The Journal of Appellate Practice and Process

Volume 2 | Issue 2 Article 2

2000

A Vision of the Future of Appellate Practice and Process

George Nicholson

Follow this and additional works at: https://lawrepository.ualr.edu/appellatepracticeprocess

 Part of the Legal History Commons, and the Litigation Commons

Recommended Citation

George Nicholson, *A Vision of the Future of Appellate Practice and Process*, 2 J. APP. PRAC. & PROCESS 229 (2000).
Available at: https://lawrepository.ualr.edu/appellatepracticeprocess/vol2/iss2/2

This document is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Journal of Appellate Practice and Process by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

AN ENVIRONMENT OF CHANGE

A VISION OF THE FUTURE OF APPELLATE PRACTICE AND PROCESS

George Nicholson*

Having been an interested observer of and participant in appellate practice and process for many years, I was startled by a recent Scottish appellate court decision. The appellant was convicted of assault and robbery. On appeal, she argued that the presiding sheriff had misdirected the jury. Specifically, she complained: "The *intonations* of the Sheriff throughout parts of his Charge to the Jury dealing with the similarities and discrepancies of the evidence . . . was such as to give a clear indication to the Jury that they should give greater weight and attention to the similarities in the evidence rather than the discrepancies."[1] In other words, the appellant did not find fault with the words the sheriff used to charge the jury. Instead, she

---

* Associate Justice, Court of Appeal, Third District, State of California. In addition to this special issue of the Journal of Appellate Practice and Process, Justice Nicholson has helped plan and publish a number of other special law journal issues on such topics as the rights of crime victims, 11 Pepp. L. Rev., *Victims' Rights Symposium* (1984); 23 Pac. L.J. 815 (1992); psychology and the law, 24 Pac. L.J. 1103 (1993); and appellate process in California, 45 Hastings L.J. 383 (1994).

1. *Clark v. Her Majesty's Advocate*, App. No. C/633/99 (Scotland July 26, 2000) (italics added), *available at* <www.scotcourts.gov.uk/opinions/C633_99.html> (accessed Oct. 19, 2000).

asserted that the tone of voice the sheriff used influenced the jury against her.

The High Court of Justiciary, Scotland's supreme criminal court, agreed. After listening to an audio recording of the jury charge, the court, while opining that the words used were appropriate, concluded: "[A]s spoken by the Sheriff, when listened to objectively, the passage did indeed create the impression that the appropriate inference to draw from the evidence on these matters was adverse to the appellant."[2] The High Court quashed the conviction based on the sheriff's tone of voice.

The Scottish court accomplished this remarkable expansion of the scope of appellate review without comment on the propriety of extending the scope of review beyond the transcript. Certainly, there can be no doubt that, in the real world, a jury may be influenced as much by the tone of voice used as by the words included in the charge. However, common law courts, such as ours and Scotland's, have always confined review to the cold, sterile record. The Scottish high court undertook a revolutionary new mode of review without even mentioning it was doing something out of the ordinary.

Technology has caused, and will continue to cause, change in appellate practice and process. For that reason, the collection of articles in this issue of the *Journal of Appellate Practice and Process* represents a significant study in the status and future of appellate practice and process for the practitioner and for the court.

The changes caused by technology fall into two general fields, both of which are represented in this collection. The first type of change, and the most visible to this point, involves improved efficiency brought to traditional appellate practice and process. Electronic research, paperless courts, and teleconferenced oral arguments are typical representations of this type of change. The second type of change calls into question the scope and direction of traditional appellate practice and process. It raises questions such as whether the Scottish court should extend appellate review beyond the traditional boundaries of the record on appeal.

---

2. *Id.*

I. ISSUES OF SPEED, EFFICIENCY, AND COMMUNICATION

The modern appellate courthouse is haunted by anachronism. At one moment, a judge engages in electronic legal research, links with a computer in another state as easily as to one in the next office, and then to a computer perhaps even in another country in search of just the right legal precedent.[3] With just a few key strokes or mouse clicks, vast databases of stored knowledge and wisdom can be searched while the judge composes a legal opinion.[4] The judge then slides the chair over to the other side of the desk where lies the record on appeal, a collection of bound pages of trial court transcripts and filings.

---

3. Technology also highlights the issue of who owns the law. *See Wheaton v. Peters*, 33 U.S. 591 (1834) (holding that judicial decisions cannot be copyrighted).

> Technology . . . provides new possibilities not available in the past. In most states, appellate courts produce and distribute opinions to a contract publisher. The publisher then collects the opinions in bound volumes or stores them electronically and sells them back to the government. Likewise, legislatures produce the statutes, but the government purchases bound volumes and electronic services containing those statutes. With the modern availability of electronic storage and telecommunications, appellate courts and legislatures must reassess this process, analyzing the policy and costs involved. It may be better to establish internal systems to provide access to the law. States that have already established such internal systems can serve as the testing ground and model for those that have not.

George Nicholson & Jeffery A. Hogge, *Retooling Criminal Justice: Forging Workable Governance from Dispersed Powers*, in *The National Conference on Legal Information Issues: Selected Essays* 240 (Rothman & Co. 1996) (available at *Justice Web Collaboratory* <http://www.judgelink.org/Insights/2000/Retool/index.html> (accessed Oct. 19, 2000)). According to Professor Robert C. Berring of Boalt Hall School of Law, one of the most provocative early articles on this topic was Gary Wolf, *Who Owns the Law?* 2.05 Wired 98 (May 1994).

