing failure to disclose, although it is unlikely that lawyers ever really face the prospect of being disciplined for failure to disclose adverse authority.⁵⁶ However, inclusion of unpublished authority in the universe of precedent that may bind a court underscores the need for the attorney to make the relevant search.

Of course, the same ethical rules should work to the advantage of counsel operating in less well-organized or well-funded contexts because opposing counsel will also be under a duty to research and disclose adverse precedent to the court. To the extent that unpublished decisions rest on applications of general principles to factually imprecise recitations of key facts, however, it will be easier for counsel to conclude that apparently

54. 5th Cir. R. 47.6; *see Hannon, supra* n. 51, at 211, 222. This represents a substantial research problem, particularly for non-institutional litigants who may not have access to databases created by accumulation of unpublished printed opinions over time.

55. "A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." ABA Model R. Prof. Conduct 3.3(a)(3).

56. Appellate courts are more likely to simply discount advocacy that reflects a failure to disclose controlling authority, or to use oral argument as an occasion to upbraid offending counsel, rather than to refer the matter to a disciplinary committee. Counsel's error may be unintentional, or at best, negligent, which would not necessarily justify sanction. Alternatively, a reviewing body comprised of practitioners and laypersons might find the violation trivial in comparison to an opinion expressed by an appellate panel. Given the sheer volume of precedent in some jurisdictions, failure to find and cite clearly appropriate controlling authority might nevertheless be viewed as an omission, rather than the type of action warranting discipline.

adverse authority is actually distinguishable and not controlling. Thus, the ethical rule compelling disclosure may prove ineffective in guaranteeing faithful adherence to unpublished precedent in the argument of cases, even if an appellate court attempts to ensure correct application of unpublished authority in the resolution of claims.

What is more troubling, however, is that searching the universe of case law is now more time consuming and more expensive, because the attorney risks an ineffectiveness claim if she fails to locate favorable unpublished authority that would have made a difference in the disposition of the client's case. This is particularly burdensome for the often under-compensated court-appointed attorney. Yet compensation rates do not always cover the costs of online research, even when that research is relatively inexpensive. Moreover, the time spent searching for unpublished authority when published authority would otherwise appear dispositive, or at least highly supportive, is probably not time that will be compensated in the average case, if only because of fiscal limitations placed on compensation schemes.

For attorneys operating with the benefit of research capabilities provided by an employer, this research obligation will increase the time involved for investigating authority for each case handled, but perhaps not markedly. Nevertheless, the real problem for many appellants' counsel in criminal cases lies in the fact that the universe of unpublished decisions typically reflects an even higher percentage of affirmances than the universe of all dispositions. Reversals, almost by definition, occur when a major flaw in the proceedings has produced prejudice sufficient to warrant relief. Those cases will usually involve the types of issues and application-of-law scenarios that are implicit in notions of publication-worthiness. So for some litigants, expanding citation options to include unpublished decisions will not result in advantages in arguing claims. It will, however, likely necessitate greater resources being expended by counsel searching for precedent that will not likely result in favorable results.

The access problem suggests a series of questions that should be addressed before a judicial rush to unwind long-standing precedent and citation rules occurs.

1. Retroactive and Prospective Application of New Citation Principles

There already exists in many jurisdictions a substantial body of unpublished decisions that cannot be readily accessed. Many unpublished decisions predate online research vehicles; others were either never published in online format or have been withdrawn. Altering the universe of precedent to include previously issued unpublished opinions poses theoretical problems when an appropriate database does not exist for reliable research. For example, if the rule change contemplates reliance on previously issued, unpublished opinions, how can counsel and the courts protect against selective use of newly issued, favorable precedent that would be less compelling if weighed against previously issued unfavorable precedent that may not be generally available? Absent access to a comprehensive database, neither the parties nor the court can protect against selectivity in designation of precedent or injustice in the individual case because the parties and the court may be unable to use precedent that would have been controlling if found and cited.

