Washington and Lee Law Review

Volume 62 | Issue 4 Article 6

9-1-2005

Commentary: Unpublication and the Judicial Concept of Audience

Joan M. Shaughnessy

Recommended Citation

Joan M. Shaughnessy, *Commentary: Unpublication and the Judicial Concept of Audience*, 62 Wash. & Lee L. Rev. 1597 (2005), http://scholarlycommons.law.wlu.edu/wlulr/vol62/iss4/6

This Article is brought to you for free and open access by Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized administrator of Washington & Lee University School of Law Scholarly Commons. For more information, please contact osbornecl@wlu.edu.

Commentary: Unpublication and the Judicial Concept of Audience

Joan M. Shaughnessy*

Recent years have seen an increased focus on the decisionmaking practices of the federal courts of appeals. Attention was focused on the phenomenon of nonprecedential appellate opinions by Judge Arnold's opinion for the panel in *Anastasoff v. United States*[1] holding that a court rule could not constitutionally strip an unpublished court decision of all precedential value and by Judge Kozinski's opinion for the panel in *Hart v. Massanari*,[2] which rejected *Anastasoff* and upheld the constitutionality of the Ninth Circuit's ban on the citation of, and refusal to give precedential effect to, unpublished dispositions of that circuit.[3] Rulemakers have also turned their attention to the issue; a proposed rule on the citation of unpublished opinions, Proposed Federal Rule of Appellate Procedure 32.1, has been under consideration for several years.[4]

Many observers, among them several of the scholars contributing to this symposium, have pointed to a range of problems and concerns raised by the widespread practice of unpublication generally and no-citation rules in particular.[5] As Professor Schiltz notes in his contribution to the symposium,

---

* Professor of Law, Washington and Lee University School of Law, Lexington, Virginia; B.A., State University of New York at Binghamton; J.D., University of Chicago. I am indebted to David S. Caudill for organizing this symposium and inviting me to provide comments and to the Frances Lewis Law Center and the Washington and Lee Law Review for sponsoring the symposium. I benefited enormously from the contributions of all the symposium participants, particularly Patrick J. Schiltz, Stephen R. Barnett, and Penelope J. Pether, to whose papers I responded, and from helpful comments offered by Brian Murchison. Thanks are also due to Erica Richards for her editorial assistance.

1. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated en banc*, 235 F.3d 1054 (8th Cir. 2000).

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

3. *See* Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of* Hart v. Massanari, 62 WASH. & LEE L. REV. 1553 (2005) [hereinafter *Take a Letter*] (analyzing *Anastasoff v. United States* and *Hart v. Massanari*).

4. See Patrick J. Schiltz, *Much Ado About Little: Explaining the* Sturm Und Drang *over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005), for a complete history of the rulemaking activity to date.

5. *See* Schiltz, *supra* note 4, at 1432 n.11 (citing articles that describe nonpublication); William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 WASH. & LEE L. REV. 1723, 1723 n.3 (2005) (same).

some commentators have argued that the current system threatens the values of fairness and openness that are central to our procedural system.[6] Professor Pether, in her *Stanford Law Review* article and her contribution here, has presented evidence that the current system particularly disadvantages members of vulnerable groups.[7] Professor Barnett testified in favor of the proposal to permit citation of unpublished opinions,[8] and his recent empirical work suggests that lawyers who have experienced rules permitting citation support such rules and find they work well.[9]

I share many of the concerns raised by our panelists and others about the current system and will not revisit them. Instead, I will reflect briefly on how revealing the debate over nonpublication has been. It has given rise to some very frank and often surprising descriptions of the work of the federal appellate courts today. I will not attempt a full description here, but I will point to a few nuggets that seem to me to be particularly revealing.

Professor Schiltz's summary of comments in opposition to the changes to Rule 32.1 includes the following description: "Because unpublished opinions are hurriedly drafted by staff and clerks, and because they receive little attention from judges, they often contain statements of law that are imprecise or inaccurate."[10] One of the members of the Advisory Committee for the Appellate Rules opposed Rule 32.1 on the grounds that unpublished opinions are "junk law."[11] As other symposium participants have noted, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit has

---

6. *See* Schiltz, *supra* note 4, at 1467–69 (remarking that some attorneys feel that no-citation rules amount to a "gag order" that shields these opinions from accountability and public scrutiny and that thwarts "equal justice").