4. Not all web sites providing legal information are helpful. The American Association of Law Librarians maintains a web site that evaluates other web sites providing legal information. *See* American Association of Law Libraries, *Access to Electronic Legal Information Committee* <www.aallnet.org/committee/aelic/index.html> (last updated Aug. 9, 1999). The introduction to the Association's site states:

> In an attempt to help make legal information easily and logically available to the public, the American Association of Law Libraries (A.A.L.L.) formed the Information Technology and Implementation Working Group. In 1998, the A.A.L.L. Board of Directors elected to make the Working Group a standing Committee. The Committee determined that the most effective role that Law Librarians could have in this process was to develop criteria for evaluating World Wide Web sites that make legal information available and to gather together pointers to sites that do a particularly good job at making particular types of legal information available. The pointer pages also describe why these sites are good examples.

Id.

The only way to search through the record for specific trial court testimony, for example, is to manually locate the testimony of the appropriate witness and then read page by page until the desired testimony is found. It is as if, by sliding the chair, the judge has gone back in time to a different era. The appellate judge has one foot in the nineteenth century and the other in the twenty-first.

With electronic research as an example, significant advances in appellate practice and process have already taken place because of technology. Younger participants may not have experienced the arduous task of writing and editing without word processing technology—dictating, typing, editing, cutting and pasting with actual scissors and glue, more typing. Perhaps more than anything else related to the appellate brief or opinion, computers have allowed practitioners and courts to edit and refine their writing with ease.

That is not to say it has had a beneficial effect in all circumstances. Occasionally, to the writer's dismay, and to the dismay of the writer's colleagues, editing and refining can become an endless process. The technology has also permitted sloth. I have seen too many sloppy points and authorities filed in the trial court become the text of a brief on appeal, with little, if any, improvement. Courts notice, and to some extent resent, this lack of care for the quality of appellate advocacy. I am also concerned about the dismal prospect that collegiality, especially among judges on the same court, will be dampened by the ability to do our work anywhere, not just at the courthouse.

An issue already causing stress among appellate judges and others is whether to utilize technology to make unpublished appellate opinions available to the public and citable as precedent. Unpublished appellate opinions generally are not citable as authority in the nation's state and federal appellate courts.[5] The continued existence of this venerable prohibition may be hanging in the balance. In 2000, it was sustained by the California Court of Appeal, but rejected by the United States

5. *See e.g.* Cal. R. Ct. 977; 8th Cir. R. 28(A)(i). There are usually very specific criteria which must be met before an appellate opinion may be published. *See e.g.* Cal. R. Ct. 976; *see also* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, 20 Cal. Law. 43 (June 2000).

Court of Appeals for the Eighth Circuit.[6] Despite valid policy and heretofore practical reasons, the Internet and virtually ubiquitous court computer storage mechanisms combine to make all appellate opinions—including unpublished decisions, which comprise the vast majority of appellate decisions—easily electronically accessible everywhere. The confluence of technological innovation and growing public and professional pressures may foster additional challenges to the prohibition, state and federal.[7]

In addition to the court cases in which publication and precedential value of appellate opinions were considered, potential legislation did so as well. One such proposal, Assembly Bill 2404, was considered and rejected by the California Legislature in 2000. The bill would have required, if adopted, all final opinions of the courts of appeal and appellate divisions of the superior courts to be made available for private publication, and it would further have provided that such opinions constitute precedent under the doctrine of stare decisis, the same as opinions ordered published by the court of decision. Such a change would have increased the volume of precedential appellate opinions in California roughly twelve-fold. Grappling with the challenges brought by technology is not always the subject of consensus.[8]

There are a few current iniatives involving technology that I believe merit some note. This list is representative of the many

---

6. *Schmier v. Sup. Ct.*, 78 Cal. App. 4th 703 (Cal. App. 2000); *see also Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000). Judge Richard S. Arnold, the author of *Anastasoff*, previously wrote a pertinent article on the topic of unpublished opinions. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999). In *Anastasoff*, Judge Arnold made it clear the ruling was not that all opinions must be published; instead, the panel concluded that all opinions, published or unpublished, are citable. *Anastasoff*, 223 F.3d at 904.

7. Ron Cohen & Ronald Steiner, *Battle Cry: 8th Circuit Rejects Rule against Citing Unpublished Opinions*, San Francisco Daily J. 5 (Sept. 6, 2000). California has a unique but related procedure, which permits the state high court to depublish previously published intermediate appellate court opinions. *See* Cal. R. Ct. 979; Stephen R. Barnett, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct*, 45 Hastings L.J. 519 (1994); *see also* J. Clark Kelso, *A Report on the Appellate System*, 45 Hastings L.J. 433, 485-496 (1994).

8. For its upcoming Winter 2001 issue, the *Journal of Appellate Practice and Process* plans to publish a "mini-symposium" of essays and articles by judges, attorneys, and law professors on the topic of unpublished opinions in the appellate courts, addressing the implications of *Anastasoff*.

positive initiatives and some are more ably and fully discussed in the articles found in this volume.

A. The Justice Web Collaboratory

As I mentioned above, I am concerned about the effect of technology on collegiality. How will we maintain optimum working relationships when we may never see each other in the flesh? Even so, technology offers the prospect of building better relationships with an unprecedented domain of participants in the justice enterprise and beyond.[9] Integration and collaboration are the key to successful implementation of technology.[10]

---

9. One vital element of judicial collegiality is sharing knowledge. When I first attended the National Judicial College and the California Center for Judicial Education and Research many years ago, instructors provided their direct chambers' telephone numbers with the generous offer to "come off the bench anytime to give you a hand; just call!" Now, with the advent of the Internet, a new mode of judicial mentoring is at hand. It is far more efficient, effective, and convenient as a means of fulfilling generous invitations by judicial elders to "just call!" The Tribal Law & Policy Institute operates the Tribal Court Mentors Circle, described as an

> on-line community of individuals who have volunteered to share their knowledge and expertise in assisting people who work in Native American Tribal courts. The Institute has established the Tribal Court Mentors Circle so that Tribal court personnel can seek advice from individuals, like themselves, who work in Tribal courts and in Indian Country.

