1996

The Public Interest in the Work of the Courts: Opinions and Beyond

Lisa A. Kloppenberg
Santa Clara University School of Law, lkloppenberg@scu.edu

Recommended Citation
76 Or. L. Rev. 249

LISA A. KLOPPENBERG*

The Public Interest in the Work of the Courts: Opinions and Beyond**

SEVERAL participants in the Innovation and Information Environment Conference questioned "who owns the law" in the context of access to court opinions on computer databases.[1] Various courts are considering proposals for a public-domain citation system of computer accessible court opinions, using vendor-neutral forms such as paragraph numbering, in order to support low cost legal research and to supplement the citation systems developed by private publishers.[2] There is a close connection between calls for a vendor-neutral or public-domain citation system for the courts and the issue of who "owns" previously rendered court opinions when parties to the suit want an opinion vacated pending appeal. Recently, the courts have split on this question, and their division reflects a larger debate about the

* Assistant Professor of Law, University of Oregon School of Law; B.A., 1984, University of Southern California; J.D., 1987, University of Southern California. I am grateful to Keith Aoki, Margie Paris, and Mark Zunich for reviewing an early version of this Comment. Donna Matthews provided excellent editorial and research assistance.

[1] James Love & Vic Garces, Electronic Legal Databases and the Public Domain, Remarks at the Innovation and Information Environment Conference (Nov. 1995); *see also* James Love, *Four Years of Struggles to Free the Law*, FIFTH CONF. ON COMPUTERS & PRIVACY (Taxpayer Assets Project) 1995 (hereinafter *Four Years*).

[2] For opposing views on the debate about instituting a vendor neutral case law citation system, compare Donna M. Bergsgaard & Andrew R. Desmond, *Keep Government out of the Citation Business*, 79 JUDICATURE 61 (1995) with Gary Sherman, *A Simplified System of Citation*, 79 JUDICATURE 60 (1995). *See also* Robert Berring, *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 CAL. L. REV. 615 (1995); *Four Years*, *supra* note 2; L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989). For an interesting summary of litigation between West Publishing Company and the Department of Justice concerning ownership to certain federal court opinions and related political controversy, see John J. Osland, *Debate Rages over Who Owns the Law*, MINNEAPOLIS STAR TRIBUNE Mar. 6, 1995, at 8A.

functions of our courts.[3] The opposing resolutions of the vacatur issue exemplify the tension between two competing missions for the courts, one based on a case processing model and one on a law articulation model.[4] The latter model, with its emphasis on the public value of adjudication, supports proposals for greater public access to court opinions.[5] Moreover, the public interest in adjudication encompasses other court activities beyond opinion production, such as discovery materials and unpublished determinations. We must consider to what extent such adjudication components should remain private now that technology may make the inner workings of courts more widely accessible.

I

COMPETING PUBLIC AND PRIVATE INTERESTS

Public and private interests compete when litigants seek to vacate a lower court ruling while that ruling is being appealed.[6] Parties sometimes agree to vacate the lower court opinion as a condition of settlement, or one party argues that settlement renders the earlier ruling moot and requests vacatur. These techniques aim to limit the ruling's precedential and preclusive value.[7] In 1992, the California Supreme Court concluded that California courts may vacate their earlier opinions in order to

[3] Of the extensive literature on the vacatur issue, I found two articles particularly helpful. *See* Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991) (arguing against vacatur due to the public interest in preserving previous court judgments). I also draw heavily in this Comment on a thoughtful and comprehensive treatment of vacatur by Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

[4] *See* Resnik, *supra* note 3, at 1526-36.

[5] *See* Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property & the Public Domain*, 18 COLUM.-VLA J.L. & ARTS 1, 45 (1993-94) (arguing that the focus in intellectual property law on individual ownership prevents us from recognizing the public interest in "widespread electronic circulation of the very language of federal judges in federal courthouses as they decide the public's business"); *see also* ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION? FROM PRIVACY TO PUBLIC ACCESS 159-73 (1994) (canvassing arguments for broader public ownership of information gathered by governmental entities, particularly electronic data); James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992) (arguing that the legal public/private distinction privileges the ownership interests of authors at the expense of the broader public interest in widespread dissemination of information).

