

Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?

KENNETH J. SCHMIER* AND MICHAEL K. SCHMIER**

The purpose of this article is two-fold: 1) to bring no-citation rules—court rules that ban mention of *most* appellate court decisions—to the attention of the public; and 2) to shed light on their insidious compromise of stare decisis and vital democratic processes. We have tried to bring the press' attention to no-citation rules, because we believe the public should not stand for them. The press has, for the most part, refused to cover this issue.

I. Are You Aware of What the Judiciary Has Done?

As a reader of this journal, you might be aware of major changes in government institutions. However, you might not know that 93% of California appellate court opinions are illegal to mention in California courts.¹ Pursuant to a California court rule, “[a]n opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party.”² This practice is not confined just to California. The United States Court of Appeals for the Ninth Circuit [hereinafter 9th Circuit] has a similar rule, Rule 36-3(b), which provides that “[u]npublished dispositions and orders of this court may not be cited to or by the courts of this circuit, [ex-

* Kenneth J. Schmier is Chairman of the Committee for the Rule of Law, an ad hoc group he formed with his brother Michael Schmier to bring attention to the compromise of the judicial system caused by no-citation rules. He is a graduate of the University of California, Hastings College of the Law (1974) and is a non-practicing lawyer, entrepreneur and systems designer. He is inventor of the NextBus Information System serving transit agencies worldwide and is CEO of the company of the same name.

** Michael K. Schmier is Dean of Academic Affairs and Professor of Law at East Bay Law School in Oakland, California. He graduated from the University of Michigan Law School (1969) and practices law in Emeryville, California. Michael Schmier ran for Attorney General of California in 1998 and 2002.

1. 2004 JUD. COUNS. OF CAL. CT. STAT. REP. (2004), at <http://www.courtinfo.ca.gov/reference/documents/csr2004.pdf>.

2. CAL. CT. R. CODE §977 (West Supp. 2004).

cept under certain circumstances].³ Currently, virtually all decisions are “published” in that they are available via the Internet. “Unpublished” refers to decisions the judges themselves designate not to be published in official reports. There is little significance to the “unpublished” designation other than the fact that no-citation rules make these decisions unmentionable. In the 9th Circuit, 87.2% of decisions are unpublished, and therefore illegal to mention.⁴ You may have thought that lawyers are free to select pertinent authorities from all past appellate court decisions, but this is no longer true. In fact, the vast majority of appellate decisions are no longer precedents, or even academic opinions of the content of our law, but rather mere legal nullities.

You are not alone if you were not aware of this. No-citation rules are largely unknown by politicians,⁵ journalists,⁶ attorneys general,⁷ and even most lawyers, not to mention the general public. It might baffle you that such a fundamental change in judicial process has gone largely unnoticed, but it is hardly surprising. The judiciaries have made no effort to publicize this change, and popular news outlets, with few exceptions, have refused to cover the subject.⁸ Below, we will explain and illustrate how the stare decisis doctrine is affected by no-citation rules, lay out a brief history of no-citation rules, provide some of their claimed justifications, and argue that no-citation rules undermine vital democratic processes to an extent that compels their abolition.

II. How No-Citation Rules Affect Stare Decisis

Stare decisis (Latin for “let the decision stand”) is legal shorthand for considerations judges must give when both following and making legal precedent. Stare decisis controls not just how cases are to be decided in light of existing cases, but also controls the caprice of judges by requiring them to suppose that all similar future cases will be decided according to their instant decision. This accountability is not only sobering, but also en-

3. 28 U.S.C §36-3(b) (2004).

4. 2004 ADMIN. OFF. OF THE U.S. CTS. ANN. REP. OF THE DIRECTOR, TABLE S-3 (2004), at <http://www.uscourts.gov/judbus2004/tables/s3.pdf>.

5. The authors have personally approached many politicians, none of whom were aware of no-citation rules.

6. See Scott Winokur, *The Law's Dirty Little Secret*, S.F. EXAM’R, Dec. 29, 1998, at A17, <http://www.nonpublication.com/winokur.html>.

7. Author Michael Schmier personally queried six former United States Attorneys General. None were aware of no-citation rules, and only Ed Meese was aware of unpublished appellate opinions.

8. The authors have made innumerable contacts to alert the media to all developments regarding this issue.

courages the examination of decisions from all perspectives, ensuring a result consistent with legal principles. Stare decisis is a bureaucracy buster, since it does not allow issues to be swept under carpets; rather, it requires judicial decision one way or another, these decisions in turn becoming a starting point for further examination of a particular issue and action by the body politic.

The constraints of stare decisis are fundamental to the judicial process. The late Judge Arnold of the United States Court of Appeals for the Eighth Circuit (hereinafter 8th Circuit) recognized this when he wrote that “principles of . . . decision[s] are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence.”⁹ The constraints of stare decisis are thought to be fundamental to the judicial process. Stare decisis, which “serves to take the capricious element out of law and to give stability to a society,”¹⁰ is rendered completely ineffective and “cannot operate as a ‘workable doctrine’ as long as courts . . . are able to reach directly contrary results on diametrically opposed legal theories, by the simple expedient of publishing one set of results but not the other.”¹¹

Stare decisis is fundamental to our judicial system, and our judicial system is part of the foundation of our democracy, thus its compromise by no-citation rules destabilizes the system. Judge Arnold¹² wrote, “[t]his practice [of refusing to recognize cases as precedent because those cases lack significance except to those involved] disturbs me so much that it is hard to know where to begin in discussing it.”¹³

III. One Example of Abandonment of Stare Decisis

Judge Kozinski,¹⁴ who has appeared to be the leading apologist for no-citation rules and one of the few to defend no-citation rules in writing,¹⁵

9. *Anastasoff v. United States*, 223 F.3d 898, 903-04 (8th Cir. 2000) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§377-78 (1833)), *vacated as moot*.

10. William Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

11. Gideon Kanner, *The Unpublished Appellate Opinion: Friend Or Foe?*, 48 CAL. ST. B.J. 386, 445 (1973) (quoting Seligson & Warnloff, *The Use of Unreported Cases in California*, 24 HASTINGS L. J. 37, 53 (1972)).

12. Judge Arnold came close to being appointed to the United States Supreme Court. He was rejected only because of a cancer diagnosis.

13. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222 (1999).

14. Judge Kozinski is a widely respected and outspoken judge of the 9th Cir.

15. *See generally* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions*, CALIFORNIA LAWYER, June 2000, at 43,

held counsel for the City of Covina's cite of a prior unpublished 9th Circuit opinion to be a violation of Rule 36-3(b) that warranted punishment.¹⁶ Counsel for the City of Covina had attempted to cite *Kish v. Santa Monica*,¹⁷ a case which would have directly relieved the City of Covina of liability for a dog bite where police did not announce the release of a dog during the chase of a hidden suspect.

Counsel advised the court that *Kish* was unpublished. *Kish* was the only prior decision of the 9th Circuit squarely on point. Judge Kozinski explained in the citable *portion*¹⁸ of *Sorchini* that:

[b]ecause *Kish* is not precedent, neither *Kish*'s holding, nor *Kish*'s observations about the state of the law, have any bearing on this inquiry. The only way *Kish* could help counsel's argument is prohibited by . . . Rule 36-3—by persuading us to rule in the City's favor because an earlier panel of our court had ruled the same way."¹⁹

Curiously, despite appellate resolutions of the "unannounced police dog biting arrestee" issue in both *Kish* and the unpublished portion of *Sorchini*, the existence of Rule 36-3 has allowed the legal issue to remain unresolved. While the appellate court cries loudly about the volume of litigation, it has left future litigation, which should be made unnecessary by these decisions, all but inevitable.

IV. Does *Sorchini* Mark the End of Common Law as We Know It?

Lawyers are supposed to cite cases showing the court what it has done with similar facts in the past. This supposition cleverly places the burden of knowledge required for obtaining equal treatment upon litigants, and thus protects the integrity of our courts. In turn, courts are supposed to respect past decisions. How is it then that *Kish*, a prior holding of the court on exactly the same facts, cannot be mentioned to the *Sorchini* court? Judge Kozinski tells us *Kish* cannot be mentioned because Rule 36-3 makes it not precedent. But Rule 36-3 does not deny precedential value to *Kish*; it only prohibits citation of unpublished cases. It is circular for Judge Kozinski to say *Kish* is not precedent *solely* because it is not citable and that it is

<http://www.nonpublication.com/don't%20cite%20this.htm>; William Glaberson, *Ideas & Trends: Unprecedented; Legal Shortcuts Run Into Dead Ends*, N. Y. TIMES, October 8, 2000, (Week in Review), at 44, <http://www.nonpublication.com/glaberson.htm>.

16. *Sorchini v. City of Covina*, 250 F.3d 706, 708-09 (9th Cir. 2001).

17. *Kish v. City of Santa Monica*, 216 F.3d 1083 (9th Cir. 2000) (unpublished disposition).

18. Courts routinely publish only portions of decisions, leaving the balance of the decision unpublished. Presumably only the law contained in the portion of the decision published can be cited in other controversies. Here, only matters related to Rule 36-3 are citable, and law used to resolve the case itself is not.

19. *Sorchini*, 250 F.3d at 708-09.

not citable *solely* because it is not precedent. Missing from Judge Kozinski's rationale is some reason *Kish* is not precedent, and no reason is stated.

Precedents, by definition, are the prior holdings of the courts regarding similar fact patterns. To say that *Kish* is not precedent for *Sorchini* is to say *Sorchini* is unprecedented. The court, however, already decided in *Kish* the issue presented in *Sorchini*, so by logic *Sorchini* is precedent. Only by redefining the meaning of precedent can Judge Kozinski make *Sorchini* unprecedented and *Kish* not precedent.

Something is obviously amiss here. Denying opinions of appellate courts prospective application without compelling reasons should raise some suspicion. Selective prospectivity, or limiting the prospective application of an opinion, has been held unconstitutional.²⁰ Can the contrivance of making the same opinions merely uncitable avoid the ban of selective prospectivity?²¹

Litigants are entitled to the respect of having their matters ultimately decided by law—that is, according to rules that are to be the same for everyone.²² Before no-citation rules, this requirement was met. Our common law legal system could (theoretically) be described as intrinsically just, because each decision became law for all. But this façade of intrinsic justness cannot be maintained when 93% of decisions are not law for everyone. We consider this a major change—indeed an abandonment—of the common law system.

V. Foreseeable Future Damage Caused by Abandonment of the Common Law System

Even if courts can make decisions that are not considered precedents,

20. Selective prospectivity has been held unconstitutional in both civil and criminal matters. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) and *Griffith v. Kentucky*, 479 U.S. 314 (1987).

21. The California Court of Appeal appears to have answered yes. See *Schmier v. Sup. Ct. of Cal.*, 78 Cal. App. 4th 703, 93 Cal. Rptr. 2d 580 (2000); *Schmier v. Sup. Ct. of Cal.*, 96 Cal. App. 4th 873, 117 Cal. Rptr. 2d 497 (2002). See also *Schmier v. Sup. Ct. of Cal.*, No. A101206 (San Francisco Super. Ct. Dec. 16, 2003), available at <http://www.nonpublication.com/schmiervsupremeappeal.pdf>.

22. The willingness of a court to follow its own law into the future has been a fundamental element of justice since time immemorial, as shown in this summary of a tale of Talmudic origin: Eliezar, who was Abraham's servant, went down into Sodom. There he encountered a thief attacking a stranger. When he interceded on behalf of the stranger, the thief threw a rock into the forehead of Eliezar and Eliezar began to bleed profusely. The thief then presented Eliezar with a bill for the medical service of blood letting. When Eliezar refused to pay, the thief took him to Sodom's court. The judge ruled in favor of the thief. Shocked at the result, Eliezar picked up a rock and threw it into the forehead of the judge, drawing blood. Said Eliezar, "Take what you owe me and pay the thief your judgment."

it seems unfair that they can make their own decisions entirely unmentionable in our judicial system, no matter how enlightening those decisions might be. What honorable judge can really be comfortable preventing a criminal defendant from truthfully arguing that the appellate court has already determined that the acts he is charged with do not constitute a criminal offense? Defendant City of Covina may not elicit the same compassion as a criminal defendant, but defendants in civil cases should be entitled to show how the courts have treated others so that they won't be treated differently without explanation. We see another constitutional issue here—the right to free speech and we are disappointed that California and Judge Kozinski reject this right.²³ It is a right that exists in our courts; indeed, it is linked inextricably to equal protection and due process. They cannot exist if litigants and courts are legally bound to *ignore* previous court decisions, and without them, the foundation of our judicial system is compromised.