Trial Court Clearinghouse, *Mentors Circle* <www.tribal-institute.org/lists/mentors.htm> (accessed Oct. 19, 2000). The "ICWA Checklist for Judges" is another useful Internet mentoring tool. It deals with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act. The checklist was originally prepared for Minnesota's Annual Conference of Judges and is now maintained on the Internet by the Indian Child Welfare Law Center. *See* Indian Child Welfare Law Center, *Indian Child Welfare Act/Minnesota Indian Family Preservation Act: A Checklist for Judges* <www.glrain.net/icwalc/judges.html> (accessed Oct. 19, 2000). The Oklahoma City University School of Law provides another on-line tribal law resource:

> As recently as 25 years ago, there was no broadly recognized field of Indian law. Today, it is a thriving branch of modern law. It touches the economic and political well-being of millions of Native Americans, and it plays a critical role in the affairs of many states.

Oklahoma City University School of Law, *Indian Law* <www.okcu.edu/law/nalrc1.htm> (accessed Oct. 19, 2000).

> In 1996, the Honorable William C. Canby, Jr., Senior Circuit Judge, United States Court of Appeals wrote: "The tribal courts are doing a huge business, and we in the federal and state judiciary could not do without them. . . . A disappearance of the tribal court system would be a major disaster, not just for the tribes and their courts, but for our whole national system of civil and criminal justice."

Statement of Mark C. Van Norman, Director, Office of Tribal Justice, before U.S. Senate

This notion that building better relationships is important is nothing new. United States Supreme Court Justice Robert H. Jackson declared: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[11]

The Justice Web Collaboratory ("JWC"), a partnership between Chicago-Kent College of Law and the National Center for State Courts, is an effort to use the World Wide Web to foster education, collegiality, and collaboration among judges.[12] To this end, the JWC may soon act as the American Judges Leadership Roundtable to aid tribal, state, and federal judges to utilize computers and telecommunications, especially the Internet, in their bench and chambers work.[13] Also among JWC

Committee on Indian Affairs (Sept. 29, 1999) (concerning S.B. 1508, Technical and legal assistance to tribal justice systems and members of Indian Tribes).

Tribal judges, as with all judges, are trying to find ways to broaden accessibility to judicial education and training. The Tribal Law & Policy Institute's Tribal Court Mentors Circle provides a new model for state and federal judges to consider. Might there be means available to enable state and federal judges to reciprocate? In other words, how may America's state and federal judges, and their various judicial education organizations, programs, and projects, lend non-threatening and useful aid to their tribal court counterparts? *See* U.S. Dept. of Justice, Office of Justice Programs & Natl. Criminal Justice Assn., *Report of the Indian Country Information Technology Meeting* <www.ojp.usdoj.gov/integratedjustice/indian-f.htm#exec> (Nov. 10, 1999).

10.

> With the availability of useful technology, criminal justice has an unprecedented opportunity to become more efficient and effective through integration. Unless a coordinated effort is made to use technology appropriately, however, its application in criminal justice will continue to be isolated and haphazard. Better coordination can be achieved only when all of the participants in criminal justice work together . . . .
>
> By using current technology to integrate the system, criminal justice can also position itself to adopt new technologies. Indeed, the need for coordination will never end. Emerging technology can be tested and adapted to criminal justice's unique needs. Setting aside misapprehension concerning technology and unnecessary isolation, criminal justice participants can "integrate the dispersed powers into a workable government."

Nicholson & Hogge, *supra* n. 3, at 247. What is true in the criminal justice system holds true for every other system affected by technology.

11. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

12. The JWC is described more fully by Dean Perritt and Professor Staudt in their article included in this volume at 2 J. App. Prac. & Process 463 (2000).

13. *See* Justice Web Collaboratory <www.judgelink.com> (accessed Oct. 19, 2000).

goals is operation of the American Judges Leadership News Service by which six to ten news bulletins, each with a short synopsis, pertinent to evolving leadership initiatives taking place anywhere in the world, are distributed weekly to all American judges. These news bulletins would be categorized and stored permanently for on-going access. Eventually, JWC hopes to establish and operate Internet links with all international and foreign judiciaries and judicial organizations.

We stand at a critical moment in the evolution of the justice system in the United States. The enormous developments in information technology and the explosive growth of the Internet in the past five years make it possible for most of the lawyers, all of the business clients, and increasing numbers of the individuals who utilize our courts to use computers and the Internet to communicate and interact with the civil justice system. Lagging behind but gaining momentum, the massive paper systems for filing and managing court documents are slowly, but inexorably, moving to electronic form.[14]

Among American knowledge workers, the group least aware of these technologies and least capable as a class of using the Internet and modern computing tools to improve their professional competence are judges. JWC may provide the interactive, distance-learning mechanism needed to begin to bring our judges into the Internet era.

JWC seeks to introduce itself to every state, federal, and tribal judge in America and to deliver education to fifty percent of the nation's 30,000 state and 800 federal trial and appellate judges, as well as to our tribal judges, within three years. As an important secondary benefit of JWC, lessons can be made available to the thousands of lawyers who appear in court before these judges and the non-lawyer "consumers" of the court

---

JWC Advisory Board members include representatives of the Federal Judges Association, American Judges Association, Judicial Division of the American Bar Association, and American Indian Court Judges Association, while liaison is maintained with the American Association of Law Librarians.

14. For a variety of initiatives undertaken by the United States Department of Justice, related to technology integration, go to Office of Justice Programs, *Integrated Justice Information Technology Initiative* <www.ojp.usdoj.gov/integratedjustice/> (accessed Oct. 19, 2000). Paul Kendall, General Counsel, Office of Justice Programs, U.S. Dept. of Justice, has been the key figure fostering these initiatives.

system who will learn asynchronously to seek solutions to their disputes using a redesigned court system.