[6] Fisch, *supra* note 3, at 591 n.10 (citing cases where courts balance public and private interests to determine whether to approve vacatur).

[7] Resnik, *supra* note 3, at 1473. For references to the extensive literature on pre-

induce settlement.[8] However, the United States Supreme Court came to the opposite conclusion in 1994, finding that federal courts should not allow vacatur as a condition of settlement absent exceptional circumstances.[9] The Court reasoned in part that the judgment already rendered has a public value which the private parties should not be entitled to automatically erase: "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur."[10] The division between the United States Supreme Court and the California Supreme Court reflects a larger debate about prioritizing the functions of courts. Do courts sit primarily to resolve private disputes efficiently? How much emphasis should be placed on courts' public "lawsaying" function[11] when this public conflicts with the interests of private litigants? I briefly explore the two cases to illuminate the public and private interests at stake and the tensions between the competing court models.

II

Opposing Resolutions of the Vacatur Issue

Mr. Neary was a cattle rancher who believed that governmental pesticide spraying had poisoned his cattle.[12] The University of California reported that Neary's "deficient ranch management practices [had] caused illness and death of many of Neary's cattle."[13] Neary sued for libel and a jury awarded him $7 million.[14] During the appeal, the parties worked out a settlement in which

---

cedent, see Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1 (1994).

[8] Neary v. Regents of the Univ. of Cal., 834 P.2d 119 (Cal. 1992).

[9] U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386 (1994).

[10] *Id.* at 392 (quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 114 S. Ct. 425, 428 (1993) (Stevens, J., dissenting)).

[11] *See* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485, 1488 (the federal courts' interest in "expounding" federal law is based on desires to promote uniformity in federal law and vindicate federal rights); Susan Bandes, *The Idea of a Case*, 42 Stan. L. Rev. 227, 299 (1990) (describing the Supreme Court's recognition of its role in "public norm creation"); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 12-14 (1988) (discussing the courts' role in creating and advancing public values through legal rulings).

[12] *Neary*, 834 P.2d at 120.

[13] *Id.*

[14] *Id.*

Neary would receive $3 million and the trial court would vacate its earlier opinion.[15] Except for certain kinds of cases like class actions, settlement of a civil lawsuit is a totally private, party-controlled matter.[16] The parties in *Neary* could have settled without disturbing the trial court's opinion, as most parties do. However, defendants wanted to erase the precedent, and Neary presumably preferred a secure $3 million to the uncertainty and delay of the appellate process.[17] Both parties sought an end to the expensive, thirteen-year dispute.[18]

The California Supreme Court identified three reasons for letting the trial court vacate its judgment. First, the majority reasoned that the parties had financed this odyssey and that courts exist for litigants, not the other way around.[19] Thus, private litigants must retain the autonomy to settle, including demanding vacatur as a condition. Second, although substantial court and public resources had already been invested in this private controversy, the court did not view litigation as a search for truth.[20] Instead, the court viewed it as primarily a dispute resolution process, so judicial integrity would not be undermined by disposing of the dispute via vacatur.[21] Finally, the justices were concerned with efficiency—they believed they would promote more settlements in the future by allowing vacatur.[22] They would also conserve party and appellate judicial resources in the immediate controversy.[23]

The dissenting justice disagreed that vacatur would achieve efficiency because incentives to settle *before* trial would diminish under the majority's presumption.[24] If the precedential effect of a ruling could be nullifed later, parties with sufficient resources would have less incentive to settle before the ruling. Further, he emphasized the public interest in the opinions of a taxpayer-fi-

---

15 *Id.*

16 Fisch, *supra* note 3, at 598; FED. R. CIV. P. 23(e).

17 Apparently, the veterinarian defendants were concerned about the judgment's affect on their professional reputations. *Neary*, 834 P.2d at 131 (Kennard, J., dissenting).

18 *Id.* at 123.

19 *Id.* The court noted: "Homilies about 'judicial integrity' and 'legal truth' will ring hollow in the ears of the parties." *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 121.