If the judicial branch of our government system can make its prior actions of no consequence in its treatment of present litigants, can other branches of government make their treatment of others irrelevant? Our nation's founders and early judges recognized that unbridled discretion is the root of corruption in government. William Cranch, an early DC circuit court judge, writing about the necessity of reporting cases (which we think is analogous to the necessity of citing cases) recognized:

In a government, which is emphatically styled a government of laws, the least possible range ought to be left to the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps, nothing induces more to that object than the publication of reports. Every case decided is a check upon the judge: he cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues of corruption are thus obstructed, and the sources of litigation closed.²⁴

We predict that if every government branch has the power to treat citizens as it pleases without a common standard, then there will be no stopping corruption of our government functionaries.

VI. A Very Brief History of Uncitability

During the 1960s, lawyers objected that too many appellate precedents were being issued, unnecessarily filling bookshelves. In response, judiciar-

23. See *Schmier v. Sup. Ct. of Cal.*, No. A101206 (San Francisco Super. Ct. Dec. 16, 2003). See also Letter from Alex Kozinski, U.S. Circuit Judge, 9th Cir., to Samuel Alito, Jr., U.S. Circuit Judge, 3d Cir., Jan. 16, 2004 12, <http://www.nonpublication.com/kozinskiletter.pdf>.

24. William Cranch, 1 United States Reports (5 U.S.) iii (1803).

ies across America decided they would not publish “routine”²⁵ decisions of their courts. California Court Rule 976 was established in 1964.²⁶ California’s constitutional revision of 1966 allowed the California Supreme Court to selectively *publish* appellate court decisions²⁷ but the revision commission expressly rejected including a no-citation provision fearing it would constitute a “prohibition on enlightenment.”²⁸ Rule 976 provides:

(b) [Standards for publication of opinions of other courts] No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

- (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
- (2) resolves or creates an apparent conflict in the law;
- (3) involves a legal issue of continuing public interest; or
- (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.²⁹

The rule (and similarly that of the 9th Circuit) did not mandate that any decision be published for any reason—even if it constitutes a marked departure from existing law.³⁰ The decision of whether to publish or not was left principally with the deciding judges. This led to specialized attorneys searching court files for generally unknowable aberrant decisions and using them to ambush opponents. In 1977, California no-citation Rule 977 was added to address fairness concerns raised regarding these tactics.³¹ By prohibiting both parties to lawsuits and the judge from citing unpublished opinions, the judicial council deemed the legal contest fair. But no public

25. The definition of routine is still not clear. Moreover, many have noted that uncitable decisions are often far from routine. Professor Lawrence Solum said:

I find no citation rules inexplicable. I know a few areas of law in great depth (e.g. have read several thousand opinions). In those areas, it is my experience that very frequently, the unpublished opinions are the ones that address the important unanswered questions of law [and] the published opinions simply repeat the conventional wisdom. This pattern would appear to turn the purpose of designating opinions as unpublished on its head!

Posted by Lawrence Solum, University of San Diego Law School, to Stephen Barnett (Jan. 14, 2004) at http://lsolum.blogspot.com/2004_01_01_lsolum_archive.html#107401877288467498 (last visited April 1, 2005).

26. See CAL. CT. R. CODE §976 (West 1996).

27. CAL. CONST. art. VI, § 16.

28. CONSTITUTIONAL REVISION COMMISSION, Minutes (n.d.) (on file with authors)

29. See CAL. CT. R. CODE §976, *supra* note 28.

30. See *Schmier v. Sup. Ct. of Cal.*, 96 Cal. App. 4th 873, 117 Cal. Rptr. 2d 497 (2002).

31. CAL. CT. R. CODE §977.

hearings appear to have ever taken place, nor was the new rule publicized outside of legal circles.

Plenty of objections to no-citation rules were raised in and out of court. Notably, Judge Cole believed:

[A] fair reading of rule 977 of the California Rules of Court surely allows citation to the unpublished opinion. To hold otherwise leaves us in the Orwellian situation where the Court of Appeal opinion binds us, under *Auto Equity Sales* . . . but we cannot tell anyone about it. Such a rule of law is intolerable in a society whose government decisions are supposed to be free and open and whose legal system is founded on principles of the common law . . . with its elementary reliance on the doctrine of *stare decisis*.³²

An appellate department of the Superior Court of Los Angeles held the rule unconstitutional, but the appellate court removed the case on its own motion and vacated the decision.³³ Law professors bemoaned the serious decline in quality of appellate decision making.³⁴ A study by Professors William Richmond and William Reynolds indicated that in three federal circuits at least sixty percent of unpublished appellate decisions failed to meet minimal standards of quality.³⁵

No one seems to have voiced concern that the fairness of applying a rule equally to all sides in a contest, which is considered fair in sport and perhaps trial by fire, had no application to a judicial system promising justice under law. Judges fearing making bad precedent had a whole new decision option. A case could be resolved and, by law, only affect the present litigants. As Justice Thompson recognized:

32. *County of Los Angeles v. Wilshire Ins. Co.*, 103 Cal. App. 3d Supp. 1, 5, 163 Cal. Rptr 123 (1979).

33. *See generally* *People v. Valenzuela*, 86 Cal. App. 3d 427, 150 Cal. Rptr 314 (1978).

34. Monroe H. Freedman, Professor of Law at Hofstra University School of Law. From a Speech to the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit:

Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.

128 F.R.D. 409, 439 (1989).

35. "In a study conducted fifteen years ago, we found that twenty percent of unpublished opinions in nine of the eleven circuits failed to satisfy a very undemanding definition of minimum standards, and that sixty percent of the opinions in three circuits failed to meet those standards. There is no reason to think that the situation has improved in the years since." William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 284 (1996) (referring to William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 602 (1981)).