The impact of the JWC concept may eventually become global. In July 2000, Justice John Ellis, Appellate Division, Family Law Court of Australia, visited Sacramento as a guest of the local bench and bar and JWC. The Family Law Court of Australia is a federal court, both trial and appellate, in a country somewhat similar in governance to the United States insofar as it has complicated state and federal elements and is rooted in the common law. While in Sacramento, Justice Ellis inquired whether organizational and technological mechanisms might be conceived and constructed by which judges, particularly appellate justices, everywhere in the world might be able, effectively and instantly, to communicate with one another for mutual benefit—social, cultural, pedagogical, and professional.

Justice Ellis raised the additional issue of "Sister Courts," akin to the "Sister City" concept which has long enjoyed worldwide currency. The central question: Might there be utility for courts around the world to ponder the idea of sister courts, bolstered by technological appendages, for the enlightenment of judges and the enhancement of justice everywhere? The answer to that question may already be at hand. Judge Lucian Netejoru, Trial Court, District of Giurgiu, Romania, and Judge Gerald Elliott, Johnson County District Court, State of Kansas, are presiding over the establishment of a "Sister Courts" project between their two courts.[15] According to Judge Netejoru:

> The alliances between courts from different countries, have the aptitude to fight against a "court's narcissism" with its own arms; each court in such an alliance shall be the "mirror" for the other, reflecting a non-neutral image. The alliance of "Sister Courts" shall have two pillars: the informal relationship between judges and the institutional conjunction. There is a need for judges to think more broadly, more inclusively, and more creatively. To this end, "Sister Courts" can provide the primary mechanism represented by a "network" of immediate links, professional as well as social, between all the judges of two courts from different countries. The existence of mutual interests at the personal level is out of doubt; therefore, the

15. Judge Elliott is president of the American Judges Association.

> determination of such interests and the establishment, on this basis, of personal relationships is a very important task. The aforementioned "network" shall enable the involved courts to enlarge their respective horizons in order to speed and improve the delivery of justice, in both jurisdictions.[16]

JWC may eventually help with such matters by acting as an Internet portal to various international and foreign judiciaries and judicial organizations. The National Center for State Courts is currently in the fledgling stages of formulating an International Think Tank on Global Court Technology ("ITT"). Ultimately, JWC, ITT, and the World Jurist Association, among other international entities, may work together to answer Justice Ellis's question.

Early in 2000, Judge Gilbert Guillaume, President of the International Court of Justice, pertinently declared:

> The Court must also continue to modernize. It has done a great deal in regard to computerization, including the creation of a bilingual web site on the Internet. This and the mirror sites opened in Glasgow, New York and Paris receive 2,400 to 2,600 visits daily. An average of 18,000 documents are downloaded every day, ranging from the parties' memorials and the Court's judgments to press communiqués. The Court will continue its work in this area, since this is a particularly useful tool for providing information and taking action; and we were gratified at the recent tributes to our site, among them that of the Encyclopaedia Britannica.[17]

---

16. E-mail from Judge Lucian Netejoru, Trial Court of Giurgiu, Romania, to George Nicholson (July 16, 2000) (on file with author).

17. *See also International Court of Justicee* <www.icj-cij.org> (accessed Oct. 19, 2000). For some existing international web sites, see, for example, World Jurists Association, <www.worldjurist.org/> (accessed Oct. 19, 2000) (featuring the *Law & Technology Quarterly*); International Commission of Jurists <www.icj.org/> (accessed Oct. 19, 2000); Project on International Courts and Tribunals <www.pict-pcti.org/> (accessed Oct. 19, 2000); Global Justice Information Network, United States Department of Justice, <www.usdoj.gov/ag/global/index.htm> (accessed Oct. 19, 2000); Global Legal Information Network, Library of Congress, U.S., <dlt.gsfc.nasa.gov/gibn/glin.html> (accessed Oct. 19, 2000).

B. California Assembly Bill 2124

Assembly Bill 2124, the "Integrated Justice Enterprise Information Act of 2000," was adopted by California's Senate (38-0) and Assembly (78-0).[18] A.B. 2124 was supported by a wide range of governmental entities and organizations.[19] In a surprise, the Governor vetoed it.[20] Nevertheless, the vision of systemwide communication and collaboration portrayed in the bill deserves the attention of appellate justices and their staffs everywhere. Indeed, Assembly Bill 2124 may well serve as a model for the nation's tribal, state, and federal courts and the various systems of justice in which they operate.

The bill provided for establishment of the "Integrated Justice Information System Task Force," to be composed of representatives of the entire justice enterprise. This task force was to create a California integrated justice information system plan setting forth steps necessary to enable justice system agencies to develop and implement, in a cost-effective manner,

---

18. For the text of A.B. 2124, see *Bill Number: AB 2124 Enrolled Bill Text* <www.leginfo.ca.gov/pub/bill/asm/ab_2101-2150/ab_2124_bill_20000822_enrolled.html> (accessed Oct. 19, 2000). *See also Bill Documents* <www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_2124&sess=CUR&house=B> (accessed Oct. 19, 2000) (stating the legislative context of A.B. 2124).

19. That support included the California Judicial Council, California Judges Association, Attorney General's Office, California District Attorneys Association, California Police Chiefs Association, California Peace Officers Association, Sheriff of Los Angeles, Crime Victims United of California, California Youth and Family Coalition, and prominent members of the criminal defense bar, among others. Assemblyman Tom McClintock authored the bill. Professor Clark Kelso, McGeorge School of Law, drafted it. Professor Kelso worked very closely on the bill's conceptual framework with Judge Tom Cecil, Sacramento County Superior Court; former State Public Defender Fern Laethem; and Special Assistant Attorney General Tom Gede, among many others, during the several years leading to the bill's introduction.

