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# DON'T QUOTE ME: THE LAW OF JUDICIAL COMMUNICATIONS IN FEDERAL APPELLATE PRACTICE AND THE CONSTITUTIONALITY OF PROPOSED RULE 32.1

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## I. INTRODUCTION

*It is like "the rolling of a snowball, [that] increaseth in bulk in every age, until it become utterly unmanageable."*<sup>1</sup>

Today there is an "alarming prospect" that the common law<sup>2</sup> will be "crushed by its own weight."<sup>3</sup> There is a fear that "multiplied judicial utterances have become a menace to orderly administration of the law."<sup>4</sup> These "utterances" are judicial opinions<sup>5</sup> that create the "heart of the common law sys-

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<sup>1</sup> David Greenwald & Frederick A. O. Scharz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1145 (2002) (quoting a metaphor regarding the increase of case law made by the Lord Chief Justice, Sir Matthew Hale, during the late 17th Century).

<sup>2</sup> Judge Richard Posner expansively defines common law as "any body of law created primarily by judges through their decisions." RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 247 (1990); BLACK'S LAW DICTIONARY 293 (8th ed. 2004) [hereinafter BLACK'S] (defining common law as the "body of law derived from judicial decisions, rather than from statutes or constitutions").

<sup>3</sup> Marla Brooke Tusk, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1209 (2003).

<sup>4</sup> *Thatch v. Livingston*, 56 P.2d 549, 549–50 (Cal. Dist. Ct. App. 1936).

<sup>5</sup> An opinion is a "court's written statement explaining its decision in a given case, . . . [usually] including the statement of facts, points of law, rationale, and dicta." BLACK'S, *supra* note 2, at 1125.

tem”<sup>6</sup>—a common law system claiming to be dependent upon precedent.<sup>7</sup>

Challenged on a number of occasions,<sup>8</sup> this system of precedent is most recently criticized on the ground that the rampant reliance on cumulative precedent actually weakens the judicial system. Specifically, some note that “a large proportion of the opinions that have been coming out of American courts add essentially nothing to the corpus of law.”<sup>9</sup> It is a simple case of “too much written material creating too little new law.”<sup>10</sup>

Because of this voluminous problem, judges began employing techniques to dispose of cases that they deemed unworthy of precedential value by utilizing case-specific dispute resolution<sup>11</sup> to replace the regurgitation of legal principles that previous opinions had already established. This approach aspired to curb the issuance of redundant opinions while still determining the merits of the case for the parties involved.

Despite this method’s efficiency of case disposal management, it could not

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<sup>6</sup> John Reid, *Doe Did Not Sit—The Creation of Opinions by an Artist*, 63 COLUM. L. REV. 59, 59 (1963) (referring to opinions as “the measure of the past and the guidepost of the future, the guarantee of continuity and the barometer of change”).

<sup>7</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 377 (1833), *quoted in* *Anastasoff v. United States*, 223 F.3d 898, 903–04 (8th Cir. 2000), *vacated as moot on other grounds en banc*, 235 F.3d 1054 (8th Cir. 2000) (declaring that the case alone, is not considered “decided and settled,” but rather the principles of the decision are held as precedents and authority to bind future cases of the same nature);

This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property.

It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges.

*Id.*; BLACK’S, *supra* note 2, at 1214 (defining precedent as an adjudication process that employs the use of prior decisions as “a basis for determining later cases involving similar facts or issues”).

<sup>8</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979–1002 (1992) (Scalia, J., dissenting) (maintaining that a system of precedent is a policy for the judicial system to follow and not a constitutional mandate). See generally Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000) (arguing for a complete break from the doctrine of stare decisis for certain classes of cases).

<sup>9</sup> PAUL D. CARRINGTON, JUSTICE ON APPEAL 35 (1976) (arguing that many written opinions are only of interest and significance to the parties).

<sup>10</sup> Boyce F. Martin, *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 177 (1999).

<sup>11</sup> RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 3 (1985) (“In every case the court must determine what the facts are and what their legal significance is. If the court determines their legal significance by applying an existing rule of law unchanged, it is engaged in pure dispute resolution. But if to resolve the dispute the court must create a new rule or modify an old one, that is law creation.”); Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy*, 50 S.C. L. REV. 235, 248 (1998) (listing the two functions of an appellate court decision: dispute resolution and law-making).

single-handedly meet the demand that increasing litigation placed on the judiciary. All federal appellate courts implemented an informal non-publication policy in response to the dramatic and crippling surge in the appellate caseload during the 1960s.<sup>12</sup> During this era, the courts experienced an exponential growth in administrative agency claims as well as an increase in the exercise of federal jurisdiction.<sup>13</sup> Nevertheless, it was not until a decade later that courts began to adopt formal rules of procedure regarding non-publication.<sup>14</sup>

Originally designed to make the judicial opinions inaccessible to the public by excluding them from the bound volumes of the Federal Reporter, non-publication plans<sup>15</sup> also had the advantage of limiting the amount of redundant case law that litigants had to consume prior to trial.<sup>16</sup> By limiting the dissemination of certain opinions, the judiciary hoped to conserve its time and resources in order to focus on more pressing issues.<sup>17</sup> Thus, *unpublished opinions*<sup>18</sup> fulfilled several functions: they were provided only to the parties involved in the litigation;<sup>19</sup> they did not require a complete recitation of the

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<sup>12</sup> U.S. JUDICIAL CONFERENCE, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964) [hereinafter 1964 CONFERENCE REPORT].

<sup>13</sup> AM. COLL. OF TRIAL LAWYERS, OPINIONS HIDDEN, CITATIONS FORBIDDEN: A REPORT AND RECOMMENDATIONS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS ON THE PUBLICATION AND CITATION OF NONBINDING FEDERAL CIRCUIT COURT OPINIONS 3 n.6 (2002) [hereinafter COLL. OF TRIAL LAWYERS], <http://www.actl.com/PDFs/Opinions.pdf>.

Other factors have also probably contributed to the burden on appellate judges: A bewildering array of new federal statutes, new crimes, and new rights of action; the highly technical nature of much modern federal litigation; the advent of the jumbo case—massive criminal conspiracy prosecutions, mass tort actions, and the like; the arrival of technology that makes discovery (and perhaps appellate records) far more voluminous than in the past, to name a few.

*Id.* See generally Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK L. REV. 685 (2001).

<sup>14</sup> U.S. JUDICIAL CONFERENCE, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12–13 (1974) [hereinafter 1974 CONFERENCE REPORT].

<sup>15</sup> Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: Reassessment*, 28 U. MICH. J.L. REFORM 119, 122 (1995).

<sup>16</sup> *Id.*; see also 1ST CIR. R. 36(a) (noting a possible saving of “time and effort in research on the part of future litigants” due to unpublished opinions).

<sup>17</sup> See, e.g., 1ST CIR. R. 36(a) (allowing judges to issue unpublished opinions “in the interests . . . of expedition”); 2D CIR. R. 0.23 (“The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial time effectively.”).

<sup>18</sup> An unpublished opinion is “considered binding on only the parties to the particular case in which it is issued.” BLACK’S, *supra* note 2, at 1125 (warning that “[c]ourt rules . . . [usually] prohibit citing an unpublished opinion as authority”).