An imperfectly reasoned and generally result-oriented opinion may be buried in a non-publication grave. A panel may avoid public heat or appointing authority disapprobation by interring an opinion of real precedential [sic] value. More frequently, a panel may make a mistake . . . and fail to publish an opinion.³⁶

The scary responsibility of appellate judging was lifted. No longer accountable to the common law with public consequences of their decisions, appellate courts became comfortable deviating from law. Courts routinely began delegating decision-making authority to staff, and except for public formalities, largely did away with three perspectives, judicial or otherwise.³⁷ Where judges did not totally delegate to staff, they began casually determining results for clerks to backfill with opinions.³⁸ All of this allowed appellate courts to process ever-larger numbers of cases.³⁹ As a result, the use of uncitable decisions skyrocketed.

Lawyers and parties disgruntled by apparently wrong appellate opinions have coupled their petitions for rehearing with alternative demands that the appellate court make its decision citable as law for all. They reason that if their clients are to be burdened by a certain result, the decision should represent law for all. Such petitions have been uniformly denied.

When charges were brought that the appellate process was creating logical conundrums instead of clarifying the law—a reasonable issue, we think, to bring to the attention of the court—they were dismissed.⁴⁰ Lawyers complaining that their profession requires them to ascertain law for clients from appellate decisions, and that no-citation rules render the law uncertain, unpredictable, or even unknowable, have nonetheless been denied standing to question no-citation rules.⁴¹ Notably, a decision resolving the free speech issue presented by the application of the no-citation rule is itself uncitable, and both the California and U.S. Supreme Courts denied it

36. Robert S. Thompson, *Mitigating the Damage, One Judge and No Judge Appellate Decisions*, CAL. ST. B. J., Nov.-Dec. 1975, at 476, 480.

37. Robert S. Thompson, *Courts Shouldn't Put Publishable Data in Unpublished Opinions*, DAILY J., Apr. 22, 2004, <http://www.nonpublication.com/thompson.html>.

38. Thompson, *supra* note 37, at 513-14.

39. *Id.*

40. *See In re Michiko Kamiyama*, No. G022140 (Cal. Ct. App. 4th Dist. May 29, 1998), <http://www.nonpublication.com/newfiles/kamiyama.html>. An example of a reversal of a lower court in an appellate decision of first impression. What should a trial judge do if the same fact pattern comes before the court again? Stare decisis requires the court to act the same way. The court knows it has been reversed, but the no-citation rule prohibits the court from taking that into consideration. The law, by law, becomes unknowable.

41. *See Schmier v. U.S. Cir.*, No. CV-00-04076-VRW (Feb. 1, 2002), <http://www.ca9.uscourts.gov/ca9/newopinions.nsf/>.

review.⁴²

Attempts to challenge no-citation rules legally have been met with the refusal of courts to force any part of the judiciary to answer questions as to the no-citation practice.⁴³ The authors, determined to sue the judiciaries directly, brought suit in trial courts asserting that court rules should be made in administrative, not judicial capacities. That avenue of attack has not been questioned. We have brought five separate suits.⁴⁴ No judiciary has ever allowed any lawsuit to proceed far enough for a deposition inquiring as to practices of the appellate judiciary related to no-citation rules, or the factual or logical support for assertions used by the judiciary to support no-citation rules, to occur.

Judge Arnold criticized no-citation rules and held the making of non-precedential opinions unconstitutional, writing:

[Some] courts are saying to the bar: "We may have decided this question the opposite way yesterday, but that does not bind us today, and what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds judicial power, which is based on reason, not *fiat*.⁴⁵

But the case was vacated as moot after en banc review was granted.⁴⁶

We have sponsored bills to override no-citation rules in three sessions of the California legislature. The efforts have achieved limited success. Notably, the California Judicial Council parried AB 2404 (2000), introduced by Assemblymember Lou Papan by prospectively publishing unpublished decisions on the Internet for sixty days to counter a perception of secrecy.⁴⁷ The Assembly Judiciary Committee barely acknowledged AB 1165 introduced by Assemblymember Mervyn Dymally in 2003. In 2004, Chief Justice George personally convinced Senate Judiciary Committee Member Sheila Kuehl to withdraw SB 1655 by agreeing to appoint a panel

42. See *Schmier v. Sup. Ct. of Cal.*, No. A101206.

43. One problem is how to challenge the rule. The first *Schmier v. Supreme Court of California* case sought and obtained an order to show cause compelling the Supreme Court of California to come into a trial court to defend its administratively (as opposed to judicially) made rule. But the case was later dismissed on standing. See *Schmier v. Sup. Ct. of Cal.*, 78 Cal. App. 4th 703

44. Perhaps more troubling to us than no-citation rules themselves has been the refusal of so many lawyers, despite market fees, to involve themselves due to of fear of judicial retribution.

45. *Anastasoff*, 223 F.3d at 904.

46. We attempted to buy Mrs. Anastasoff's claim for its full amount, \$6,436 which would have avoided the opportunity for vacation by en banc panel. Had her counsel not refused the offer, the law on this point might be different.

47. Stephen R. Barnett, Scott Bennett, Maria Lin & Janet Tung, *New Day: California Unpublished Decisions to Be Posted Online*, DAILY J., Sept. 26, 2001, <http://www.nonpublication.com>.

to study standards mandating publication of opinions.⁴⁸ A committee chaired by Justice Werdegar has been convened, but has been charged to look at modifications to publication rules rather than the propriety of no-citation rules. This report is due by Fall 2005.⁴⁹ The California judiciary has refused to allow outsiders to participate in, or even quietly attend these meetings.⁵⁰ In 2005, no California legislator would agree to author a bill on the subject.

A hearing on no-citation rules was held before the House of Representatives Subcommittee on the Courts, Intellectual Property and the Internet in 2002.⁵¹ The Subcommittee encouraged the Federal Appellate Rules Committee (hereinafter FARC) effort to create proposed Federal Rule of Appellate Procedure (hereinafter FRAP) 32.1, which would eliminate no-citation rules in the federal judiciary. That rule would make all decisions citable as persuasive authority only, taking no position on any precedent issue. A letter-writing campaign against the new rule led by Judge Kozinski failed to avert endorsement of the new rule by the committee,⁵² but the proposed rule was delayed one year by the Standing Committee on rules of the judicial conference for a study of operation of no-citation rules in the federal courts by the Federal Judicial Center completed on April 14, 2005.⁵³ On April 18, 2005 FARC approved FRAP 32.1. On June 15, 2005, the Standing Committee unanimously approved FRAP 32.1. Judicial conference vote on appeal was set for September 20, 2005.