20. The governor's veto message stated:

> While this bill's intent is to assist in the creation of efficiencies in the transmission of information between various law enforcement agencies, I have concerns that this bill would create a significant pressure on the General Fund, likely in the tens of millions of dollars to implement recommendations made by the bill's task force. The 2000 Budget Act includes $34.4 million to assist in implementation of the Judicial Technology Initiative and $75 million one-time funding to local law enforcement agencies for the purchase of high-technology equipment. Thus, it is not clear to me that the proposed task force and plan are necessary at this time.

Bill Number: AB 2124 Vetoed Date: 09/10/2000 <www.leginfo.ca.gov/pub/bill/asm/ab_2101-2150/ab_2124_vt_20000910.html> (accessed Oct. 19, 2000).

an integrated justice information system that maximizes standardization of data elements and communications technology and reduces unnecessary duplication of data collection, storage, or entry. In creating this plan, the task force would have consulted with and taken into consideration existing information technology planning efforts being undertaken by justice system entities. The task force would have also formulated recommendations regarding the establishment of a permanent planning or development process for the purpose of achieving continuous collaboration among the various entities that participate in the integrated justice information system. The statutory goal of such a task force was to share and coordinate planning efforts of justice system entities in order to promote opportunities for information integration.

Assembly Bill 2124 addressed governance as much as it did technology. It would have mandated responsible action on an issue which, for years, has confounded government—federal, state, and local—including, most particularly, the multitude of agencies and organizations which together comprise the Justice Enterprise. During this period, largely by default, government has created a confusing mix of overlapping, duplicative—indeed, redundant—and very costly efforts to identify, acquire, and utilize technology, especially computers and telecommunications systems. Unfortunately, the complex mix of leaders of these various agencies and organizations, try as they may, have been unable to bridge their various constitutional, statutory, traditional, and cultural divisions to work together effectively to reduce, if not avoid altogether, duplication, redundancy, and repeated waste of the hard-earned taxes entrusted to everyone in government by taxpayers. It is important to become familiar with the countless, often invisible problems that continue to impede effective progress toward integrating technology identification, acquisition, and utilization across the branches and levels of government. Progress on this front will reduce taxpayer costs, improve public safety—especially school, park, and playground safety—and enhance liberty. Assembly Bill 2124 was California's opportunity to achieve these worthy ends by pondering and developing multi-jurisdictional ideas for solving this costly and continuing riddle. The law would have cobbled a representative,

inclusive cross-section of high level representatives of the various agencies and organizations which comprise the justice enterprise. Someday, a successful bill will do that. In the meantime, leaders in the justice system, especially judges, must do what they can to implement the noble vision embodied in Assembly Bill 2124.

Harvard Business Professsor Andrall Pearson noted that businesses need two systems—one to run the business and one to develop new ideas.[21] Assembly Bill 2124 would have done that for California's criminal justice system. Similar efforts in other states and nations may yet achieve the same end.[22]

C. Sacramento Capital Case Project

The Sacramento Capital Case Project is a pilot project designed to explore and implement use of digital case records and appellate briefing in capital cases. It is a cooperative effort between the Sacramento Superior Court, the State Public Defender, the State Attorney General, and the State Habeas Corpus Resource Center. The goal is to digitize the clerk's and reporter's transcripts, photographs of trial exhibits, the motions to correct the record, the corrected record, and the briefing to the

---

21. Andrall E. Pearson, *Tough-Minded Ways to Get Innovative*, Harv. Bus. Rev. 99, 100 (May/June 1988).

22. *See* Wayne Hanson, *Defining the Justice Enterprise*, Govt. Tech. 1, <www.govtech.net/publications/gt/1995/mar/jusenter.shtm> (Mar. 1995); Tod Newcombe, *Information Links the Justice Enterprise*, Govt. Tech. 1, <www.govtech.net/publications/gt/1995/mar/justice.shtm> (Mar. 1995). Enterprises, like other "teams," need leaders. *See* Lewis Losoncy, *The Motivating Team Leader* (St. Lucie Press 1995) (dealing with "turning problems into progress"). For other pertinent "team" resources from St. Lucie Press, see Jerry W. Koehler, *Teams in Government: A Handbook for Team-Based Organization* (St. Lucie Press 1996); Lewis Losoncy, *Best Team Skills* (St. Lucie Press 1996); Bob Fisher & Bo Thomas, *Real Dream Teams* (St. Lucie Press 1996); Jerry Arcaro, *Teams in Education: Creating an Integrated Approach* (St. Lucie Press 1995); and Peter Mears, *Organization Teams: Building Continuous Quality Improvement Facilitator's Guide* (St. Lucie Press 1994). Even computer software can contribute to teamwork and team building; one such software, TeamTrack, is helping the eleven judges and forty-nine staff of the United States Court of Appeals for the D.C. Circuit to operate as a team. *See* Michelle Gamble-Risley, *Groupware Appeals to Judges*, Govt. Tech. 24 (May 1997), (available at www.govtech.net/publications/gt/1997/may/may1997-jandt/may1997-jandt.phtml (accessed Oct. 20, 2000)); Alan Freedman, *Groupware—We're Having a Party*, Govt. Tech. 66 (July 1997) (available at <http://www.govtech.net/publications/gt/1997/may/may1997-productfocus/may1997-productfocus.phtml> (accessed Oct. 20, 2000)).

California Supreme Court. To do this, the work product is provided incrementally via the Internet and compact disk to the parties and courts involved. As the work of compiling and correcting the case record advances, the product is updated, and eventually it is submitted to the Supreme Court in digital form. The digital record is also available to federal courts for habeas corpus proceedings.