<sup>19</sup> FED. JUDICIAL CTR., STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REPORT OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE 3 (1973) [hereinafter STANDARDS FOR PUBLICATION] (“[T]he judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable a judge to provide a statement so that the parties can understand the reason for the decision.”); Niketh Velamoor, Recent Development, *Proposed Federal Rule of Appellate Procedure 32.1 to Require That*

facts;<sup>20</sup> they abrogated the need for careful attention to legalese;<sup>21</sup> and they ultimately eased the volumes of case law that simply disgorged tedious reiteration of legal principles.<sup>22</sup> Another non-publication policy that accompanies *unpublished opinions* is the use of *no-citation rules*.<sup>23</sup> These rules generally prohibit or restrict litigants from citing unpublished opinions to an appellate court for all purposes.

Practitioners and scholars alike have voiced criticism over these policies.<sup>24</sup> Critics rail over perceived violations of First Amendment protections and harbor suspicions that judges are creating a “secret law.”<sup>25</sup> They grumble over an alleged missed opportunity to augment a legal argument while simultaneously arguing that the authority to restrain precedent is outside the province of the judiciary.<sup>26</sup> This debate has caused many members of the judiciary to second-guess their own policies and propose an amendment to the Federal Rules of Appellate Procedure (“FRAP”): Rule 32.1.

Proposed Rule 32.1 (“Rule” or “Proposed Rule” or “FRAP 32.1”) creates a uniform rule of citation for the federal courts of appeals.<sup>27</sup> The Rule would require federal appellate courts to allow citation of judicial opinions designated

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*Circuits Allow Citation to Unpublished Opinions*, 41 HARV. J. ON LEGIS. 561, 563 (2004).

<sup>20</sup> Martin, *supra* note 10, at 190 (prescribing the use of unpublished decisions only for those cases where the area of law is well-settled and the case-at-bar merely involves a variant on those facts).

<sup>21</sup> Velamoor, *supra* note 19, at 563 (attributing “lower-quality writing, reasoning, and detail” to unpublished opinions).

<sup>22</sup> Martin, *supra* note 10, at 178. (“Unpublished opinions act as a pressure valve in the system, a way to pan for judicial gold while throwing the less influential opinions back into the stream.”).

<sup>23</sup> Velamoor, *supra* note 19, at 562.

<sup>24</sup> See generally Charles A. Babcock, *No-Citation Rules: An Unconstitutional Prior Restraint*, 30:4 LITIGATION 33 (2004); Charles R. Eloschway, *Say It Ain't So: Non-Precedential Opinions Exceed the Limits of Article III Powers*, 70 GEO. WASH. L. REV. 632 (2002); Suzanne O. Snowden, *“That’s My Holding and I’m Not Sticking To It!” Court Rules That Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 WASH. U. L.Q. 1253 (2001); Jon A. Strongman, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 KAN. L. REV. 195 (2001); Tusk, *supra* note 3.

<sup>25</sup> *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985); see also Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995).

<sup>26</sup> Carpenter, *supra* note 11, at 236.

<sup>27</sup> “Some circuits freely permit such citation, some circuits disfavor such citation but permit it in limited circumstances, and some circuits do not permit such citation under any circumstances.” Memorandum from Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, to Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules (May 22, 2003), <http://www.nonpublication.com/newrule32.htm> [hereinafter Scirica Memorandum] (explaining how the circuits diverge in their treatment of unpublished opinions when used for persuasive value).

as *unpublished* in appellate briefs and oral arguments.<sup>28</sup> Accordingly, FRAP 32.1 would ease the perceived hardship placed upon multi-jurisdictional practitioners.<sup>29</sup> Additionally, the Rule would remove all disciplinary actions<sup>30</sup> as a matter of policy<sup>31</sup> for failing to follow no-citation restrictions.

Many, however, argue that the Rule would be more burdensome than beneficial. Judges denounce the Rule<sup>32</sup> because it will add to the already overwhelming caseload of the federal appellate courts.<sup>33</sup> Others believe that the Rule will cause judges to spend more time drafting their written opinions for fear that they will become legally binding.<sup>34</sup> In turn, the increased time needed to dispose of individual cases will create a forceful incentive to use summary dispositions.<sup>35</sup>

As a practical matter, practitioners assert that the labyrinth of differing rules restricting citation and publication of appellate opinions is ripe with weaknesses. These shortcomings include, among other things, fostering unfairness to litigants, diminishing judicial accountability,<sup>36</sup> denying equal access to the law, and violating the First Amendment.<sup>37</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (claiming that practitioners of more than one circuit may have trouble remembering the different rules regarding citation in each circuit).

<sup>30</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1994) (stating that it was "ethically improper" for a lawyer to cite to an unpublished opinion in violation of that tribunal's court rules). *But see* ABA Resolution 01A115 (August 1, 2001), available at <http://www.abanet.org/crimjust/policy/cjpol.html> (last visited Feb. 27, 2005):

RESOLVED, THAT the American Bar Association opposes the practice of various federal courts of appeal in prohibiting citation to or reliance upon their unpublished opinions as contrary to the best interests of the public and the legal profession.

FURTHER RESOLVED, THAT the American Bar Association urges the federal courts of appeals uniformly to:

(1) Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and

(2) Permit citation to relevant unpublished opinions.

*Id.*

<sup>31</sup> Scircia Memorandum, *supra* note 27.

<sup>32</sup> *See generally* Alex Kozinski, *In Opposition to Proposed Rule of Appellate Procedure 32.1*, 51 FED. LAW. 36 (2004); Martin, *supra* note 10; Phillip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 913 (1986).

<sup>33</sup> REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 13 (2004) [hereinafter 2004 CONFERENCE REPORT], <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf>.

<sup>34</sup> *Unpublished Judicial Opinions: Hearing Before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary*, 107th Cong. 13 (2002) (statement of Alex Kozinski, Judge, U.S. Court of Appeals for the Ninth Circuit).

<sup>35</sup> 2004 CONFERENCE REPORT, *supra* note 33, at 13; *see also* Nat'l Classification Comm. v. United States, 765 F.2d 164, 175 (D.C. Cir. 1985).

<sup>36</sup> David S. Tatel, *Some Thoughts on Unpublished Opinions*, 64 GEO. WASH. L. REV. 815, 815 (1996).

<sup>37</sup> Carpenter, *supra* note 11, at 236.

In spite of these infirmities, the overall utility of this system is needed. Consequently, this Comment argues that our federal appellate courts need a uniform rule regarding the publication of opinions to ensure that all litigants have and receive equal access to a universal precedent. Furthermore, citation to unpublished opinions should remain restricted in order to maintain a coherent body of law and authority pursuant to any publication plan.<sup>38</sup>

Part II of this Comment summarizes the relevant legal history leading up to the use of the unpublished opinion as well as the advances in technology that ultimately required the implementation of no-citation rules. Part III gives a brief overview of the Judicial Conference's Proposed Amendment 32.1 to the Federal Rules of Appellate Procedure and the rationale behind its creation; it also provides analysis of the Judicial Conference's argument for FRAP 32.1, including fairness to the litigant. In Part IV, this Comment discusses the need to balance judicial efficiency against the rights of parties; it further argues that the judiciary needs a uniform publication plan instead of a uniform citation plan if it is to ascertain the desired goal of a predictable and consistent body of circuit case authority. Finally, Part V concludes by offering both predictions and possible solutions to the ongoing debate.