23 *Id.*

24 *Id.* at 128-30 (Kennard, J., dissenting).

nanced institution: "the ultimate purpose of a judgment is to administer the laws . . . and thereby do substantial justice."[25] During the pretrial, trial and first appellate stage of *Neary*, significant public resources had been devoted to the case, rendering it no longer a wholly private matter. Moreover, he reasoned that this case involved a matter of significant public concern involving allegations of unsafe governmental pesticide spraying and the conduct of state employees.[26] He was also concerned about the integrity of a system which lessened the importance of unfavorable decisions when parties could purchase vacatur.[27]

One justice concurred on "the facts of this case"—apparently because the precedential value of the lower court's ruling in *Neary* was factually limited.[28] But he expressed concern about the implications of the broad majority presumption, particularly the specter of vacatur in products liability cases where the precedential value of an opinion would be greater.[29] There, a presumption against vacatur would be more efficient for the courts because other victims could use preclusion principles against a defendant in earlier judgments.[30]

The United States Supreme Court opinion in *Bonner Mall* two years later is a useful contrast to *Neary*. A bankruptcy court issued an important legal ruling, construing the recently revised Bankruptcy Code as not containing the "new value" exception.[31] The district and appellate courts disagreed.[32] After the Supreme Court agreed to hear the case, the parties entered a consensual plan of reorganization, which effectively mooted the litigation.[33] Thereafter, one party asked the Court to vacate the Ninth Circuit's opinion, which was adverse to its interests.[34]

The Court refused to do so, holding that mootness by reason of settlement does not generally justify vacatur of a prior judgment.

---

[25] *Id.* at 127.

[26] *Id.* at 130-31.

[27] *Id.* at 127-28.

[28] *Id.* at 126 (Mosk, J., concurring).

[29] *Id.* at 126-27.

[30] *Id.* at 127; *see also* Fisch, *supra* note 3, at 593-94. Professor Resnik demonstrates, however, that courts vary in how willing they are to deny future preclusive effects or deny affording authoritative or persuasive weight to even vacated prior legal opinions. Resnik, *supra* note 3, at 1501-11.

[31] *Bonner Mall*, 115 S. Ct. at 389.

[32] *Id.*

[33] *Id.*

[34] *Id.*

Justice Scalia, writing for a unanimous Court, relied on the public interest in the court opinion already rendered.[35] The rulings concerning how to interpret the Bankruptcy Code were important precedent, which litigants and the public rely on to shape their conduct.[36] The Court also reasoned that allowing vacatur might deter pretrial settlements by encouraging litigants to "roll the dice" at the trial level and seek vacatur later if necessary.[37] Finally, the Court emphasized that the settlement was voluntary and the party seeking vacatur could instead pursue appellate reversal of the earlier ruling.[38]

III

THE STRENGTH OF THE PUBLIC INTEREST IN THE WORK OF COURTS

Although the *Bonner* Court disagreed with the *Neary* court about whether vacatur on appeal promotes efficient resolution of disputes for parties and courts, both courts were genuinely concerned with efficient case processing. The Supreme Court saw little conflict in the vacatur context between the case processing and lawsaying functions of the federal courts. But by emphasizing the general public interest in court opinions, the Supreme Court differed significantly from the California court about the extent of the public interest in court opinions. In so doing, the Court gave support to a law articulation model of adjudication.[39] I suggest that courts need to perform both roles—and which function is emphasized in a particular case should depend on the substantive issue and the level of court involved.[40] For example,

---

[35] *Id.* at 392.

[36] *Id.* at 393; *see also* Burnet v. Coronnado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.").

[37] *Bonner Mall*, 115 S. Ct. at 393.

[38] *Id.* at 392.

[39] The vacatur cases and related scholarship provide some interesting philosophical alignments. For example, Justice Antonin Scalia authored *Bonner Mall*. Another "conservative," Judge Frank Easterbrook, also emphasized the public value in judicial opinions when writing for the Seventh Circuit on the vacatur issue. *In re* Memorial Hosp., 862 F.2d 1299, 1300 (7th Cir. 1988). Their emphasis on the "lawsaying" function of the courts in these opinions is to some extent harmonious with the emphasis of some "liberal" scholars. *See, e.g.*, Bandes, *supra* note 11; Fiss, *supra* note 11.