On the other hand, prospective application of the rule might appear to solve this problem at first blush, while offering some other benefits. For instance, prospective application notifies judges and supporting legal staff that precision cannot be sacrificed in any disposition simply because the supporting opinion will not be published and, thus, open to public scrutiny. Additionally, prospective operation of the rule will necessarily press for the creation of new databases which are permanent and comprehensive, avoiding the problem of selective reliance on unpublished precedent not readily available to counsel or the court in an accessible format.

To the extent that appellate courts are able to reconstruct comprehensive databases from records of unpublished decisions, they may be obligated, by abandonment of a “no-citation” rule, to create such databases and make them available to researchers in at least an online format. The use of court web sites could accomplish this, although not without some substantial cost for the initial entry of data. Similarly, the databases created could simply

be made available to online research vehicles for incorporation into existing databases.⁵⁷

Designating a rule change in this area as prospective-only also raises another issue. Judge Arnold's thesis is essentially that all pronouncements of law by federal courts constitute the "law" upon which future litigants may rely. If that is true, how can judicial rulemaking discard previously unpublished cases from citation and reliance questions? If the appellate courts are violating the terms of the authority delegated to them under the Constitution by designating some decisions as nonprecedential, how can a court constitutionally adopt a rule of prospective application, yet continue to deprive prior unpublished decisions of precedential authority?

2. *Disparity in Access to Unpublished Opinions*

Resource disparity is almost inherent in many areas of appellate practice. Large appellate offices, typically those of attorneys general or public agencies, enjoy an advantage over smaller offices and solo practitioners in terms of resources available for practice.⁵⁸ Even when fiscal resources are roughly

57. At that point, would the typical disclaimer disappear because there would be no point in denoting those decisions that had been labeled "Do not publish?" Or would prior designation of an opinion as unpublished supply another layer of strength to the hierarchy of authority as controlling or persuasive? In other words, would a previously unpublished decision carry the same precedential weight as a published decision? Should an unpublished decision of one circuit be viewed as having the same precedential weight as a published decision of another? Judge Arnold suggested this point in his earlier essay in *The Journal*. He noted that the Fifth Circuit relied on an unpublished decision of the Eighth Circuit in *U.S. v. Kocourek*, 116 F.3d 481 (8th Cir. 1997) (per curiam) (table), to decide *U.S. v. Luna*, 165 F.3d 316 (5th Cir. 1999). Arnold, *supra* n. 1, at 220-21. The irony lies in the fact that within the Eighth Circuit, citation to *Kocourek* would have arguably violated the "no-citation" rule. 8th Cir. R. 28A(i) (adopted as of Dec. 8, 1994). In a similar vein, when the Eighth Circuit, en banc, vacated the initial panel decision in *Anastasoff*, 235 F.3d 1054, 1055 (8th Cir. 2000), it observed the conflict between its prior, unpublished decision in *Christie v. U.S.*, No. 91-2375MN (8th Cir. Mar. 20, 1992) (per curiam) (unpublished), and a published holding of the Second Circuit, *Weisbart v. U.S.*, 222 F.3d 93 (2d Cir. 2000), issued while *Anastasoff* was pending before the panel. The panel had concluded that it could not overrule a prior decision of the circuit based on authority from another circuit, and the panel opinion reflected no definitive statement of the relative merits of the two holdings. 223 F.3d at 905 n. 15.

58. See Horton, *supra* n. 50, at 1701 (arguing that criticism that repeat litigants would be advantaged by greater access to unpublished opinions over "one-shot" litigants has been rendered less legitimate by access to unpublished opinions on computer systems and publication of some unpublished opinions in administrative agency reports and newsletters). But this view presupposes that access to all unpublished opinions in online

comparable, a factor that occurs when attorney caseloads in large offices are such that time available for any single appeal compromises representation ability of individual attorneys within the office, the larger appellate office still enjoys certain benefits that accumulate over time in practice.⁵⁹ Collegiality alone is a significant factor in appellate practice, but apart from the opportunity to share ideas with colleagues, the actual benefits of shared litigation experience are likely to include generation of important data or databases that will be available for argument in cases presenting common issues. These concerns are not implicated by Judge Arnold's reasoning, of course, but they suggest the substantial advantages that accumulated experience, including experience in individual cases resolved with unpublished decisions, offers from practice in a large office handling a volume of appeals in a common area of law.⁶⁰