## II. A TIME TO OPINE

*"Much would be gained if three-fourths (maybe nine-tenths) of . . . [the opinions] published in the last twenty years were utterly destroyed."*<sup>39</sup>

The debates surrounding restrictions on the publication and citation of judicial opinions originate from a legitimate concern regarding the maintenance of a manageable, cohesive, and accessible body of law.<sup>40</sup> Although this debate has

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<sup>38</sup> Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FED. LAW., June 2004, at 37; see also Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinion and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 944 (1989) ("In order to preserve the savings associated with nonpublication . . . lawyers must be persuaded not to use unpublished opinions."); Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Reality*, 3 J. APP. PRAC. & PROCESS 175, 180 (2001) (concluding that the "reduced cost and increased judicial efficiency . . . [of limited publication would be] frustrated if citation to unpublished decisions were permitted"). For a comprehensive list of jurisdiction-specific citation rules across all federal and state courts, see THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 27-42 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

<sup>39</sup> *Thatch v. Livingston*, 56 P.2d 549, 549-50 (Cal. Dist. Ct. App. 1936) (reasoning that the mountains of judicial opinions have merely created "confusion, and often contempt" and have no place except in the "waste basket").

<sup>40</sup> Martin, *supra* note 10, at 177 (describing the exponential growth of the Federal Reporter, which started in 1996 at 73 F.3d and finished at 103 F.3d, totaling over 45,000 pages of appellate opinions).

garnered much attention recently, it is not a novel paradigm.<sup>41</sup> In 1777, Lord Coke called for the limited publication of his native England's judicial opinions in fear that the law books would "grow to be like *elephantini libri*, of infinite length, and in mine opinion lose somewhat of their present authority and reverence."<sup>42</sup> In the United States as early as 1915, lawyers and judges feared that they would be unable to stay current with the law as long as judicial opinions proliferated.<sup>43</sup> Again in the 1940s, the Third and Fifth Circuits studied different plans that would decrease the number of published opinions.<sup>44</sup>

#### A. THE UNPUBLISHED OPINION IS BORN

Despite nearly 200 years of judicial uproar, it was not until the 1960s that policymakers initiated discussion about limiting publication of judicial opinions.<sup>45</sup> There was extensive concurrence among the circuits that "too many opinions [were] being printed and published."<sup>46</sup> Indeed, most commonly believe that nearly all judicial opinions prior to this time were published.<sup>47</sup>

In 1964, the Judicial Conference of the United States<sup>48</sup> ("Judicial Confer-

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<sup>41</sup> See Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U. L.Q. 257; Charles A. Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949 (1964).

<sup>42</sup> See Greenwald & Schwarz, Jr., *supra* note 1, at 1144–45 (quoting Lord Coke who, in 1777, complained about the growth of law books yet, only thirty volumes of reported decisions existed at that time).

<sup>43</sup> William L. Reynolds & William M. Richman, *The Non-Precedential Precedent-Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168–69 (1978).

<sup>44</sup> See generally Francis P. Whitehair, *Opinions of Courts: Fifth Circuit Acts Against Unneeded Publication*, 33 A.B.A. J. 751 (1947); *Opinions of Courts: Should Number Published be Reduced?*, 34 A.B.A. J. 668 (1948).

<sup>45</sup> 1964 CONFERENCE REPORT, *supra* note 12, at 11.

<sup>46</sup> FED. JUDICIAL CTR., ANNUAL REPORT 7–8 (1971).

<sup>47</sup> Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 308 (1990) ("It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small."); see also Michael Hannon, Developments and Practice Notes, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 201 n. 13 (2001) (explaining how during the course of research he performed on Lexis and Westlaw to determine the amount of unpublished opinions before 1970, he found very few).

<sup>48</sup> The Judicial Conference of the United States is an annual conference of judges that includes the chief judge of each circuit. The purpose of the Judicial Conference is to "promote uniformity of management procedures and the expeditious conduct of court business." 28 U.S.C. § 331 (2000). The Conference is authorized by Congress to study the "operation and effect" of the rules of practice and procedure as well as recommend to the Supreme Court any "changes in or additions to those rules . . . [in order] to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." *Id.*

ence” or “Conference”) warned of the “difficulty and economic cost of establishing and maintaining accessible private and public law library facilities” in light of the burgeoning number of published opinions;<sup>49</sup> they called only for the publication of opinions of “great precedential value.”<sup>50</sup> Seven years later, the Federal Judicial Center<sup>51</sup> (“Judicial Center”) created the Advisory Council on Appellate Justice to study the appellate process. Based on the results, in 1972, the Judicial Center called for national review and modification of all circuit publication practices in order to reduce the number of published opinions,<sup>52</sup> and further called for significant restrictions on the citation of unpublished opinions.<sup>53</sup> The Conference adopted these admonitions and recommended to each circuit that they develop their own opinion-publication plan.<sup>54</sup>

By 1974, all of the circuits had implemented some form of publication restriction. The Judicial Conference commented that these publication plans were successfully reducing the superfluous publication of opinions.<sup>55</sup> Although the Conference raised concerns over the lack of uniformity in the publication plans’ requirements and procedures, there was hope “that further experimentation may well lead to the amendment of the diverse circuit plans and that eventually a somewhat more or less common plan might evolve.”<sup>56</sup> By all accounts, authors of publication plans have succeeded in their goals; the federal courts of appeals methodically reduced the number of published opinions such that almost 80% of all opinions are now unpublished.<sup>57</sup> Nevertheless, this long-awaited “success” has incurred criticisms of its own.

Many contend unpublished opinions foster a reduction in judicial accountability.<sup>58</sup> Opponents complain that these opinions are merely a vehicle for judges to bury decisions that may be contrary to public policy or deemed un-

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<sup>49</sup> 1964 CONFERENCE REPORT, *supra* note 12, at 11.

<sup>50</sup> *Id.*

<sup>51</sup> Created in 1967 to “promote improvements in judicial administration,” the Federal Judicial Center researches federal court operations and procedures and provides ongoing education to judges and various court employees. Federal Judicial Center, <http://www.fjc.gov> (last visited Aug. 15, 2005).

<sup>52</sup> BD. OF THE FED. JUDICIAL CTR., RECOMMENDATION AND REPORT TO THE APRIL 1972 SESSION OF THE UNITED STATES JUDICIAL CONFERENCE ON THE PUBLICATION OF COURTS OF APPEALS OPINIONS (1972) [hereinafter 1972 RECOMMENDATION AND REPORT].

<sup>53</sup> *Id.*

<sup>54</sup> U.S. JUDICIAL CONFERENCE, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (1972) [hereinafter 1972 CONFERENCE REPORT]; *see also* STANDARDS FOR PUBLICATION, *supra* note 19, at 18–19, 22–23. The Advisory Council on Appellate Justice proposed a model rule for adoption by the circuit courts and advocated for the prohibition on citation of unpublished opinions. *Id.*

<sup>55</sup> 1974 CONFERENCE REPORT, *supra* note 14, at 12–13.

<sup>56</sup> *Id.* at 12.

<sup>57</sup> *See* Strongman, *supra* note 24, at 195.