7. *See* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1504–14 (2004) [hereinafter *Inequitable Injunctions*] (criticizing the institution of unpublished opinions as masking the process which favors some groups and disadvantages other groups); Pether, *Take a Letter*, *supra* note 3, at 1591 (same).

8. *See Hearing on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Appellate Rules Committee, United States Judicial Conference*, 108th Cong. 17–18 (2004) (statement of Stephen R. Barnett) (advising that the Committee should "recommend adoption of proposed Rule 32.1"), *available at* http://www.nonpublication. com/barnett32.1.pdf.

9. Stephen R. Barnett, *The Dog that Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders*, 62 WASH. & LEE L. REV. 1491, 1504 (2005) (finding "virtually no complaints" in allowing citation to unpublished opinions).

10. Memorandum from Patrick J. Schiltz, Reporter, to the Advisory Committee on Appellate Rules (Mar. 18, 2004) [hereinafter Schiltz Memo], *available at* http://www.nonpublication.com/schiltz.pdf.

11. Minutes of Spring 2004 Meeting of Advisory Committee on Appellate Rules 8, *available at* http://www.uscourts.gov/rules/minutes/app0404.pdf. *See* Schiltz, *supra* note 4, at 1449 n.99, 1452 n.126 (identifying Mr. Sanford Svetcov as the speaker).

likened some unpublished opinions to "sausage" that is "not safe for human consumption."[12]

Contrast these statements to Judge Kozinski's description of the process of writing a published opinion. In an interview with Jeffrey Cole published last summer in *Litigation*, the judge reported that his opinions go through fifty or more drafts, sometimes many more.[13] He repeatedly stressed the care with which each phrase of a published opinion is scrutinized.[14]

The extreme disparity found in these descriptions is striking. Of course, these descriptions do represent extremes, and perhaps some rhetorical excess as well. (As Professor Barnett's empirical work suggests, many lawyers find the quality of most unpublished opinions to be good.[15]) Nevertheless, they do suggest that judges believe they are engaged in two very different tasks—one task represented by published opinions, one by unpublished dispositions.[16] Moreover, at least some judges believe that those separate tasks carry with them very different obligations.[17] One might describe the differences by saying that the judges seem to believe they are writing for very different audiences.

The audiences for unpublished dispositions are described as solely the litigants, their attorneys, and the lower court whose judgment has been

---

12. *See* Judge Kozinski, Public Comment 03-AP-169, Proposed Federal Rule of Appellate Procedure 32.1 (Jan.16, 2004) (writing in opposition to proposed Federal Rule of Appellate Procedure 32.1), *available at* http://www.nonpublication.com/kozinskiletter.pdf.

13. *See* Jeffrey Cole, *My Afternoon with Alex: An Interview with Judge Kozinski*, LITIG., Summer 2004, at 16 (discussing Judge Kozinski's desire that his opinions be both read and enjoyed).

14. *Unpublished Judicial Opinions: Hearing Before the House Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary*, 107th Cong. 12–13 (2002) (stating opinion of Hon. Alex Kozinski et al.).

15. *See* Barnett, *supra* note 9, at 1551–52 (arguing for adoption of Rule 32.1).

16. *See* Richman, *supra* note 5, at 1725 (describing a "two-track" system of appellate justice).

17. A striking example of this phenomenon is found in the report of the June 2004 deliberations of the Committee on the Rules of Practice and Procedure, in which one of the members, commenting on Proposed Rule 32.1, is reported as observing:

> One of the members suggested that the key issue was not citation, but the status of unpublished opinions. He pointed out that the committee note refers to unpublished opinions as "official actions" of the court. But, he noted, they are commonly crafted by law clerks and only endorsed by judges. They do not receive the same scrutiny as published opinions and clearly do not represent the views of the full court. The proposed rule, he said, *would elevate unpublished opinions into actions of the court* and give them a status that they do not presently have.