The project's organizers hope to develop the capability to create completely accurate case records in digital form. As can be seen, the cooperation of the participants is indispensable. Indeed, the success of the project is a testament to the ability of the participants to work together toward a common goal despite the nature of the adversary process. This pilot project will serve not only as an example for other criminal cases, both capital and non-capital, but also for civil as well as administrative proceedings.[23]

D. Pro Per Projects

In the past decade, trial and appellate courts have witnessed an explosion in the number of cases filed by self-represented litigants—particularly in the areas of family law, landlord/tenant, and small claims. Some jurisdictions report that at least one party is self-represented in up to 90% of new filings; in over 60% of cases, both parties are self-represented. Although the great majority of cases filed by self-represented litigants are factually and legally uncomplicated, many of these litigants struggle to navigate a procedurally complex court system that is unfamiliar to most lay persons, that employs difficult, even arcane, terminology, and that imposes highly technical requirements for pleadings, motions and evidentiary proofs. These litigants invariably require greater expenditures of time and attention by judges and court staff to move their cases through the judicial process. To date, little effort has been spent trying to simplify the court process itself so that self-represented litigants are able to navigate the courts without undertaking a crash course in civil procedure.

---

23. For further information, contact Michael Roddy, Clerk/Administrator, Sacramento County Superior Court at <mroddy@sna.com>.

To address this major shortcoming, the National Center for State Courts ("NCSC") has initiated a partnership with the Illinois Institute of Technology's Institute of Design and the Chicago-Kent School of Law to examine court processes and recommend modifications to eliminate or reduce procedural barriers to access for self-represented litigants. This unique partnership brings together the extensive expertise of the NCSC in court management, the distinguished expertise of the Institute of Design in human-centered systems design, and the nationally renowned expertise of the Chicago-Kent School of Law in the use of technology in the justice system.

This consumer-based approach designs and proposes new court processes from the ground up, based on the needs of all court users—attorneys and litigants. The partnership will also design and propose user-friendly electronic interfaces to aid courts to provide public access to redesigned court processes.

A two-pronged strategy will be utilized, according to Professor Ronald Staudt of the Chicago-Kent College of Law. First, it will seek to reduce the complexity of court proceedings through a systemic, human-centered design process that works from the ground up. The design process is sensitive to the cultural, language, educational background, and computer literacy of people who choose to or must represent themselves in court. Equitable and fair treatment of all litigants will be a key consideration throughout the design process. Second, the partnership will harness the power of the Internet to help appellate court justices and trial court judges, and their respective staffs, to create "portals" to their civil justice processes, to help provide consumer-friendly computerized assistance for potential and actual self-represented litigants. The two strategies come together to create a web-based prototype of a consumer-based approach for either or both trial and appellate dispute resolution processes.[24]

Technology will be a central, if not the central, feature by which that change will be pursued. Like all changes in court procedure, the NCSC/IIT project suggests some interesting implications for appellate courts across the nation. From a

24. *See* Justice Web Collaboratory, *Meeting the Needs of Self-Represented Litigants: A Consumer Based Approach* <www.judgelink.org/public_access/proposal.html> (accessed Oct. 20, 2000).

purely practical standpoint, we can expect that some or all of these "redesigned" court procedures will be challenged at some point in time. Appellate courts will have to decide whether court procedures can be redesigned without violating core principles of the justice system—namely, due process of law, equal protection, and neutrality and objectivity of the forum. Assuming these modifications survive appellate review, there is also the question of whether such reforms of the justice system should be extended beyond courts with high numbers of self-represented litigants to the full spectrum of civil cases or even to the appellate bench.[25]

E. Judges and Elections

An issue of considerable interest to many state judges is the matter of judicial elections. Many appellate judges face the dilemma of having to run to obtain or retain their offices while being subject to rules of ethics requiring that they avoid becoming enmeshed in politics. The Internet provides judges with one way to cut through politics and give the public unfiltered information about themselves, who they are, and what they have done.[26]

Web sites were constructed for the purpose of educating the California public concerning the appellate courts, the justices, and the process of voting on the retention of those justices.[27] In addition, official court web sites can offer such information. For example, the web site of the California Court of Appeal, Third

---

25. To learn about similar issues, worldwide, contact the International Association of Youth and Family Judges and Magistrates, CMolenstraat 15, 4851 SG Ulvenhout, The Netherlands, telephone and fax: +31 76 561 2640, e-mail: <j.vandergoes@tip.nl>.

26. Judges ignore the Internet in this context at their peril. Critics may use it to gain access for their views, too.

27. *See* California Voter's Internet Guide, *Supreme and Appellate Court Retention Elections: Pertinent Information and How to Get It!* <www.appellateretention.org> (accessed Oct. 19, 2000); Judicial Information, *Site Map* <Vote98.ss.ca.gov/Judges98/Site%20guide2.html> (last updated Sept. 8, 1998). Beyond informing the voters concerning the mechanics of retention elections and the identities of the justices, <www.appellateretention.org> refers voters to the American Bar Association's web page concerning judicial independence. *See* ABA Commn. on Separation of Powers & Jud. Indep., *An Independent Judiciary* <www.abanet.org/govaffairs/judiciary/execsum.html> (July 4, 1997); League of Women Voters of Cal., *League's Voters Guide to Judicial Elections* <ps.ucdavis.edu/GAWS/LWV/judicelect1.html> (accessed Oct. 19, 2000).