<sup>58</sup> William L. Richman & William M. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 283 (1996).



popular;<sup>59</sup> hence, these decisions combine to create a “secret law.”<sup>60</sup> Many also argue that unpublished opinions undermine a litigant’s already limited power of appeal to the U.S. Supreme Court by further eroding “the possibility of review based upon a conflict among the circuits.”<sup>61</sup> In effect, these opinions often convert the courts of appeals into “courts of last resort.”<sup>62</sup>

## B. THE TECHNOLOGY BOOM

Copyright law bears no significance in the realm of publication<sup>63</sup> of judicial opinions.<sup>64</sup> Until the last quarter century, judicial opinions were only available to the public in case reporters or at the courthouse.<sup>65</sup> Therefore, the decision not to physically publish a written judicial opinion meant that the opinion would be publicly inaccessible.<sup>66</sup> Alternately, an *unpublished* written opinion was available only to the litigants of the case. With the advent of technology, the decision not to physically publish an opinion ceased to be an effective blockade to the litigating population.<sup>67</sup> Today, in addition to inclusion in bound volumes, an unpublished opinion can also be “stored, accessed and retrieved in digital form.”<sup>68</sup>

Consequently, the term *unpublished opinion* is a misnomer. These opinions are, in fact, prepared and issued for public dissemination at a near exhaustive level. For example, Lexis and Westlaw have archived the unpublished opinions of nearly every circuit available,<sup>69</sup> and they are also available in book format

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<sup>59</sup> “Sometimes I suspect that courts are designating certain opinions as unpublished because they find them embarrassing, either due to the rulings they are rendering that are patently unfair, or because the facts they are reciting in the opinion upset the judges due to their sexual flavor.” Arthur S. Leonard, Letters to the Editor, NAT’L L.J., July 15, 2002, at A21 (referring to cases involving “lesbian, gay, bisexual and transgendered legal issues”).

<sup>60</sup> See Wald, *supra* note 25, at 1374; *County of Los Angeles v. King*, 474 U.S. 936, 938 (1985).

<sup>61</sup> Reynolds & Richman, *supra* note 43, at 1203.

<sup>62</sup> See Hannon, *supra* note 47, at 200.

<sup>63</sup> Publication is “[t]he offering to distribute copies . . . to a group of persons for purposes of further distribution . . . or public display . . . .” 17 U.S.C. § 101 (2000).

<sup>64</sup> “[N]o reporter has or can have any copyright in the written opinions delivered by this court . . . .” *Wheaton v. Peters*, 33 U.S. 591, 668 (1834), as codified by 17 U.S.C. § 105 (2000) (“Copyright protection under this title is not available for any work of the United States Government . . .”).

<sup>65</sup> Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CALIF. L. REV. 541, 544 (1997).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (including Internet services “such as Westlaw and Lexis”).

<sup>69</sup> The Eleventh and Fifth Circuits continue to withhold unpublished opinions from Lexis and Westlaw. Stephen R. Barnett, *From Anatasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 6 (2002).

through West's Federal Appendix.<sup>70</sup> Furthermore, as of December 17, 2004, federal law requires that all judicial opinions, published *and* unpublished, rendered by a federal court be posted on that court's website.<sup>71</sup> Today, "it is the rare opinion that is not disseminated for mass consumption."<sup>72</sup>

This enhanced public accessibility has substantially changed the way the judiciary perceives the term *unpublished*. When the court refers to its opinions as *unpublished*, it is not referring to dispositions that are unavailable to the public, but rather to those opinions where precedent or binding authority may be restricted.<sup>73</sup> The effect of categorizing an opinion as unpublished is to make it subject to limitations, usually referred to as no-citation rules promulgated by the courts of appeals.<sup>74</sup>

In essence, the no-citation rules of today function as the equivalent of the

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<sup>70</sup> *Id.* at 2 (stating that the new case-reporter series was launched in September of 2001 and consisted "entirely of 'unpublished' opinions from the federal circuit courts of appeals (except, currently, the Fifth and Eleventh Circuits)"); see also Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 LAW LIBR. J. 475, 475-76 (2004) (describing the Federal Appendix as "a new case reporter that print[s] the full text of 'unpublished' opinions, complete with headnotes, topics, and key numbers . . . [and] is readily available to any library patron familiar with the most fundamental of legal research skills, using a digest to find cases by subject").

<sup>71</sup> E-Government Act of 2002, Pub. L. No. 107-347, § 205(a), 116 Stat. 2899, 2913 (2003); see generally United States Court of Appeals for the First Circuit, <http://www.ca1.uscourts.gov> (last visited Aug. 15, 2005); United States Court of Appeals for the Second Circuit, <http://www.ca2.uscourts.gov> (last visited Aug. 15, 2005); Third Judicial Circuit, <http://www.ca3.uscourts.gov> (last visited Aug. 15, 2005); United States Court of Appeals for the Fourth Circuit, <http://www.ca4.uscourts.gov> (last visited Aug. 15, 2005); United States Court of Appeals for the Fifth Circuit, <http://www.ca5.uscourts.gov> (last visited Aug. 15, 2005); U.S. Court of Appeals for the Sixth Circuit, <http://www.ca6.uscourts.gov> (last visited Aug. 15, 2005); United States Court of Appeals for the Seventh Circuit, <http://www.ca7.uscourts.gov> (last visited Aug. 15, 2005); United States Court of Appeals for the 8th Circuit, <http://www.ca8.uscourts.gov> (last visited Aug. 15, 2005); United States Court of Appeals for the Ninth Circuit, <http://www.ca9.uscourts.gov> (last visited Aug. 15, 2005); U.S. Court of Appeals for the Tenth Circuit, <http://www.ca10.uscourts.gov> (last visited Aug. 15, 2005); United States Court of Appeals for the Eleventh Circuit, <http://www.ca11.uscourts.gov> (last visited Aug. 15, 2005); United States Court of Appeals for the District of Columbia Circuit, <http://www.cadc.uscourts.gov> (last visited Aug. 15, 2005); U.S. Court of Appeals for the Federal Circuit, <http://fedcir.gov> (last visited Aug. 15, 2005).

<sup>72</sup> Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 17, 18 (2000).

<sup>73</sup> *Id.*; see also Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate Over Publication and Citation of Appellate Opinions*, 84 JUDICATURE 90, 91 (2000) (stating that "the word 'unpublished' has become purely a term of art, actually meaning 'non-precedential'"); K. K. DuVivier, *Developments and Practice Notes, Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 403 (2001).

<sup>74</sup> Greenwald & Schwarz, Jr., *supra* note 1, at 1138 (classifying no-citation rules into two groups: "those in which citation is forbidden and those in which it is strongly disfavored or restricted").

*unpublished* designation of the past: they restrict public accessibility. If a litigant is unable to cite from an *unpublished* opinion, the judiciary may continue to construct opinions of lesser quality, which are intended only for specific litigants. However, these “lesser” opinions are attractive alternatives to judges *only if* the opinions are *powerless* when applied to any other case. As a result, concerns of judicial efficiency now outweigh<sup>75</sup> concerns over the “ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law facilities”<sup>76</sup>—the very fear that initially spurred the implementation of publication plans.<sup>77</sup>

### C. THE NECESSITY OF PUBLICATION PLANS

Although the initial purpose behind publication plans was to save the cost and time of librarian services due to prolific opinion writing,<sup>78</sup> the court system was aware of additional reasons to implement restrictions on publication.<sup>79</sup> Nevertheless, non-publication plans single-handedly could not solve the crisis and would require augmentation.<sup>80</sup> No-citation rules were a logical choice.