Minutes of the Committee on Rules of Practice and Procedure 9, *available at* http://www.uscourts.gov/rules/Minutes/june2004.pdf (emphasis added). I should note that this comment may not have been made by a judicial member of the Committee.

appealed. Their interest is seen as limited to knowing the resolution of their dispute and some rough description of the basic reason why the case was won or lost.[18] It is as though no other audience for these dispositions exists in the judges' minds—not their colleagues on the appellate bench (it seems to me that a certain "we all know that we don't write these things" attitude crops up fairly often in the comments[19]) and not members of the bar or the public. The idea seems to be that, although these dispositions are often available to the public and the bar, there is no reason for that audience to be interested in what they say.[20] The dispositions are not written for the public; they are rather, as Professor Pether has noted, akin to a private letter to the parties from the court.[21]

The audience for published opinions is clearly different. Unsurprisingly, references are made in the literature to other members of the panel, to other judges of the court, and to district court judges within the circuit—to all those, in other words, who will be bound by the decision.[22] It is understood as well

---

18. *See, e.g.*, Schiltz Memo, *supra* note 10, at 39 (noting that unpublished opinions are "written for those already familiar with the case"); Judge Browning, Public Comment 03-AP-076, Proposed Federal Rule of Appellate Procedure 32.1 (Dec. 30, 2003) ("[An unpublished disposition] contains minimal factual and legal analysis, and is intended to give the parties a general understanding of the panel's reasons for its decision"), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-076.pdf; Judge Fernandez, Public Comment 03-AP-061, Proposed Federal Rule of Appellate Procedure 32.1 (Dec. 22, 2003) ("Unpublished dispositions are, essentially, designed to dispose of a single case to speak to the parties. . . . It is one thing to write a decision for the purpose of speaking only to the individuals then before the court; it is quite another thing to write a decision intended to speak to other individuals also."), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-061.pdf; Letter from Judge John L. Coffey et al., U.S. Court of Appeals for the Seventh Circuit, to Judge Alito, Chair, Advisory Comm. on Appellate Rules, Judicial Conf. of the U.S. 1 (Feb. 11, 2004) ("The purpose of [unpublished orders] is to give the parties an explanation of the reason for the decision."), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-396.pdf.

19. *See, e.g.*, Kozinski, *supra* note 12, at 2 (stating that unpublished opinions "appear to have been written (but most likely were not) by three circuit judges"); Schiltz Memo, *supra* note 10, at 39 (stating that "unpublished opinions are hurriedly drafted by staff and clerks"); Prof. Eugene Volokh, Public Comment 03-AP-158, Proposed Federal Rule of Appellate Procedure 32.1 (Jan. 21, 2004) (noting that unpublished opinions may be "drafted in haste and with little editing by a staff attorney"), *available at* http://www.secretjustice.org/pdf_files/comments/03-AP-158.pdf.

20. *See, e.g.*, Judge Wallace, Public Comment 03-AP-082, Proposed Federal Rule of Appellate Procedure 32.1, at 2 (Dec. 23, 2003) (arguing that there is no "precedential value" in unpublished opinions, and that they are used for "error correction" only), *available at* http://www.secretjustice.org/ pdf_files/comments/03-AP-082.pdf.

21. Pether, *Inequitable Injunctions*, *supra* note 7, at 1436 n.4 (citing Hart v. Massanari, 266 F.3d 1155, 1178 (9th Cir. 2001)).

22. *See, e.g.*, Judge Nelson, Public Comment 03-AP-131, Proposed Federal Rule of

that members of the bar who practice before the courts of the circuit are also immediate audiences for the published decision.[23] It is striking to me how demanding those audiences are seen to be in some of what I have read. It seems that every possible nuance of the published opinion must be explored, every conceivable reading anticipated and addressed, every future application of the opinion foreseen.[24] This immense burden is, I think, a relatively recent imposition, perhaps a judicial self-imposition, and Judge Kozinski summarized its history in his *Hart* opinion.[25] (Professor Peter Tiersma's recent paper, *The Textualization of Precedent*, beautifully describes this process.[26]) The courts, in separating their law-making function from their dispute-resolving function,[27] have seen themselves as forced to act more as legislators, attempting to hand down a comprehensive rule to control a wide range of future decisions.[28]