Appellate District, includes a history of the court,[28] a summary of what appellate justices do,[29] a description of how appellate justices are selected,[30] and an explanation of what appellate retention elections are.[31] The site also contains a biography of each justice, which is submitted by the justice.[32]

II. ISSUES OF SCOPE AND DIRECTION

While the speed, efficiency, and communication that technology offers generally bear positive fruit, the use of technology in appellate practice and process reflects the care and consideration that goes into its use. As noted above, technology allows improvement of processes but also permits hyperactivity or sloth. Beyond these issues, however, technology raises the spectre of fundamental change. Instead of merely preserving and improving traditional approaches, technology may bring about significant changes in the very definition of appellate practice and process.

Consider the potential impact of artificial intelligence.[33] Will appellate judges ever be replaced by "thinking machines"? What will be the role of the appellate practitioner ten, twenty, or fifty years from now?[34] Are we so entrenched in our traditions

---

28. *Courts: 3rd Appellate District History* <www.courtinfo.ca.gov/courts/courtsofappeal/3rdDistrict/about.htm> (accessed Oct 20, 2000).

29. *Courts: What Appellate Justices Do* <www.courtinfo.ca.gov/courts/courtsofappeal/3rdDistrict/do.htm> (accessed Oct 20, 2000).

30. *Courts: How Appellate and Supreme Court Justices Are Selected* <www.courtinfo.ca.gov/courts/courtsofappeal/3rdDistrict/selected.htm> (accessed Oct 20, 2000).

31. *Courts: Appellate Retention Elections: What They Are and How to Learn More about the Appellate Courts and the Justices Who Serve on Them* <www.courtinfo.ca.gov/courts/courtsofappeal/3rdDistrict/retention.htm> (accessed Oct 20, 2000).

32. *Courts: List of Current Justices* <www.courtinfo.ca.gov/courts/courtsofappeal/3rdDistrict/justices.htm> (accessed Oct 20, 2000). For a broader range of questions and answers, under the title, "Court User Information," go to *Questions & Answers: Court User Information* <www.courtinfo.ca.gov/q&a/index.htm?> (accessed Oct. 19, 2000).

33. Artificial intelligence is something unknown to most judges and unsuspected by all but a few of us. *See Judicial Applications of Artificial Intelligence,* 6 Artificial Intelligence & L. 105 (1998); *see also Judicial Applications of Artificial Intelligence* (Giovanni Sartor & L. Karl Branting eds., Kluwer Academic Publishers 1998); *Complete Catalogue: Judicial Applications of Artificial Intelligence* <www.wkap.nl/book.htm/0-7923-5472-9> (accessed Oct. 20, 1999).

34. *See* Philip H. Weber, *Dream on for the Computer Brief,* Cal. B.J. 6 (Sept. 1994).

that we are blind to the possibilities, if not probabilities? In another context, Judge Learned Hand cautioned pertinently that a failure to adopt the fruits of progress cannot be excused simply because the failure is universal.[35]

A short story, entitled *Non Sub Homine*, written by a lawyer under the pseudonym H.W. Whyte, provides fodder for discussion concerning the application of technology to the judicial process.[36] The story takes place in the future at the "old" Foley Square courthouse in New York. A computer, called the "2-10," operated by a man named Cook and his assistant Jane, has replaced the courts, both trial and appellate.

> While the computer had originally been intended as a library of legal decisions, its opinions on questions previously decided was soon accepted as irrevocable . . . . [I]n only four and a half years of full service, the 2-10 had generated a new respect for the law . . . for Cook knew that the people felt they were no longer subject to the vagaries of an inherently political judiciary, of mindless whim, of the flux of ulcers. By taking law out of the hands of man, the 2-10 had put it beyond corruption.[37]

This time, however, the 2-10 was unable to reach a decision. "[A] simple question about the assignability of a lease under an ambiguous contract" froze the computer.[38] It printed out two decisions, one in favor of the plaintiff and one for the defendant, but could not choose between them because "there was nothing to either [opinion] that was not completely justified."[39] "'The 2-10 is infallible,' Cook found himself saying. 'It cannot be permitted to fail.'"[40] Cook tore up the opinion in favor of the defendant and directed Jane, over her

---

35. "Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages." *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

36. H.W. Whyte, *Non Sub Homine*, in *Dark Sins, Dark Dreams* 121-26 (Barry N. Malzberg & Bill Pronzini eds., Doubleday & Co. 1978).

37. *Id.* at 123 (ellipses in original); *see also* Robert C. Berring, *A Few Parting Words*, 1 Green Bag 2d 227 (1998) (taking a similar theme of fictional computers making judicial decisions).

38. Whyte, *supra* n. 36, at 124.

39. *Id.*

40. *Id.*

protest, to file the opinion in favor of the plaintiff.[41] Cook immediately programmed the 2-10 to select an opinion randomly when the case was evenly balanced. Realizing, however, that the public confidence engendered by the 2-10's ability to dispense perfect justice would be shattered if the public were to learn the computer had failed to reach a decision, Cook concluded that Jane must be killed to insure the safety of his secret.[42]

Judge Richard A. Posner, in *Overcoming Law*, concluded *Non Sub Homine* has "no literary merit."[43] Nonetheless, he acknowledged that

> [a]bove all, the story makes us think about the ineradicable element of creativity in legal judgment. The computer has been programmed with all decided cases. It is supposed to decide new cases by reference to them. But many of those decided cases (all that were not mere replays of earlier cases) were once new cases. How is a new case to be decided when the only materials for decision are old cases that by definition are different from it? A computer needs more in its memory bank than this computer has been given; needs as much, in fact, as fallible humans have in their memory banks.[44]

The possibility that, in the future, computers will be powerful enough and contain sufficient information to replace human judgment is surrealistic and even disturbing. The scenario presented in *Non Sub Homine*, while absurdly implausible, causes one to pause and consider just what we hope to achieve, ultimately, in the application of technology to legal and judicial practices and processes.