To many, “[u]nlimited proliferation of published opinions” threatens a unified and consistent body of law;<sup>81</sup> a legal system containing an incalculable number of opinions would be nearly impossible to navigate and control. Additionally, with all these opinions abound, the burden of writing a judicial opinion increases daily.<sup>82</sup> Limited publication greatly reduces the amount of time

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<sup>75</sup> *Id.* at 1145. Prior to the 1970s, the rationale for limited publication was the fear that judges would be unable “to stay current with the development of the law.” *Id.* This fear has been replaced with another concern, deeply as frightening: the ability of judges to stay “current with their own personal caseloads.” *Id.*

<sup>76</sup> 1964 CONFERENCE REPORT, *supra* note 12, at 11.

<sup>77</sup> Shuldberg, *supra* note 65, at 544.

The digital availability of information directly impacts both what it means for an opinion to be “unpublished” and the rationale supporting the content of existing limited publication plans. When the printed volume was the sole source of law, the decision not to publish an opinion meant that the public did not have access to that opinion. Now, however, opinions that are not published in print are nevertheless made available to the public in digital format. Moreover, digital technology allows for more efficient storage and research of information, which impacts the rationale underlying the limited publication plans.

*Id.*

<sup>78</sup> STANDARDS FOR PUBLICATION, *supra* note 19, at 8 (“Posting, maintenance, shelving and librarian services result in time and money costs disproportionate to the value of the materials.”).

<sup>79</sup> *Id.* at 6–8 (listing the need for cohesive law, the workload of lawyers, research devices, and collegiality amongst judges as other reasons behind publication plans).

<sup>80</sup> *Id.* at 6.

<sup>81</sup> *Id.* (referencing an estimate in 1963 that claimed published opinions “approached two and a half million” only to swell to approximately three million just ten years later).

<sup>82</sup> *Id.*

and resources a judge must devote to the preparation of an opinion.<sup>83</sup> Not only does the ability to write an unpublished opinion streamline opinion writing (since judges would not have to acquit their “legal scholarship in every opinion”), but limited publication also avoids a disharmonious union among circuit judges.<sup>84</sup> Therefore, the judiciary will have more time to consider and resolve critical issues through the disposition of cases with unpublished opinions.<sup>85</sup>

These benefits, however, are not limited to the judiciary. If all opinions were to be published and deemed as precedent, litigants would be “staggered by the research load.”<sup>86</sup> In terms of researching and preparing a case, the encumbrance of innumerable judicial opinions to litigants is proportionate to that of judges.<sup>87</sup> Zealous advocacy would force litigators to conduct infinite searches for cases with parallel fact-patterns in order to serve their clients. Such searches would require an “immense expenditure of time and funds” to comb through mountains of opinions.<sup>88</sup>

There are additional concerns with increasing the weight given to unpublished opinions. For example, is every case truly worthy for publication or consideration as precedent? Judges may find the cases poorly briefed or the record insufficient on which to base an opinion.<sup>89</sup> Furthermore, if a court rejected a litigant’s argument, giving every case precedential value may prematurely foreclose a legal analysis or theory.<sup>90</sup> Unpublished opinions may also display a “lack of awareness of the accepted published law, [which judges argue] . . . is best attributed not to the deciding courts’ schemes but to the failure of counsel to bring it to the courts’ attention.”<sup>91</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 7.

<sup>85</sup> *Id.*

<sup>86</sup> *See* DuVivier, *supra* note 73, at 414.

<sup>87</sup> STANDARDS FOR PUBLICATION, *supra* note 19, at 7.

<sup>88</sup> *Id.*

<sup>89</sup> Letter from Alex Kozinski, Judge, U.S. Court of Appeals for the Ninth Circuit, to Samuel A. Alito, Jr., Judge, U.S. Court of Appeals for the Third Circuit 6 (Jan. 16, 2004), <http://www.nonpublication.com/kozinskiletter.pdf> [hereinafter Kozinski Letter].

<sup>90</sup> *Id.* (expressing fear that issuance of a precedential opinion that rejects a certain line of reasoning, merely because it was presented in a poor fashion, might be the death of an actually viable argument).

<sup>91</sup> Weresh, *supra* note 38, at 184.

## D. STATUS QUO: CONFUSION

*“By their number and variety they tend to weaken the authority of each other, and to perplex the judgment.”*<sup>92</sup>

The 1974 “experiment” with different publication plans did not result in uniformity among the circuits.<sup>93</sup> Over the years, the circuits have created a cornucopia of local rules and procedures for the publication and citation of appellate opinions.<sup>94</sup> In 1995, however, the Judicial Conference’s desire for uniform practice and procedures reignited. Congress recommended that the Judicial Conference’s committees join forces in order to create “a uniform set of procedures and mechanisms for access to circuit court opinions, guidelines for publication distribution, and clear standards for citation.”<sup>95</sup>

Although there are varying standards for publication of judicial opinions among the circuits, there remains a constant, underlying assumption: “[n]ot all decisions by the courts of appeals warrant publication.”<sup>96</sup> The court rules for each circuit generally lay out the criterion for publication of opinions.<sup>97</sup> Nevertheless, each publication plan differs on the amount of guidance given regarding the *decision* to publish. Some circuits, like the Third Circuit, leave enormous discretion to the individual panel members: “[a]n opinion . . . is designated as precedential and printed . . . when it has precedential or institutional value.”<sup>98</sup> Conversely, other circuits follow a more comprehensive scheme:

A published opinion will be filed when the decision (i) establishes a new, or changes an existing rule of law; (ii) involves an issue of continuing public interest; (iii) criticizes or questions an existing law; (iv) constitutes a significant and nonduplicative contribution to legal literature (A) by a historical review of law, (B) by describing legislative history, or (C) by resolving or creating a conflict in the law; (v) reverses a judgment or denies enforcement of an order; or (vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.<sup>99</sup>

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<sup>92</sup> J. Myron Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 791 (1975) (internal citations omitted).

<sup>93</sup> See discussion *supra* Part II.A.

<sup>94</sup> COLL. OF TRIAL LAWYERS, *supra* note 13, at 7.

<sup>95</sup> JUDICIAL CONF. OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 69–70 (1995), <http://www.uscourts.gov/lrp/CVRPGTOC.HTM>.

<sup>96</sup> *Hart v. Massanari*, 266 F.3d 1155, 1163 (9th Cir. 2001) (commenting that the “overwhelming consensus” of judicial and academic opinion is that the issuance of non-precedential opinions does not violate the Constitution as a matter of policy); *Robel*, *supra* note 38, at 941 (recommending that “opinions that serve no lawmaking function should not be published”).

<sup>97</sup> Gerken, *supra* note 70, at 480.

<sup>98</sup> 3D CIR. INTERNAL OPERATING P. 5.2.

<sup>99</sup> 7TH CIR. R. 53(c)(1).

The publication plans of the circuits diverge in other areas as well. Plans differ as to presumptions of publication<sup>100</sup> as well as the number of judicial votes required to categorize an opinion as published or unpublished.<sup>101</sup> Unfortunately, many believe that judges ignore their own circuit's standards when making these decisions.<sup>102</sup> These disjointed approaches to unpublished opinions create a confusion that naturally spills over into attempts to cite to these opinions.

The American College of Trial Lawyers finds the current circuit rules regarding publication and citation to be "confusing, perilous, and getting worse."<sup>103</sup> Today, three systems exist in the courts of appeals concerning citation to unpublished opinions: prohibited, disfavored, and permitted.