Appellate Procedure (Jan. 7, 2004) (describing published opinions as means of informing lawyers and judges removed from the case), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-131.pdf; Judge O'Scannlain, Public Comment 03-AP-285, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 5, 2004) (describing the current burden of reading published opinions); Wallace, *supra* note 20 (noting that precedential opinions "guide lawyers and judges when similar cases arise"), *available at* http:///secretjustice.org/pdf_files/Comments/03-AP-285.pdf.

23. *Unpublished Judicial Opinions*, *supra* note 14, at 10.

24. *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1176 (9th Cir. 2001) ("[T]he rule [in a precedential opinion] must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases.").

25. *Id.* at 1159–75 (describing the transformation from common law-era case precedent to modern-day binding authority).

26. *See* Peter M. Tiersma, *The Textualization of Precedent*, LOYOLA LA LEGAL STUDIES PAPER NO. 2005-6, at 52 (Mar. 2005) (describing the shift from a "case-law" regime, characterized by "analysis of the facts, the issue, and the outcome," to an "opinion-law" system, characterized by "careful scrutiny of the written words of the opinion"), *available at* http://ssrn.uom/abstract=680901; *see also* Richard B. Capelli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 784 (2003) (describing a shift away from judicial opinions as sources of common law towards judicial opinions as statutory substitutes).

27. Interestingly, in his comment letter opposing Rule 32.1, Judge Wallace attributes the genesis of the Ninth Circuit no-citation rule to a study by Judge Hufstedler in which she distinguished between the error correction and precedent setting responsibility of the courts of appeals and, according to Judge Wallace, "demonstrate[d] . . . that you can have one without the other." Wallace, *supra* note 20, at 2. Former Judge Hufstedler submitted a comment letter, but did not mention this history. Former Judge Hufstedler, Public Comment 03-AP-106, Proposed Federal Rule of Appellate Procedure 32.1 (Dec. 1, 2003), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-106.pdf.

28. *See, e.g.*, Judge Berzon, Public Comment 03-AP-134, Proposed Federal Rule of Appellate Procedure 32.1 (Jan. 13, 2004) (opposing Rule 32.1), *available at* http://www.secretjustice.org/ pdf_files/Comments/03-AP-134.pdf. In the letter, Judge Berzon refers to the "statute-like reliance on particular language" that characterizes the approach to binding

For some judges, the perceived audience for published opinions goes well beyond those I have described. In his *Overcoming Law*, Judge Posner suggests that "extraordinary" judges may perform their judicial duties in such a way as to maximize their influence on the law.[29] At least for those judges, intended audiences include judges in other circuits and academics, who will notice and perhaps be persuaded by novel, well-written, cutting-edge opinions. Professor Schiltz's observation about judges' concern for their legacy captures this sense of the wider legal and academic world as the audience for many published opinions.[30]

What, if any, conclusions might one draw from these observations about the issues that concern the symposium authors? First, the judges who conceive of unpublished dispositions as private letters misunderstand their audience. As Professor Barnett's interviews make clear, lawyers read and use unpublished dispositions as official statements of judges.[31] The public, in the form of clients in other cases, does as well.[32] Professor Pether's research shows how important

---

precedent in the Ninth Circuit. *Id.* at 3. *See also* Danny S. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 GREEN BAG 2d 17, 22–23 (2000) (describing Kozinski-Reinhardt's defense of unpublished opinions as based on a view of judges' work as like legislators' in that judges are seen as "hav[ing] the power to define the law prospectively through the use of particular authoritative language" (citing Judge Kozinski & Judge Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions*, CAL. LAWYER, June 2000, at 43)).

29. *See* RICHARD A. POSNER, OVERCOMING LAW 140–43 (1993) (describing a mathematical model of judicial utility); *see also* Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1097–98, 1103–04 (2004) (describing the ethical challenges created by judges' interest in writing important, noteworthy opinions).