Judge Posner utilizes as a premise, for which it appears no proof is needed, the necessity of creativity in legal judgment and further suggests that creativity is a uniquely human function. How can we be sure this wisdom, perhaps conventional wisdom,

---

41. *Id.* at 125.

42. *Id.* at 125-126.

43. Richard A. Posner, *Overcoming Law* 490 (Harvard Univ. Press 1995) [hereinafter *Overcoming Law*]. Judge Posner made a unique use of the Internet to prepare and author a book defending Benjamin Cardozo as a great jurist. Richard A. Posner, *Cardozo: A Study in Reputation* (Univ. Chicago Press 1993). One element of that use was comparison of the number of "computer hits" of Cardozo's work as compared to other judges.

44. *Overcoming Law*, *supra* n. 43, at 491.

will always hold true? Might there come a day when pure objectivity based on former experience will be preferred over human judgment, even if that objectivity results in a perfectly balanced case and a random judgment is chosen from two equally sustainable options? Furthermore, will computers, ever faster, and their programs, ever more complex, imitate human judgment, maybe even with the biases and self-preservation tendencies omitted?

These are questions for which I have no answer. Having heard so many skeptics in my youth who insisted man would never set foot on the moon, I cannot dismiss out of hand the possibility that computers will become powerful enough to replace human judgment in answering legal questions. Nonetheless, I harbor hope that the application of technology will be reasoned and sensible, and will prove helpful to the human situation, rather than destructive.

Only a little less revolutionary, perhaps, yet more immediately pressing, are issues concerning the scope of appellate review and how technology will affect that scope. These changes, both possible and real, are exciting as well as intimidating. As I noted at the outset, they threaten to transform the very nature of appellate review.

Technology is forcing us to grapple with new issues. Should appellate courts review trial court proceedings by viewing a video record? This manner of review alters the appellate process itself, making it possible to review matters currently beyond the scope of appellate review, such as the demeanor of a witness or the apparent bias of the trial judge, attorney, or juror betrayed by facial gestures or body language. The California Supreme Court may have inadvertently taken its first step down the path of expanded review. Considering a claim of prosecutorial misconduct during closing argument, the court stated:

> We have reviewed a videotape of the closing arguments, and conclude that, taken in context, nearly all of the challenged remarks properly served to remind the jury of its duty to render a decision based on the evidence and nothing else.[45]

45. *People v. Gionis*, 892 P.2d 1199 (Cal. 1995).

This statement was unnecessary in the context of the decision because the court had already decided that the prosecutor's comments were not prejudicial. Although the court could have deleted the reference to the videotape without affecting the decision, it did not, thus implicitly inviting challenges to trial court proceedings based on a videotape of the proceedings.

While the Scottish court willingly applied technology to change the scope of appellate review by listening to the audio recording of the charge to the jury and basing its decision on the tone of the sheriff's voice, other courts have been more reticent to charge into this new territory. One such case arose in California.

Appellate review in California, as in most jurisdictions, is traditionally based on the written record of the proceedings—clerk's transcript (including pleadings, motions, orders, and other filed papers), reporter's transcript (the transcribed record of the oral proceedings), and exhibits admitted into evidence at trial. Recently, some California trial courts have begun recording the proceedings on videotape, presumably to allow preparation of a reporter's transcript for proceedings at which no court reporter was present. In one such case, the trial court proceedings were videotaped, and a reporter's transcript was later prepared for appeal.[46] Although the reporter's transcript was provided to the appellate court as part of the record on appeal, the appellant sought to use the videotape to show circumstances not apparent on the written record—as proof of the trial court's failure to study adequately certain documents proffered by the parties and even to show, in the words of the appellant, "a very telling silence on the part of the court" in response to an offer of proof. The appellate court rejected the arguments based solely on the viewing of the videotape, not because the tape was unreliable in any way or did not faithfully depict the trial court proceedings, but because such reliance would upset the tradition of reviewing only the written record of the trial court proceedings and cause fundamental change in the scope of appellate review.[47]

---

46. *Moustakas v. Dashevsky*, 25 Cal. App. 4th 752, 754 (Cal. App. 1994).

47. *Id.* at 754-755.

The appellate court stated: "A drastic change in the principles of appellate review would be needed before we could base our decisions on appeal on our own evaluation of the sights and sounds of the trial courtroom." Nonetheless, with the advent of technology (including the decidedly low-tech use of a video recorder), change in the very nature of appellate review may be inevitable.[48] The real questions concerning change in the scope of appellate review are: what will be the nature of the changes (review of videotapes for the sights and sounds of the courtroom, use of artificial intelligence decisionmaking technology, or other uses of technology), who (legislature, judiciary, or popular will) will effect the changes, and how fast will they take place?

As a judge very interested in the future of appellate practice and process, I sincerely hope my comments and the insightful articles bound in this volume stimulate dialogue on the best uses of current technology in appellate practice and process. I also hope we promote discourse on the most favorable and collegial scenarios for identifying, acquiring, and applying evolving technology in the future.

Technology will certainly continue to have an impact; we must act diligently to assure it does not alter, inappropriately, appellate practice and process. At the same time, we must take advantage of technology's benefits, in human terms as well as in practical and utilitarian terms.

48. *See* Robert C. Owen & Melissa Mather, *Thawing Out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. App. Prac. & Process 411 (2000). Several cases illustrate the potential impact of technology on the development of substantive law by appellate courts, in addition to their reshaping the scope of appellate review. *See e.g. Arizona v. Evans*, 514 U.S. 1 (1995); *People v. Spence*, 78 Cal. App. 4th 1242 (Cal. App. 2000) (currently pending before the California Supreme Court); *People v. Downing*, 33 Cal. App. 4th 1641, 1657 n. 26 (Cal. App. 1995).