Four circuits—the Second, Seventh, Ninth, and Federal Circuits—currently employ a prohibitory system. These circuits prohibit citation to unpublished opinions, except in related cases for the purposes of res judicata, collateral estoppel, and law of the case.<sup>104</sup>

The second group of circuits maintains a scheme of disapproval. The First, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits disfavor but allow citation to an unpublished opinion when the unpublished opinion has "precedential" or "persuasive" value on a material issue, and there is no published opinion that is on point.<sup>105</sup> It is unclear what these circuits mean by "precedential" value since an opinion is designated as unpublished once it has been determined that it does not establish, alter, modify, clarify, or explain a rule of law.<sup>106</sup>

The third and final category—aptly named the permissive circuits—includes the Third and Eleventh, and the District of Columbia ("D.C.") Circuit opinions

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<sup>100</sup> See, e.g., 1ST CIR. R. 36.2(b)(1) ("In general, the court thinks it desirable that opinions be published."); see also DONNA STIENSTRA, FED. JUDICIAL CTR., UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 29–30 (1985).

<sup>101</sup> STIENSTRA, *supra* note 100, at 32; see, e.g., 1ST CIR. R. 36; 3D CIR. INTERNAL OPERATING P. 5.1; 5TH CIR. R. 47.5.2; 11TH CIR. R. 36-2.

<sup>102</sup> COLL. OF TRIAL LAWYERS, *supra* note 13, at 6.

<sup>103</sup> *Id.* at 2.

<sup>104</sup> 2D CIR. R. 0.23; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3(a); FED. CIR. R. 47.6(b). Any opinions published in the U.S. Court of Appeals for the District of Columbia Circuit prior to January 1, 2001, are also prohibited from being cited. D.C. CIR. R. 28(c)(1)(A).

<sup>105</sup> 1ST CIR. R. 32.3(a)(2); 4TH CIR. R. 36(c); 5TH CIR. LOC. R. 47.5.3; 6TH CIR. R. 28(g); 8TH CIR. R. 28(i); 10TH CIR. R. 36.3.

<sup>106</sup> See, e.g., 4TH CIR. R. 36(a) which provides:

Opinions by the Court will be published only if the opinion satisfies one or more of the standards for publication:

- i. It establishes, alters, modifies, clarifies, or explains a rule of law within the circuit; or
- ii. It involves a legal issue of continuing public interest; or
- iii. It criticizes existing law; or
- iv. It contains a historical review of a legal rule that is not duplicative; or
- v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

*Id.*

issued on or after January 1, 2002. These circuits do not impose restrictions on the reasons for which a litigant can cite an unpublished opinion.<sup>107</sup> The value these circuits will give these opinions remains unclear. The Third Circuit does not specify how much weight an unpublished opinion should be given,<sup>108</sup> while the Eleventh Circuit considers them to be of persuasive value.<sup>109</sup> The D.C. Circuit allows citation of unpublished opinions distributed after January 1, 2002 to be cited as precedent,<sup>110</sup> however, litigants are reminded that the circuit decides to issue an unpublished opinion when “it sees no precedential value in that disposition.”<sup>111</sup> These various no-citation practices and publication plans are at odds, and the confusion they engender raises numerous concerns within the legal community.<sup>112</sup> Yet, the heart of the debate always comes back to a single uncertainty: the value of an unpublished opinion as precedent.<sup>113</sup>

#### E. I’M A PARTY AND I’LL CITE IF I WANT TO . . . BUT SHOULD I HAVE THE RIGHT TO?

In order to safeguard the efficiency associated with non-publication, litigants must be persuaded not to use unpublished opinions. Two primary disincentives are widely in practice in the courts of appeals: no-citation rules and uselessness as precedent. Academics have been the strongest opponents of publication plans and no-citation rules.<sup>114</sup> They have attacked both disincentives on public

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<sup>107</sup> 3D CIR. R. 28.3; 11TH CIR. R. 36-2; D.C. CIR. R. 28(c)(1)(B).

<sup>108</sup> See 3D CIR. R. 28.3 (failing to list unpublished opinions among the authority considered binding on the court); 3D CIR. INTERNAL OPERATING P. 5.8 (stating that the court cannot refer to an unpublished opinion because such opinions are not binding).

<sup>109</sup> 11TH CIR. R. 36-2.

<sup>110</sup> D.C. CIR. R. 28(c)(1)(B).

<sup>111</sup> D.C. CIR. R. 36(c)(2); see also D.C. CIR. HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES § IX.A.7 (“[C]ounsel will now be permitted to argue that an unpublished disposition is binding precedent on a particular issue . . . . [But] counsel are reminded that the Court’s decision to issue an unpublished disposition means that the Court sees no precedential value in that disposition.”).

<sup>112</sup> REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 130 (1990) (claiming the “policy in courts of appeals of not publishing certain opinions, and concomitantly restricting their citation . . . [due to] perceived necessity” is now obsolete due to technological advances).

<sup>113</sup> See *Anastasoff v. United States*, 223 F.3d 898, 903–04 (8th Cir. 2000), *vacated as moot on other grounds en banc*, 235 F.3d 1054 (8th Cir. 2000) (holding that every written opinion in the circuit will be precedent). *Contra Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (holding that Article III of the Constitution does not require federal courts to treat all of their decisions as binding precedent).

<sup>114</sup> See Salem M. Katsh & Alex V. Chachkes, *Constitutionality of “No-Citation” Rules*, 3 J. APP. PRAC. & PROCESS 287, 295 (2001); 2004 CONFERENCE REPORT, *supra* note 33, at 9 (“[M]any bar associations, attorneys, and members of the public, and numerous law review and bar journal articles have been urging for a long time a review of the disparate citation practices”); Kozinski Letter, *supra* note 89, at 11–12 (stating that no-citation rules “enjoy

policy and constitutionality grounds.<sup>115</sup>

*i. Public Policy*

The central policy issue in the debate over publication and no-citation doctrines revolves around the issue of fairness.<sup>116</sup> Not long ago, when unpublished opinions were only found physically on file with the court, it was thought that without no-citation rules, “large institutional litigants [like the government] who can afford to collect and organize non-precedential opinions would have an unfair advantage.”<sup>117</sup> Nevertheless, technology and the resulting accessibility have made this argument moot.<sup>118</sup> Therefore, the debate turns to the continued practice of restricting citation to these physically accessible yet unpublished opinions.

Definite assumptions in this dispute are logical: (1) there is no incentive for citation without the benefit of precedence; (2) for an opinion to have precedential value, it must have some power to bind; and (3) the power to legally bind future litigants and courts obliges authors to bind themselves to their written word and requires future litigants to find that written word. These obligations, namely careful opinion writing and research, increase the burdens associated with litigation for both courts and litigants alike. These burdens stretch resources and time, thereby increasing delays in adjudication<sup>119</sup> and creating a “less accessible class of precedents.”<sup>120</sup>

The inverse of these assumptions is also true: restrictions on citation limits precedence.<sup>121</sup> This restriction of precedence ensures that a smaller library of legal opinions exists. Fewer legal opinions promote equal access to precedent.<sup>122</sup> While a cursory glance at the methods of research may illustrate that public accessibility to unpublished opinions is limitless and generally free of

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widespread support among members of the bar because many lawyers recognize significant benefits to them and their clients, though the critics of no-citation rules tend to be very vocal, thus creating the illusion that theirs is the prevailing view”).