In the past few years, many jurisdictions have abandoned experiments with no-citation rules, while no jurisdiction has recently adopted such a

48. Linda Rapattoni, *Bill on Unpublished Opinions Dropped: The chief justice agrees to study how the rules are applied, but remains opposed to such cites*, DAILY J., Apr. 26, 2004, <http://www.nonpublication.com/rapattoni4-26.htm>.

49. Press Release, Judicial Council of California (November 23, 2004), <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR64-04.PDF>; <http://www.nonpublication.com/councilreleases.pdf>.

50. Linda Rapattoni, *Judiciary Guards its Secrets: Lawmakers and lawyers protest closed policy and budget meetings*, DAILY J., Feb. 16, 2005, <http://www.nonpublication.com/secret.htm>.

51. See *Unpublished Judicial Opinions: Hearing Before the House Subcomm. On Courts, the Internet, and Intellectual Property of the Comm. On the Judiciary*, 107th Cong. 1 (2002), <http://www.judiciary.house.gov/legacy/schmier062702.htm>.

52. Letter from A. Wallace Tashima, U.S. Cir. Judge, 9th Cir., to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (Feb. 6, 2004), <http://www.nonpublication.com/tashima.pdf>.

53. Tim Reagan et al., *Citations to Unpublished Opinions in the Federal Courts of Appeals*; Preliminary Report Federal Judicial Center, April 14, 2005, at <http://www.nonpublication.com/bjc.pdf>. As a FARC member, Judge John G. Roberts, Jr. twice voted to approve FRAP 32.1 shortly before his nomination as Chief Justice of the Supreme Court of the United States. If confirmed, he will not only become Chairman of the Judicial Conference of the United States, but will appoint its future members.

rule.⁵⁴ At this time, the 9th Circuit and the California systems remain committed to enforcement of their no-citation rules.

VII. Justifications Given for No-Citation Rules

We believe there are no good reasons for no-citation rules. We agree with Judge Arnold, who believes that judges who think unpublished opinions should be without precedential value are driven to that conclusion by the volume of work.⁵⁵ Of course, no-citation rules go beyond depriving decisions of precedential value; indeed, the decisions are made unmentionable in judicial proceedings.

But what reasons are given to justify no-citation rules? “There would not be enough books to hold the unpublished opinions,” says Justice Werdegar.⁵⁶ Chief Justice George explains that uncitable opinions “are a necessary evil to chill the development of the law.”⁵⁷ California Assemblymember Hannah Beth-Jackson defended California’s no-citation rule to the Assembly Judiciary Committee, stating that it was unreasonable to require lawyers to search through large numbers of unpublished opinions to find the law.⁵⁸ The Western Center for Law and Poverty has said that were unpublished opinions citable the additional research would be burdensome on less affluent litigants.⁵⁹ This rationale is echoed by the ACLU of Southern California.⁶⁰ A summary of the 484 comments received by FARC in response to proposed FRAP 32.1 provides a comprehensive collection of justifications.⁶¹

54. See generally Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003).

55. *Anastasoff*, 223 F.3d at 904.

56. Video tape: Marin Meet Your Judges Night (October 28, 1998) (on file with authors).

57. Peter Blumberg, *Publish Is His Platform*, DAILY J., March 19, 1998, at 1.

58. *Appellate Opinions: New Publication and Citability Rules Hearing before the Assembly Judiciary Comm. on A.B. 1165*, 2003 Leg., 2003-2004 Sess. 2 (Cal. 2003) (statement of Hannah Beth-Jackson, Assemblymember), <http://www.nonpublication.com/1165analysis.htm>.

59. *Appellate Opinions: Publication; Citation Hearing before the Assembly Judiciary Comm. on A.B. 2404*, 2000 Leg., 2000-2001 Sess. 9 (Cal. 2000) (statement of the Western Center on Law and Poverty), <http://www.leginfo.ca.gov>.

60. See Letter from Peter Eliasberg, Managing Attorney, ACLU, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (January 28, 2004), http://www.secretjustice.org/pdf_files/Comments/03-AP-235.pdf. This letter is typical of those submitted by persons contacted by Judge Kozinski. But see Arthur B. Spitzer & Charles H. Wilson, *The Mischief of the Unpublished Opinion*, 21 No. 4 LITIG. 3 (1995), http://www.secretjustice.org/pdf_files/law_review/spitzer.pdf for the view of the New York ACLU. The difference may be that the director of the Southern California ACLU is married to Judge Stephen S. Reinhardt, co-author of *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions* (see Kozinski & Reinhardt, *supra* note 15).

61. See Memorandum from Patrick J. Schiltz, to the Advisory Committee on Appellate

Judge Kozinski, who authored *Sorchini*, and the content of most of the letters opposing proposed FRAP 32.1 received by FARC, has written the most. After telling the New York Times that uncitable opinions are “garbage”⁶² he wrote to FARC that “when the people making the sausage tell you it’s not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway.”⁶³ But according to Judge Kozinski, it is acceptable for the appellate court to issue garbage, because all that matters in an uncitable case is that the result is correct.⁶⁴ In short, the sheer volume of cases handled by the appellate courts necessitates issuing uncitable opinions.⁶⁵

Kozinski points out that trying to parse an unpublished opinion to determine the thinking of judges is futile because most likely, the judges have had little if anything to do with the opinion.⁶⁶ Holding the judiciary responsible for writing an opinion that is reasoned according to law just because three judges signed it is, to him, unreasonable.⁶⁷ Startled by his candor, the Federal Judicial Center (hereinafter FJC) issued a press release to disclose (belatedly) the judiciary’s delegation of most decision-making to non-judicial staff.⁶⁸ Many judges have argued that eliminating no-citation rules will fundamentally change operations in appellate court systems.⁶⁹ While this has not proved to be true,⁷⁰ we think no-citation rules hide quality control problems resulting from the delegation of appellate decision-

Rules (March 18, 2004), <http://www.nonpublication.com/schiltz.pdf>.