Moreover, bodies of unpublished case law may exist in forms that would permit large appellate offices, typically public agencies, to create new databases by manual searching of case files that were concluded with unpublished decisions. This would permit the creation of a database accessible by one office, typically representing a governmental entity,⁶¹ but not generally available to opposing counsel. Of course, the database might be characterized as a public document available for disclosure to opposing

format is available, which is not yet correct. And selective publication of some unpublished opinions in specialized reporters necessarily means that legal editors, not the courts, are determining which opinions should be made generally available.

59. Other commentators have suggested that institutional litigants have certain distinct advantages in the publication process by virtue of their involvement in large numbers of cases. See Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 Harv. Civ. Rights-Civ. Libs. L. Rev. 109, 130-31 (1995) (also noting the institutional litigants have better access to the information contained in unpublished opinions); Robel, *supra* n. 16, at 956-57 (concluding that institutional litigants, particularly government units, are able to rely on reasoning and citations to authority in unpublished opinions to develop arguments in future cases).

60. Indeed the New Mexico rule prohibiting citation to unpublished opinions recognizes this very problem:

An opinion, decision, or memorandum opinion, *because it is unreported and not uniformly available to all parties*, shall not be published nor shall it be cited as precedent in any court.

N.M. R. App. P. 12-405(C) (emphasis added).

61. This likelihood is suggested by Charles G. Mills, *Anastasoff v. United States and Appeals in Veterans' Cases*, 3 J. App. Prac. & Process 419 (2001) (discussing veterans' disability appeals).

counsel,⁶² even though a strong argument could be made that the creation of the database itself constituted the work product of the appellate office. As work product, the database might not be subject to disclosure, just as prosecutors' records of prior jury service of citizens used to assist trial counsel in making peremptory challenges are typically not subject to disclosure to the defense. Further, the database might be created selectively, so that only affirmances would be included. Because the available database would not contain reversals, it would likely not include prior unpublished "precedent" contrary to the general interests of the agency's principal client(s). Individual attorneys within the office would be excused from ethical sanction based upon failure to provide contrary authority because the database searched would not, itself, be designed to include decisions resolved contrary to the client's interests. In this event, the disclosed database would be of little use to opposing counsel.

Finally, the most critical immediate problem would appear to be that private providers of case information do not necessarily include all unpublished decisions in their electronic databases. Thus, Westlaw, for example, determines which unpublished opinions will be included in its online database for access by users.⁶³ Ultimately, this means that West Publishing Company editors, rather than appellate courts, would determine the scope of existing precedent that may appropriately be relied upon by litigants.⁶⁴ The only alternative to privatization of precedent determination will be the creation and maintenance of publicly accessible databases of all published opinions by appellate courts

62. See e.g. Deborah Leonard Parker, *Electronic Filing in North Carolina: Using the Internet instead of the Interstate*, 2 J. App. Prac. & Process 351, 358-59 (2000) (noting that both the North Carolina Attorney General's Appellate Division and the state's Office of Appellate Defender now access opposing briefs through the "brief bank" created by the state's e-filing system for appeals). Another commentator suggests that "[a]ccess can also be equalized through discovery requests to institutional litigants for copies of the dispositions (whether published or unpublished) of cases in which they were involved over the same issues." Horton, *supra* n. 50, at 1701.

63. See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 Wake Forest L. Rev. 71, 98 n. 165 (1999) (noting that Westlaw does not contain all unpublished opinions from circuits permitting online publication, but selects cases on individual merits for inclusion on its electronic database).