<sup>115</sup> Katsh & Chachkes, *supra* note 114, at 296. *See generally* Babcock, *supra* note 24, at 33; 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); Snowden, *supra* note 24, at 1253; Strongman, *supra* note 24; Tusk, *supra* note 3.

<sup>116</sup> STIENSTRA, *supra* note 100, at 3.

<sup>117</sup> ADVISORY COMM. ON RULES OF APPELLATE PROCEDURE, 107TH CONG., MINUTES OF FALL 2002 MEETING 27 (2002), <http://www.uscourts.gov/rules/Reports/AP12-2002.pdf>.

<sup>118</sup> *See* discussion *supra* Part II.B.

<sup>119</sup> *See* discussion *infra* Part IV.A.iii.

<sup>120</sup> Kozinski Letter, *supra* note 89, at 14.

<sup>121</sup> Daniel B. Levin, *Fairness and Precedent*, 110 YALE L.J. 1295, 1301 (2001).

<sup>122</sup> *Id.*; *see also* Robel, *supra* note 38, at 946 (claiming that “[d]ifferential access to the opinions favors certain litigants,” namely the wealthy and frequent litigators).



cost, a more thorough look reveals that this access is not free from encumbrances. For a fee a litigant may conduct computer research on Lexis or Westlaw or perform, free of charge, case research on the websites created by the courts themselves. However, these “free” websites are not always free from impediments or costs. For example, a litigant must have access to a computer, must pay Internet service provider fees, and must masterfully navigate these websites<sup>123</sup> in order to avoid expending additional time and possibly incurring additional costs. Endless research may be fueled by the idea that a relevant and material unpublished opinion exists: an idea that can be equated with the “proverbial needle in the haystack.”<sup>124</sup> Even so, only litigants with vast resources could locate such a needle if it were to exist.<sup>125</sup> The fear is that litigants with vast resources will be able to create their own pool of precedents if unpublished opinions are citable. Thus, the exact argument that proponents of FRAP 32.1 have used in the past turns against them. If fairness is to be a central fighting point, then it is “unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable and withhold it if unfavorable.”<sup>126</sup>

Allegations can also surface that publication plans and no-citation rules make it harder for the public to hold judges accountable for their decisions. Yet, trial courts at the state<sup>127</sup> and federal level function without a mandatory opinion-writing and publication requirement<sup>128</sup> and are never questioned about their behavior over these practices.<sup>129</sup>

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<sup>123</sup> A visit to the websites maintained by the federal courts of appeals (where court opinions—published and unpublished—are posted as required by the E-Government Act of 2002) exposes a very confusing and not easily navigable system. The easiest way to retrieve an opinion is through its docket number—an often impossible piece of information to know unless one was a party to the litigation. Although keyword search features exist, they are nowhere near as detailed or sophisticated as Lexis or Westlaw features; there are no summaries, headnotes or points of law. A litigant would have to read hundreds of cases before coming across binding precedent. Furthermore, some circuits post opinions going back only a few years. See text accompanying *supra* note 71.

<sup>124</sup> Levin, *supra* note 121, at 1301–02.

<sup>125</sup> *Id.*

<sup>126</sup> STANDARDS FOR PUBLICATION, *supra* note 19, at 19.

<sup>127</sup> Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423, 433 (2002) (finding state appellate unpublished opinions less accessible and citable than their federal counterpart since only five states permit citation).

<sup>128</sup> J. MYRON JACOBSTEIN & ROY M. MERSKY, FUNDAMENTALS OF LEGAL RESEARCH 22, 45 (5th ed. 1990).

<sup>129</sup> It is important to note that many lower trial courts are not courts of record. US-Info.state.gov, Outline of the U.S. Legal System, Dec. 2004, <http://usinfo.state.gov/products/pubs/legalotln/state.htm> (last visited Aug. 17, 2005).

*ii. Constitutional Infirmities*

The text of the Constitution is the logical launching point for any examination of the legality of these doctrines. In Article III, the Founders declared that “[t]he judicial Power of the United States, shall be vested in one supreme Court . . . [And it] shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treatises made, or which shall be made, under their Authority . . .”<sup>130</sup> Nowhere do the Founders provide guidance on the role of precedent.

*1. Ultra Vires Actions?*

*“I am not so naïve (nor do I think our forebears were) as to be unaware that judges in a real sense ‘make’ law.”*<sup>131</sup>

At least one circuit has held that all unpublished opinions hold precedential value and, therefore, restricting citation to them is outside the scope of Article III powers granted to the federal judiciary.<sup>132</sup> In 2000, the Eighth Circuit alleged that any restriction on precedence would be “an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.”<sup>133</sup> The Eighth Circuit judiciary believed this ruling was in harmony with the intent of our Founding Fathers.<sup>134</sup>

To the contrary, this “originalist view” is out of tune with the principles laid out by the framers of the Constitution. The Continental Congress never debated the doctrine of precedent<sup>135</sup> and the Federalist Papers touched upon the subject just briefly.<sup>136</sup> Additionally, it is the province of the Legislative Branch to create parameters in which the Judicial Branch is to function: “The Constitution gives Congress authority to determine the size, jurisdiction, and structure

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<sup>130</sup> U.S. CONST. art. III, §§ 1–2, cl. 1.

<sup>131</sup> James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

<sup>132</sup> See generally *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot on other grounds en banc*, 235 F.3d 1054 (8th Cir. 2000); see also Cooper, *supra* note 127, at 425 (stating that the Eighth Circuit primarily relied upon an originalist analysis of the judicial power).

<sup>133</sup> *Id.* at 900.

<sup>134</sup> *Id.*

<sup>135</sup> Cooper, *supra* note 127, at 425.

<sup>136</sup> THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 2003). “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” *Id.* at 470. See Cooper, *supra* note 127, at 425 n.16 (arguing that this statement was not part of a comprehensive depiction of the features of judicial power, but rather part of an argument promoting life tenure for judges).

of the judicial branch, the level at which it will be funded, and, within limits, the basic procedural rules the courts apply.”<sup>137</sup>

Furthermore, it is an inherent responsibility of judges to manage precedent and develop a consistent and reasoned body of law to govern litigation.<sup>138</sup> The Supreme Court has twice passed on the opportunity to rule on the constitutionality of no-citation rules, which supports the view that courts have an innate power to decide what opinions are of precedential value, as well as limit a litigant’s ability to cite from unpublished opinions.<sup>139</sup>

## 2. *To Cite or Not To Cite . . . That Is a First Amendment Question!*

Reformers have argued that “no-citation” rules violate First Amendment protections.<sup>140</sup> This argument asserts that “these rules—which restrict attorneys from communicating certain information (the content of an unpublished opinion) in advance of the time that such communication is to occur (in a brief or oral argument)—operate as an impermissible prior restraint on attorney speech.”<sup>141</sup>

Dissenters also note the ability of practitioners to cite “opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles,” when forwarding their argument.<sup>142</sup> Yet, Judge Kozinski of the Ninth Circuit Court of Appeals draws the obvious distinction: name-brand recognition. He argues that one would never mistake the above-referenced list for “expressions of the law of the circuit.”<sup>143</sup> Although the Advisory Committee maintains that citation to an unpublished opinion would merely be for the persuasiveness of its reasoning,<sup>144</sup> Judge Kozinski claims that the litigators really want “the added

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<sup>137</sup> William H. Rehnquist, *1995 Year-End Report on the Federal Judiciary*, in STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Shelley L. Dowling ed.), available at <http://www.uscourts.gov/ttb/jan96ttb/1yearend.html> (last visited Aug. 17, 2005).