30. Schiltz, *supra* note 4, at 1486; *see also* Emily Bazelon, *The Big Kozinski*, LEGAL AFF., Feb. 2004, at 32 (quoting Judge Kozinski as writing that "once in a while, I write an opinion precisely for the purpose of getting into [a casebook]").

31. Barnett, *supra* note 9. *See also* TIM REAGAN ET AL., FEDERAL JUDICIAL CENTER, CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS 75–121 (June 1, 2005) (reporting results of a lawyer survey on unpublished opinions), *available at* http://www.fjc.gov; Lauren Robel, *The Practice of Precedent*: Anastasoff, *Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 406–07 (2002) (suggesting that citation prohibitions do not, in practice, allow lawyers to ignore comfortably unpublished opinions).

32. *See* Laurence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215, 1216 (2004) (emphasizing the lawyer's ultimate goal—superior representation of his client); *see also* Minutes of the June 17–18, 2004 Meeting of the Committee on Rules of Practice and Procedure 9 (reporting that "[o]ne lawyer-member suggested that local non-citation rules pose a serious perception problem for the courts of appeals. He said that it is difficult to explain to a client that a court has decided a similar case in the recent past, but the case cannot be cited to the same court."), *available at* http://uscourts.gov/rules/Minutes/june2004.pdf.

some of those official statements can be to litigants in similar cases.[33] The judges whose names appear on the unpublished dispositions, whether they like it or not, are seen by the bar and the public as responsible for what is *said* in their names[34] as well as what is *done* in their names. Insistence on non-citation, as these panelists and others have shown, is perceived as an abdication of that responsibility.[35] All court decisions should be available to the public and should be citable to the court which rendered them.

On the other hand, the pressure of audience for published opinions may be greater in many cases than it needs to be. Professor Schiltz's observation about the overwhelming docket of the federal appellate courts is clearly correct.[36] The concern with resolving every future permutation of any opinion before it has been completed may have gone too far. If judges were able to re-imagine their audience as a common law audience, expecting each opinion to contribute only an incremental part of the body of law applicable to a problem, they might find themselves able to write simpler, less ambitious opinions.[37] In some cases, at least, this would be a great advantage.[38] In others, it might be a serious loss. The legal system benefits from brilliant, path-breaking opinions. It also benefits from authoritative opinions setting forth generally applicable legal rules.[39] One approach, explicitly followed by some circuits and suggested by several scholars, would be to permit judges to decide whether their decisions should be immune from correction by a later panel, as is now the case with all published opinions, or not.[40] In other words, permit judges to designate

---

33. Pether, *Inequitable Injunctions, supra* note 7, at 1504–14.

34. Schiltz, *supra* note 4.

35. *See* Sarah M.R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH & LEE L. REV. 1637 (2005) (arguing that uncitable opinions erode our general confidence in the judiciary).

36. Schiltz, *supra* note 4, at 1475.

37. Judge Alito's description for this Symposium of the published work of his court in the 1960s is illuminating in this regard. He found the typical opinion of that era much shorter and less complex than those published by the Third Circuit today. Much of the difference may be due to the greater legal and factual complexity of the current docket, but it may also be, in part, the result of a less ambitious view of precedent.

38. *See* Boggs & Brooks, *supra* note 28, at 25–26 (advocating a "one case at a time" approach to judicial efforts); *see also* Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 721–23 (2001) (describing some of the reasons that might counsel against subjecting a decision to the law-of-the-circuit rule, or "self-binding precedent" to use the authors' term).

39. *See* Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1466–71 (1995) (describing the utility of opinions written in rule-like form).

40. *See, e.g.*, Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 21–25 (2002) (suggesting three possible degrees of precedential weight to be afforded unpublished opinions);

opinions as not subject to the law-of-the-circuit rule, rather than as unpublished and not citable. Such opinions would be available as persuasive authority but could be rejected for good reason.