64. For a compelling look at the magnitude of problems associated with researching unpublished opinions, see Hannon, *supra* n. 51.

or jurisdictions.⁶⁵ Even then, there may be legitimate concerns that databases could be tampered with by digital invasion, suggesting an interesting *ultra vires* parallel to the process of depublication, by which existing precedent in some jurisdictions is now retroactively stripped of its precedential value.⁶⁶

3. *The Impact on the Tradition of Printed Opinions*

The access argument may proceed on the assumption that online access to a court's decisions represents the only consideration for publication/citation rules. Once online publication makes the entire body of a court's work available to legal researchers and the public, future litigants' interests are only frustrated by inclusion of notations in an online document indicating that the decision may not be cited as precedent in future cases. In a real sense, the "not for publication" notation teases counsel with the prospect that a similar rationale will be available in a factually similar case to afford relief for the client, yet the question of whether the court will really reach that conclusion remains. The online availability of an opinion denoted "not for publication" undermines the concept integral to the no-citation rule, that the court itself has determined that the opinion does not warrant reliance as precedent or that its precedential value is limited to application of *res judicata*, collateral estoppel, or law of the case doctrines. Of course, unless there is something fundamentally flawed in the opinion or disposition ordered by the court, there is no justification for designating the decision as a

65. Judge Holloway suggested the creation of a public database in her dissent to the adoption of the Tenth Circuit's "no-citation" rule:

We can make the rulings, together with a simple index, available at our circuit library and can distribute the rulings to the clerks of the district courts, to the state bar associations, and to other depositories at law schools, without undue burden. Making the rulings available in such places, with a rudimentary index, will afford the public, and bar and the district judges reasonable access to our unpublished rulings.

955 F.2d at 37-38. Of course, the more feasible approach, with fifteen years of hindsight, is to publish all rulings online.

66. See Michael A. Berch, *Analysis of Arizona's Depublication Rule and Practice*, 32 *Ariz. St. L.J.* 175 (2000); Steven B. Katz, *California's Curious Practice of "Pocket Review,"* 3 *J. App. Prac. & Process* 385 (2001) (both articles discussing depublication of previously issued opinions in their respective jurisdictions).

second-class product not eligible for future reliance by litigants in the same court.

The rule change proposed as a constitutional necessity by the *Anastasoff* panel would have an additional consequence if adopted as a general proposition by other courts. It would necessarily increase the volume of published opinions required for reproduction on paper or inclusion in online form by requiring that all opinions retain precedential value. The *Anastasoff* court rejected the relationship between publication in any particular format and citation rules, of course.⁶⁷ But, in fact, there would be a consequence implicating the future of printed decisions. Unless legal publishers would be willing to expand use of paper publication or to publish incomplete sets of judicial decisions, the demise of printed media as vehicles for disseminating judicial decisions would be rapidly hastened. Even though unpublished opinions now typically are much shorter than at least more significant published opinions, courts would likely have to increase their work to accommodate the need for greater explication and precision in their decisionmaking. Thus, opinions previously targeted for nonpublication would likely become longer as the judges and their staffs labor to bring them up to the standards imposed for publication of opinions.

Even in the short run, the rule change would likely have dramatic consequences. Disposition time—the time between submission of the case and issuance of the ruling and supporting opinion—would likely increase as a result of the need to ensure the quality of reasoning and writing in all opinions. This delay itself would not preclude print publication, but it would make printing of all decisions more time-consuming and costly. As reporter subscriptions decline in response to the availability of other vehicles for legal research, the increased cost and some delay in publication of all decisions would tilt the playing field even further toward reliance on online sources, whether offered by commercial concerns or courts themselves, and toward discontinuance of publication of printed reporters.⁶⁸

67. 223 F.3d at 903: “We do not mean to suggest that the Framers expected or intended the publication (in the sense of being printed in a book) of all opinions. For the Framers, limited publication of judicial opinions was the rule, and they never drew that practice into question.”

68. The last publishing authority for printed reports will undoubtedly be the United States Supreme Court, whose written opinions undoubtedly will continue to be published by the

For the profession, this loss of the paper alternative will likely stress most counsel advanced in age who dislike the use of computers. But the change will force the entire profession to adjust its sense of trust.⁶⁹ Reality tells us that online data can be changed without notice, something not true about a printed document.⁷⁰ Lawyers and courts will eventually accept online sources as beyond reproach, even though we know this is technically not true. This reality is a consequence of technological advances encroaching on established custom in practice, but it is one that will not be avoidable for practitioners or courts.