62. See Glaberson, *supra* note 15.

63. Kozinski, *supra* note 23, at 2.

64. “To cite [unpublished opinions] as if they were—as if they represented more than the bare result as explicated by some law clerk or staff attorney—is a particularly subtle and insidious form of fraud.” Kozinski, *supra* note 23, at 5, 7.

65. Kozinski, *supra* note 23, at 6. *But see Proposed Amendments to the Federal Rules of Appellate Procedure: Hearing Before the Appellate Rules Comm.*, U.S. Judicial Conference 1 (2004), http://www.nonpublication.com/Barnett_testimony.pdf.

66. “Dispositions bearing the names of three court of appeals judges are very different in that regard. Published opinions set the law of the circuit, and even unpublished dispositions tend to be viewed with fear and awe, simply because they, too, appear to have been written (but most likely were not) by three circuit judges.” Kozinski, *supra* note 23, at 2.

67. Kozinski, *supra* note 23, at 6.

68. Press Release, Federal Judicial Center, Staff Attorney Offices Help Manage Rising Caseloads (issued undated), <http://www.uscourts.gov/newsroom/stffattys.htm>.

69. “This is insufficient reason to alter the status quo in an area so fraught with consequence for the judiciary, for the orderly development of precedential case law, for the practice of law, and for persons who pay legal bills.” Judge Diane S. Sykes, Supreme Court of Wisconsin, *at* <http://www.nonpublication.com/wisc.pdf>.

70. See generally *Proposed Amendments to the Federal Rules of Appellate Procedure: Hearing Before the Appellate Rules Comm.*, U.S. Judicial Conference 1 (2004), http://www.nonpublication.com/Barnett_testimony.pdf.

making to law clerks.

Judge Thompson argues that appellate courts need more judges and far less staff because the appellate task is not fit for delegation.⁷¹ Having judges dictate right results to be supported by clerk-drawn opinions, he says, is “posterior backward,” resulting in legal analysis that often falls short of its conclusions.⁷² Privately he has poignantly observed that in ghost-writing opinions, law clerks will extend their judge’s known proclivities beyond those the judge himself might allow in search of approbation.⁷³

Whether it is appropriate for the judicial function to be delegated to staff is outside the scope of this article, but language lifted from Judge Kozinski’s dissent in *Pincay v. Andrews*⁷⁴ indicates that Judge Kozinski should be the last person to justify no-citation rules on this basis. He stated, “While delegation may be a necessity in modern law practice, it can’t be a lever for ratcheting down the standard for professional competence.”⁷⁵ That standard is evidenced in the California Constitution, which requires written decisions with reasons stated.⁷⁶ From litigants’ point of view, the elimination of any prospective authority from those stated reasons leaves the analysis untrustworthy.

Judge Kozinski justifies no-citation rules by a separation of “error correction” and “law-making” functions.⁷⁷ Judge Kozinski asserts that precious judge time must be reserved for the law-making function. He defines a judicial methodology contrary to the practice commonly taught in the United States:

“[The lower courts’s and appellate courts’s not sitting *en banc*] responsibility in applying the law is to analyze and apply the published opin-

71. *See id.* at 10.

72. *See* Thompson, *supra* note 37.

73. Judge Thompson told this to Kenneth Schmier in private discussion at his home. Judge Thompson’s telephone number is (858) 456-8092.

74. *See Pincay v. Andrews*, No. 02-56577 15897 (November 15, 2004), <http://caselaw.lp.findlaw.com/data2/circs/9th/0256577p.pdf>.

75. *Id.* at 15916.

76. *See supra* note 27. Here is an interesting historical note regarding the adoption of the Cal. Const.: “Undoubtedly [the requirement of a written opinion] will insure a careful examination of the cases, and result in well considered opinions, because they must come before the jurists of the country and be subjected to the severest criticism. . . . It tends to purity and honesty in the administration of justice.” *Powers v. City of Richmond*, 10 Cal. 4th 85, 141, 893 P.2d 1160, 40 Cal. Rptr. 2d 839 (quoting 2 WILLIS & STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 951(1880)).

77. “Court of appeals judges perform two related but separate tasks. The first is error-correction: We review several thousand cases every year to ensure that the law is applied correctly by the lower courts, as well as by the many administrative agencies whose decisions we review. The second is development of the circuit’s law: We write opinions that announce new rules of law or extensions of existing rules.” *See Kozinski & Reinhardt, supra* note 15.

ions of this court and opinions of the Supreme Court. *They are not relieved of this duty just because there is an unpublished circuit disposition where three judges have applied the relevant rule of law to what appears to be a similar factual situation.* The tendency of lower court judges, of course, is to follow the guidance of the court of appeals, and the message we communicate through our noncitation rule is that *relying on an unpublished disposition, rather than extrapolating from published binding authorities, is not a permissible shortcut.* We help ensure that judges faithfully discharge this duty by prohibiting lawyers from putting such authorities before them, and thereby distracting the judges from their responsibility of analyzing and reasoning from our published precedents.”(Emphasis added.)⁷⁸

VIII. Our Response to the Justifications

Many distinguished scholars, bar associations, and a few judges have carefully highlighted compromises to the legal system, constitutional rights, and respect for individuals that result from no-citation rules. A vast selection of these articles can be linked via www.nonpublication.com.⁷⁹

We also believe that a large portion of criminal appeals could be eliminated while increasing fairness to those involved by paying success fees to attorneys. Rather than swamping our appellate courts with universal appeals perfunctorily argued by poorly paid counsel and perfunctorily considered by low level court staff, we prefer that attorneys triage appeals, bringing to the courts those they evaluate as meritorious, and intend to win.⁸⁰

We want to raise higher level issues that need addressing. We believe no-citation rules are insidiously poisoning our democratic system. We realize this is an extreme statement, but if consideration is given to the centrality of voluntary obedience by the citizenry to a known body of accepted law, the destructive potential should become apparent. We will argue here that precedents and stare decisis combine to regulate our democracy, enlighten our community and give us a realistic approach to a messianic age. We are surprised how many scoff at these ideas or tell us that idealism has no place where practical solutions are needed. In rebuttal, we insist the founding fathers created a wonderfully practical system of government effectively harnessing individual interests to relentlessly press government

78. Kozinski, *supra* note 23 at 6. (Moreover, Judge Thompson has told this author that clerks often excessively embrace certain positions they think a judge favors, whereas the judge himself would recognize the limits.)