This solution does not resolve the concern raised by Professor Pether and others with differential treatment for some cases and litigants.[41] Some cases will still receive sustained attention from appellate judges and will result in opinions that bind the circuit; many others will receive more summary treatment. In the long run, though, that difference seems to me inevitable and, given the limited resources of the appellate courts, perhaps even helpful.[42]

It makes sense to me that this choice—whether or not to bind the circuit—should be left to the panel. It is they who now undertake the process of circulating opinions to all circuit judges for comment and critique, a demanding undertaking as described by judicial commentators on Rule 32.1,[43] and it is they who are in the best position to know whether factors such as unusual facts or unskilled advocacy counsel against binding future panels.[44] This suggestion also responds to one of the judicial concerns mentioned by Professor Schiltz in his symposium submission—the fear that opinions not written for publication will bind the entire circuit if they become citable.[45]

This leads me to a tentative suggestion. Paradoxically, the proposed Rule 32.1 might be more acceptable to opponents if it were less modest and explicitly addressed the law-of-the-circuit rule.[46] It appears that, even without

---

Boggs & Brooks, *supra* note 28, at 24 (distinguishing between opinions that are intended to bind the circuit and those that are not); Cooper & Berman, *supra* note 38, at 739–40 (same).

41. *See, e.g.*, Pether, *Take a Letter*, *supra* note 3, at 1555 (referring to "marginalized" groups); Richman, *supra* note 5, at 1730 n.27 (discussing the attitude of at least some judges concerning the "bottom 80% of the docket").

42. *See* Schiltz, *supra* note 4, at 1475 (describing the rising caseloads in federal appellate courts); Cooper & Berman, *supra* note 38, at 738–43 (describing the utility of appellate court practice which treats some, but not all, opinions as binding the circuit).

43. *See* Schiltz Memo, *supra* note 10, at 39 (emphasizing the time committed to published opinions); Kozinski & Reinhardt, *supra* note 28, at 44 (same).

44. *See, e.g.*, Kozinski, *supra* note 12 (explaining the variety of situations that can conspire to create an opinion poorly suited to be precedential); Judge Shadur, Public Comment 03-AP-066, Proposed Federal Rule of Appellate Procedure 32.1 (Dec. 18, 2003) (citing an instance where special circumstances made a precedential opinion undesirable), *available at* http://www.secretjustice.org/pdf_files/comments/03-AP-066.pdf.

45. *See* Schiltz, *supra* note 4, at 1483–84 (describing a potential reason for judicial reluctance to endorse proposed Rule 32.1).

46. What I am suggesting is much like the earlier "alternative A" version of Rule 32.1, which was one of three versions presented to the Advisory Committee on the Appellate Rules at its November meeting. Schiltz, *supra* note 4, at 1448. That alternative, which was suggested in part to allay fears about increasing the precedential effect of unpublished opinions, would have explicitly stated: "A court of appeals may designate an opinion as nonprecedential." Minutes of

such a change, proposed Rule 32.1 is moving forward.[47] The Judicial Conference approved the Rule at its meeting on September 20, 2005.[48] If enacted, it should go some way toward alleviating the concerns expressed by many of the participants at this symposium.

Fall 2002 Meeting of Advisory Committee on Appellate Rules 32.1, *available at* http://www.uscourts.gov/rules/Minutes/app1102.pdf. The version was rejected because the Advisory Committee did not want to take a position on the issue raised in *Anastasoff* about whether issuing opinions not deemed precedential is constitutional. Schiltz, *supra* note 4. My suggestion may be slightly different and less problematic in that it would simply allow courts of appeal to continue their practice of exempting "unpublished" opinions from the law of the circuit rule. Neither *Anastasoff* nor any other source has ever suggested that the circuit-binding status of published court of appeals opinions is constitutionally required. *See* Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 86–118 (2000) (demonstrating that *Anastasoff* does not subscribe to any one theory of precedent). A rule addressing the precedential effect of unpublished opinions might also have raised Rules Enabling Act concerns. Schiltz, *supra* note 4, at 1484. Those issues are interesting and difficult in their own right, but beyond the scope of this brief commentary.

47. Schiltz, *supra* note 4, at 1456–57.

48. *See* THE FEDERAL JUDICIARY, FEDERAL RULEMAKING (reporting Judicial Conference action of Sept. 2005), *at* http://www.uscourts.gov/rules/#judicial0905.