CONCLUSION

Anastasoff may be seen in two starkly different contexts. First, it clearly represents one vision of constitutional necessity, as expressed in Judge Arnold's opinion for the Eighth Circuit panel. In this view, the change in citation rules is dictated by the historic power of the Constitution, as contemporarily applied, to mandate

Government Printing Office for some time after all other reporters have been discontinued. For an interesting history of publication of legal opinions and transformation of legal research by development of online dissemination and other means of compilation, such as CD-ROM technology, see Lynn Foster & Bruce Kennedy, *Technological Developments in Legal Research*, 2 J. App. Prac. & Process 275 (2000).

69. A leading academic law librarian has reflected on the role of technology in changing our traditions and methods in thinking like lawyers. See Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. App. Prac. & Process 305 (2000). Professor Berring issues a call for "a new Blackstone" in his essay to "reconceptualize the law, legal categories, and legal education" to ensure that we retain human control over information and its use in the legal system. *Id.* at 317-18.

70. For instance, when an opinion published in print format is withdrawn, a notice of the court's action will typically follow. In the online context, such a notice of withdrawal can be removed. See e.g. *Powell v. State*, 906 P.2d 765, 1995 WL 425027 (Okla. Crim. App. July 14, 1995). In an earlier online version of *Powell*, the court noted that its prior opinion, published at 902 P.2d 1119 in the advance sheets had been withdrawn and would be republished with a later opinion. In the later opinion, the court indicated that rehearing had been granted. 906 P.2d at 784. It explained its rationale for granting rehearing while not granting relief, noting that it did so to "correct an omission in the Court's opinion." *Id.* The online report was altered to reflect publication of the revised opinion which will appear in the bound volume. See 1995 WL 425027 and 1995 WL 559633. Not only does online publication offer the potential for altering the court's publication decision, but an opinion only appearing online can later be simply deleted in its entirety. See J. Thomas Sullivan, *Redefining Rehearing: "Previewing" Appellate Decisions Online*, 2 J. App. Prac. & Process 435, 441 n. 17 (2000) (noting withdrawal of Oklahoma Court of Criminal Appeals' initial opinion in *Dodd v. State*, 1999 OK CR 29, 1999 WL 521976 and its non-availability on either the Oklahoma courts' Web site or through the online private service provided by Westlaw).

the result. The practical consequence of this view, however, is that some litigants—typically appellants—will be confronted by a substantial body of unfavorable law that has traditionally not been a necessary factor in the decisionmaking process. For their counsel, the requirement that unpublished decisions be researched and then, disclosed and distinguished, if possible, will simply add to counsel's workload in rendering effective assistance without appreciably improving the client's chances on appeal.

The second view is entirely different. In this view, a change in both publication and citation rules will be dictated by technological developments. The publication vehicle for dissemination of all decisions is readily available: online publication. Because it is available, the publish/do-not-publish designation has lost some sense of rational, if not moral, authority. The availability of opinions not designated for publication undermines judicial credibility in suggesting that for some well-defined reason, these accessible judicial expressions do not warrant the faith of the very courts that have issued them. The continuing rationale for not publishing, and thus, not permitting citation, is corrupted by the implicit notion that there is something flawed about these decisions and their supporting opinions that warrants their designation as second-class products of the appellate decisionmaking process.

Those courts that currently do not permit the online publication of their unpublished opinions—a posture certainly consistent with the not-for-publication determination—also risk the suggestion that there is something inherently unworthy about part of their work. The determination can no longer be grounded in notions of economic value in keeping access to the body of the law affordable or usable. Sooner or later, enterprising publishers will likely find a way to acquire and publish, online, even those judicial opinions that courts have not released for online publication. Once that happens, an emerging market in this type of information will press courts to make their work available.

In the long run, it is likely that considerations of availability and access that will prove most challenging to courts insistent on no-citation rules, rather than agreement that the judicial power accorded by Article III has been usurped by the federal courts in their rulemaking function. At some point, the questions posed here will be addressed and resolved, probably

by decisions that will first appear online, but not carrying the notation “Not for publication.” The unresolved issue is whether they will carry a different notation: “Not suitable for citation.”