[40] This suggestion parallels my treatment of other doctrines courts have developed for mediating between these two functions. *See* Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297 (1996) (hereinafter *Measured*); Lisa A. Klop-

the Supreme Court has a heightened lawsaying function in constitutional cases, and it should hesitate before reflexively applying the doctrine of avoiding "unnecessary" constitutional determinations.[41] Similarly, vacatur is less appropriate where an opinion has significant precedential import or preclusive potential. Thus, courts should be more hesitant to vacate appellate opinions as opposed to trial court rulings because of our hierarchical system of precedent. Additionally, vacatur is less appropriate when a powerful repeat player is requesting vacatur to shape the law in a particular area.[42]

CONCLUSION

The Court's emphasis on the public interest in *Bonner* lends greater credence to the argument for greater public access to court opinions (which might be accomplished through a vendor neutral citation system). In addition, this public interest extends beyond opinions to reach other court activities, such as discovery;[43] unpublished and de-published determinations and decisions to selectively publish;[44] the work of magistrates;[45] settlements; status conferences; and judicial efforts to encourage

penberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (hereinafter *Avoiding*).

[41] *See Measured*, *supra* note 40; *Avoiding*, *supra* note 40.

[42] *See* Resnik, *supra* note 3, at 1525. Professor Resnik explores the complexity of the public interest in published court opinions in a much more comprehensive manner than this Comment. *See* Resnik, *supra* note 3, at 1536-39 (her two conflicting evaluations of the vacatur practice reflects the impossibility of a single, simplistic right answer about the mission of the courts).

[43] For example, it may be less costly for courts and parties to comply with Federal Rule of Civil Procedure 5(d), which presumptively requires the filing of discovery materials with a court absent an order to the contrary, if discovery is exchanged or stored in computer-readable form. However, the Supreme Court, in construing Washington State discovery rules, broadly stated that "pretrial depositions and interrogatories are not public components of a civil trial." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984); *see also* RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 577-79 (2d ed. 1992) (collecting some arguments for greater public access to pretrial materials); Resnik, *supra* note 4, at 1493-94 n.85.

[44] For arguments that such practices endanger courts' function of espousing public values, see Martha J. Dragich, *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) and Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. REV. 109 (1995) (challenging California and federal court practices).

[45] "By the early 1990's . . . the number of magistrates nearly equaled the number of Article III district judges." MARCUS & SHERMAN, *supra* note 43, at 712. The enormous significance of pretrial activity in civil litigation today is demonstrated by

alternative dispute resolution.[46]

Each item on this preliminary list must be examined in light of competing public and private interests. For example, even if private parties do not "own" previously published court opinions, they may be entitled to control aspects of litigation traditionally considered private. Increased public access may plague already overburdened judges and administrators or impose substantial costs or delay. Public exposure of certain information may lead some litigants to opt out of the court system. Although these adjudication-related activities are often deemed private by lawyers, litigants and judges, we should at least be debating what parts of this public system *should* remain private as technology enables cheaper and easier public access.[47] Courts are publicly financed and they perform several important governmental missions. We need and deserve access to information about the workings of the judicial branch so that we can monitor courts and better reflect on their priorities as a polity.[48]

Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631.

[46] Resnik, *supra* note 3, at 1500-01. Professor Resnik has demonstrated how federal judges have focused increasingly in recent decades on strengthened judicial management techniques, including increased judicial settlement and alternative dispute resolution efforts. Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5 (Summer 1991); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

[47] For example, the Legal Information Institute of Cornell Law School has put information online from 15 years of civil litigation in federal court. This project should enable easier empirical research and monitoring of the courts' work. Professors Stephen Eisenberg and Kevin Clermont of Cornell Law School constructed the database with information that was generated by the Administrative Office of the United States Courts and assembled by the Federal Judicial Center. The data are available online at URL: http://www.law.cornell.edu/ or URL: http://teddy.law.cornell.edu:8090/questata.htm.

[48] The American Judicature Society supports cameras in the courtroom in order to enable citizens to evaluate the courts as a democratic institution and to increase public support for and understanding of the judicial process. Frances Kahn Zemans, *Public Access: The Ultimate Guardian of Fairness in our Justice System*, 79 JUDICATURE 173 (1996).