79. www.nonpublication.com is maintained by the Committee for the Rule of Law, of which the authors are board members. The website attempts to be a library of materials on this subject. Most documents referenced herein can be found at that web site.

80. See generally <http://www.nonpublication.com/solutions.html>.

and our citizenry to ever-higher standards despite all manner of intransigence. The system they created will keep seeking perfection in laws, our government, and ourselves until that perfection is achieved or the system is abandoned. We honor their effort, and all who have sacrificed defending that effort, by relentlessly standing for their system, hoping that before we tire we can enlist others to recognize the importance citability and stare decisis have in its processes.

We agree wholeheartedly that Judge Kozinski's goal of encouraging judges (and the community as well) to think is an admirable one. Judge Learned Hand wanted the following slogan emblazoned over the portals of every courthouse: "I beseech ye . . . think ye may be mistaken."⁸¹ He told Congress:

Like all of us—and that is constantly the fault charged, and properly charged, against the courts—after they have proceeded a while they get their own set of precedents, and precedents save "the intolerable labor of thought," and they fall into grooves, just as judges do. When they get into grooves, then God save you to get them out of the grooves.⁸²

Inconsistency in human knowledge forces thought.

Judge Kozinski holds that no-citation rules foster consistency of the published precedent.⁸³ But the inconsistencies of unpublished opinions do not go away. Litigants are hurt and courts inculcate into themselves bad precedent nonetheless. In the age of computer research, no-citation rules cannot keep uncitable decisions from the eyes of judges and their law clerks. No-citation rules only stop the test of those authorities by discussion in open court.

Judge Kozinski has noted that no-citation rules are a necessity in jurisdictions that have a "binding precedent" policy. Judge Kozinski defines binding precedent as:

A panel of our circuit, when it speaks, binds not just the three judges, but every other panel in the circuit in the future of each such case, unless there is an en banc vote and hearing which is an enormously involved process. So the first to hit an issue and publish opinion may in fact move facts into law.⁸⁴

Only a minority of United States Courts of Appeal, the 9th Circuit

81. LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 229-30 (Irving Dilliard ed., Alfred A. Knopf, Inc., 1963) (1952).

82. *Id.* at 241.

83. For instance, its enactments could not be reviewed other than by an en banc appellate panel.

84. From the Bar Association of San Francisco presentation entitled "Unpublished Decisions: Caught Between Scylla and Charybdis" (April 24, 2001). A transcript of the discussion is available at <http://www.nonpublication.com/discussion.pdf>.

among them, adhere to binding precedent policy. California has a somewhat less rigid policy embodied in *Auto Equity Sales*⁸⁵ but all appellate opinions are subject to the veto power of the California Supreme Court via its assumed power to depublish appellate opinions. This unique depublishing power is occasioned by unmonitored lobbying of special interests with access to Supreme Court justices, but without public notice or real opportunity for outsiders to participate.⁸⁶ The no-citation policy and the power to depublish opinions create a process that allows only a few judges to control the law, with little opportunity for other judges to offer other thinking. We believe that centralization of so much power is unwise, even in the name of consistency of law.

On the one hand, we believe the creation of “binding precedents” absolutely binding on other panels of the same appellate court and lower courts exceeds the judicial authority to decide a case or controversy. Otherwise, the judicial law-making authority would equal or even exceed the power of the legislative branch to make law, if for no other reason, that it cannot be subsequently reviewed by an appellate panel. On the other hand, we believe the making of decisions that carry no precedential effect whatsoever violate the constitutional prohibition of selective prospectivity. Viewed over time, common law processes chart a path between these extremes that is a better way to improve consistency.

Under that method, conflicting authorities are brought to judges who give reasons supporting the better precedent. Thus, the law is continuously improved by countless judges through the ongoing weighing of precedents, arguments, and issues, together with reasoned adherence to *stare decisis*. The law is found not from any one source, but from the ongoing discussion.

There can be no question that the abilities of judges to weigh wisely these considerations vary greatly. But the purpose of the judiciary is to employ common sense (born of individual human judgment) with historical experience born of precedent, as a last check over all of our laws and those with power. We use the judiciary as such a check with the hope that one or a few *thinking* persons can keep us from an illogical or unjust stampede. Precedents, and the making of precedent, force thought. Indeed, FARC took the view that judges could be trusted with determining the application of precedents, and we concur with that trust.

There is a measure of chaos here that might offend those that want a

85. *But see* *Auto Equity Sales, Inc. v. Super. Ct.*, 57 Cal. 2d 450, 369 P.2d 937, 20 Cal. Rptr. 321; CAL. CT. R. CODE §979 (West 1996), which arrogate to the Supreme Court the right to silence appellate courts.

86. *See* CAL. CT. R. CODE §979.

perfectly consistent, hierarchical system of judicial decision-making. But, as Dee Hock profoundly explains in *Birth of the Chaordic Age*, institutions work best when the human beings comprising them are freest to use the limits of their abilities to advance the goals of the organization.⁸⁷ His word “chaordic” is a blend of chaos and order.⁸⁸ It is intended to describe institutions that harness the human capacity *to think* creatively (limited only by a firm commitment to common goals and standards). Nowhere, in our view, does *stare decisis* compel any court to follow any historical rule, even of higher courts. But it does direct judges to *think carefully* about considerations that should be given in deciding to follow or not follow such historical rules. We trust that by *thinking carefully*, judges will appreciate the need for consistent application of law and will only depart from consistent application when certain that they can enlighten the community with an approach that yields better justice or demonstrates appropriate mercy. We trust that as the chaordic process of individual judges continually valuing competing precedents continues over time, constant refinement of our law will be the result.

IX. Citability Provides Feedback to Our Government System

Citation of appellate opinions is a *sine qua non* for a government system worthy of trust. Any system must have feedback of its real world performance so it can correct itself. Heaters, for example, have thermostats for this purpose. Citability provides an elegant manner of feedback to our governmental system.

Our “system” could be described thus: The judiciary is where democratically created law is made to affect individuals. No person can be subject to government force except with the sanction of a court. Every person subject to an order of a court has the right to appeal to a higher court which is required to issue a written decision with supporting reasons stated. Because the resulting decision is citable and because of *stare decisis*, that decision potentially affects all persons that are, or *even might become*, similarly situated. Relying upon the reality that most of us are far more concerned about potential impact of court decisions on our own lives than actual impact upon faceless others, our system can count on journalists to spread word of appellate decisions. Informed as to an appellate court decision, a very large community of court watchers drawn from the public, having skills in many areas, monitors and criticizes those court actions.

87. DEE HOCK, *BIRTH OF THE CHAORDIC AGE* 264 (Berrett-Koehler Publishers, Inc., 1999) (1999).

88. *Id.* at cover page.

The community of court watchers includes lawyers, judges, academics, journalists, industry groups, politicians, social workers, and clergy—in a word, everyone. These court watchers protect individual litigants because they can be expected to, and often do, join with litigants to raise the issue of an incorrect judicial resolution to a supreme court or to executive or legislative bodies. Via the threat and promise of equal application of law made real by *stare decisis*, our “system” of government makes sure not only that individuals subject to bad law are unlikely to stand alone, but that constituencies sufficient to amplify cries of error form around such individuals such that the body politic has to take notice. Because of this process error is unlikely to stand for long. To use a physical analogy, the citation of opinions is like water. Unlike other materials, the solid form of water floats in its liquid form. Were it not so, water frozen each winter would not be raised to be thawed by the sun in the spring and our earth could be frozen solid. So too, error should not be allowed to sink out of view, lest we be frozen in error, but should be attached to a mechanism likely over time to bring the error to light. The citation of opinions is that mechanism. This feedback system regulates the democracy. It is our essential warranty to protect us by striving for enlightenment and equal treatment. It stood as a substantial quality control system, not just for the courts, but for the entire society.

What is left of this system in the presence of no-citation rules? Little. The public is discouraged from monitoring unpublished opinions not just because they do not readily appear with the court’s work, but because judges often eliminate any statement of facts from these decisions, supposedly to save time in the decision-writing process.⁸⁹ Without a statement of facts, the effort to review a court decision becomes unreasonably difficult for all but the parties.

It has been reported to us that some judges view statements of facts and legal analysis minimally necessary for citability as “make work.” First year algebra students often decry “showing their work” as unnecessary, too. But it certainly makes error easier to isolate. Would any court find the requirement in our California Building Code that structural engineers show their calculations to be too onerous? No, because somebody could get hurt by error, and we know that error happens when process is not followed. Appellate courts can cause immeasurable harm by embracing an apparent result without the process of testing that result with step by step analysis resting on a careful fact statement. A careful fact statement shows the liti-

89. In the 9th Circuit, judges are forbidden to set out the facts of the unpublished cases they decide. *See* U.S.C.A. 9th General Order 4.3 (a).

gants that the judges know the facts, and serves as the basis upon which court watchers can evaluate the rightness of a decision.

But even were review of uncitable opinions by court watchers possible, their concern is sedated because the decisions are not law for all. Worse still, constituencies that might have rallied around an affected individual turn away fearing that a given decision might, by their involvement, become law for all by being published, and thus leave individuals to bear the burden of the court's error alone, and the error entirely unaddressed and ready to harm again.

High volumes of new legislation, administrative regulations, and appellate decisions do not necessitate the abandonment of the warranty of the citation-dependent quality control mechanism. Neither the Supreme Courts nor the appellate courts, nor the legislative nor executive branches can possibly maintain a quality assurance mechanism equivalent to the hundreds of thousands of court watchers, skilled in so many diverse areas, all motivated by self-interest, that monitor the release of citable decisions.

Because no-citation rules disconnect the amplification equal protection would otherwise bring to unpublished judicial actions, systematic feedback of the problems encountered in the enforcement of our laws to those that can correct those problems is greatly inhibited. Before error becomes apparent, judiciaries are likely to have established firmly rooted but hidden precedents, calcifying not only the error of their decision, but the bureaucratic practices established or preserved in accordance with those decisions. Giving error such a head start leaves the public with no realistic chance of nipping it in the bud. We believe all manner of monstrosities will be the result.

X. No-Citation Rules Keep the Judiciary From Learning

Citation is the method by which our judiciary, even our entire society, learns as a whole. Any person may write a comment regarding a judicial opinion. Through modern research techniques, any comment containing a case citation can be discovered. That comment may cause a court to decide a subsequent case a different way, criticize the old authority, and make the law wiser and more defined over time. Any person writing superior logic can truly expect to influence the law, allowing us to claim a true democracy. Our democracy can truthfully represent that any person, even after death, can improve our law, encouraging all to participate in its improvement. The law becomes more appreciated because it has been developed from the ongoing contributions of the entire society.

Over time we can expect our communal knowledge base to identify

right, and, perhaps more important to the communal learning process, clarify why errors are wrong. No-citation rules sedate this process. They foster unawareness and denial. If an uncitable decision has no prospective legal effect, why should anyone comment? In short, no-citation rules operate as a ban on enlightenment.

XI. Full Citation Allows Us to Expect a Better Future

The formation of precedent at the highest level of review of right asserts the golden rule over our legal system. It makes certain that our judges never subject any one of us to that which the court is not willing to subject others, were another person similarly situated. Full citability encourages respect for the inestimable value of every individual. This in turn reinforces the core systemic strength of our democracy—that so long as all are treated equally, issues will ultimately be made right.

We Americans are good people who endeavor constantly to improve the world and ourselves. We have a wonderful goal often stated but rarely considered in our Pledge of Allegiance: Liberty and Justice for All. It is a messianic goal because one person's undisciplined use of liberty often causes an injustice to another. But the two conditions are not mutually exclusive. "Liberty and Justice for All" is possible if our societal commitment to human enlightenment continues long enough that our community comes to know and love a just law so dearly that, even without enforcement, none of us are tempted to evade the law to the detriment of others. Communication media has become so effective that, if properly used, the enlightenment of humanity is more reachable than ever before.

Publication and citation see to it that our law is regularly discussed within our community and that input regarding its improvement is solicited from all. It constitutes a mechanism to develop and inculcate an infinitely just law, by our people in our people. Citation should be unimpeded, and we should continue to have faith that with open discussion of all our law our democracy shall, one day, achieve liberty and justice for all.