<sup>138</sup> Hart v. Massanari, 266 F.3d 1155, 1159–80 (9th Cir. 2001).

<sup>139</sup> See *Do-Right Auto Sales v. U.S. Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976); *Bowder v. Dir., Dep’t of Corr. of Ill.*, 434 U.S. 257, 258 n.1 (1978).

<sup>140</sup> U.S. CONST. amend. I. The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”

<sup>141</sup> Tusk, *supra* note 3, at 1202; see also *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (defining a prior restraint as any scheme which gives “public officials the power to deny use of a forum in advance of actual expression”).

<sup>142</sup> Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure 35 (May 22, 2003) [hereinafter May 22, 2003 Alito Memorandum], <http://www.uscourts.gov/rules/Reports/AP5-2003.pdf> (last visited Aug. 18, 2005).

<sup>143</sup> Kozinski Letter, *supra* note 89, at 2.

<sup>144</sup> May 22, 2003 Alito Memorandum, *supra* note 142, at 35.

boost of claiming that *three court of appeals judges endorse that reasoning*.<sup>145</sup>

No-citation rules do not limit a litigator's use of the content of unpublished opinions. On the contrary, they are free to rely on the arguments and thought processes of unpublished opinions.<sup>146</sup> Instead, no-citation rules merely prohibit litigators from citing to the case itself.<sup>147</sup> Furthermore, the generalized prohibition against prior restraint is not absolute. In fact, the Supreme Court has sanctioned its use in cases of "clear and present danger to national security" as well as those involving obscenity.<sup>148</sup> Additionally, as an officer of the court, a lawyer may be subject to restrictions on speech to which an ordinary citizen would not.<sup>149</sup> Moreover, the Court has held that "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."<sup>150</sup>

Mere distrust of the judiciary causes these misplaced fears and, while fear of judicial irresponsibility is a legitimate concern, it provides little justification for mandating universal citation of unpublished opinions.<sup>151</sup> By adopting strict publication guidelines, judges will be held accountable and fear of judicial impropriety will be mitigated.<sup>152</sup>

### III. PROPOSED FEDERAL RULE OF APPELLATE PROCEDURE 32.1

The controversy surrounding the use of unpublished opinions was brought to the judicial forefront in 2000 and 2001 by two "intellectual heavy-

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<sup>145</sup> Kozinski Letter, *supra* note 89, at 4.

<sup>146</sup> "The non-citation rule does not preclude the use of reasoning and ideas taken from an unpublished opinion that may happen to be in the possession of counsel." STANDARDS FOR PUBLICATION, *supra* note 19, at 18–19.

<sup>147</sup> Therefore, any arguments claiming no-citation rules are content-based restrictions on speech are incorrect. *See* Greenwald & Schwarz, Jr., *supra* note 1, at 1164.

<sup>148</sup> *Schneck v. United States*, 249 U.S. 47, 52 (1919); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 62–65 (1976) (listing various instances where speech has been restricted).

<sup>149</sup> *See generally In re Sawyer*, 360 U.S. 622 (1959).

<sup>150</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991).

<sup>151</sup> *See* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 168–69 (1996).

Given the workload of the federal courts of appeals today, the realistic choice is not between limited publication, on the one hand, and, on the other, improving and then publishing all the opinions that are not published today; it is between preparing but not publishing opinions in many cases and preparing no opinions in those cases. It is a choice, in other words, between giving the parties reasons for the decision of their appeal and not giving them reasons even though the appeal is not frivolous.

*Id.*

<sup>152</sup> Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325, 331 (2001) (maintaining that formal publication guidelines and internal enforcement of them by peer oversight, keeps judges honest in their publication decisions).

weights”:<sup>153</sup> Judge Arnold of the Eighth Circuit in the *Anastasoff v. United States* opinion<sup>154</sup> and Judge Kozinski of the Ninth Circuit in the *Hart v. Massanari* opinion.<sup>155</sup> Unfortunately, these fascinating arguments focused largely on the circumscribed question as to whether unpublished decisions should be given the same binding precedential value as published opinions from the same jurisdiction.<sup>156</sup>

By 2001, the Department of Justice (“DOJ”) joined the debate. The DOJ asked the Judicial Conference to amend the rules and establish uniform procedures permitting the citation of unpublished opinions.<sup>157</sup> In response, the Conference began an arduous rulemaking process that same year.<sup>158</sup> This was not

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<sup>153</sup> Barnett, *supra* note 69, at 8.

<sup>154</sup> *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000). Faye Anastasoff sought a refund for overpaid federal income tax. *Id.* at 899. She mailed her refund claim to the IRS on April 13, 1996 for taxes she paid on April 15, 1993. *Id.* The IRS denied her claim under 26 U.S.C. § 6511(b), which limited the payment of refunds to taxes paid within the three years prior to the filing of the claim. *Id.* Although the appellant had mailed her claim within this period, the IRS did not receive and file it until April 16, 1996, which made her claim one day late. *Id.* Under the “mailbox rule,” which deems claims as received when post-marked, the appellant’s claim would have been valid. *Id.* However, in a prior unpublished opinion, the Eighth Circuit ruled that reliance on the “mailbox rule” is improper under a § 6511(b) claim. *See generally* *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. LEXIS 36446 (8th Cir. Mar. 20, 1992). The appellant argued that the Circuit was not bound by the *Christie* decision because it was an unpublished opinion and thus not precedent under 8th Cir. R. 28A(i). *Anastasoff*, 223 F.3d at 899.

<sup>155</sup> *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). A lawyer in an appellate brief cited an unpublished opinion. *Id.* at 1158–59. The Court ordered counsel to show cause as to why he should not be disciplined for violating 9th Cir. R. 36-3 which states that “[u]npublished dispositions and orders of this Court are not binding precedent . . . [and generally] may not be cited to or by the courts of this circuit . . .” *Id.* at 1159; 9TH CIR. R. 36-3. Counsel responded that Rule 36-3 is possibly unconstitutional, relying on the Eighth Circuit’s ruling in *Anastasoff*. *Hart*, 266 F.3d at 1159.

<sup>156</sup> Velamoor, *supra* note 19, at 564; *Anastasoff*, 223 F.3d at 900–05; *Hart*, 266 F.3d at 1159–77.

<sup>157</sup> The DOJ has proposed that a new rule, Rule 32.1, be added to the FRAP governing citation of unpublished or non-precedential opinions. Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure 3 (May 21, 2002), <http://www.uscourts.gov/rules/Reports/AP5-2002.pdf> [hereinafter May 21, 2002 Alito Memorandum].

<sup>158</sup> Under the Rules Enabling Act, Congress has authorized the federal judiciary to promulgate the rules of practice, procedure and evidence for the federal courts. 28 U.S.C. §§ 2071–2072 (2000). This authority is subject to Congressional scrutiny. *Id.* § 2074. The Act authorized the creation of the Judicial Conference which, in turn, authorized the Committee on Rules of Practice and Procedure (“Standing Committee”) and an advisory committee specifically dealing with appellate rules. *See id.* § 2073; Leonidas Ralph Mecham, Admin. Office of the U.S. Courts, The Rulemaking Process, <http://www.uscourts.gov/rules/proceduresum.htm> (last visited Aug. 17, 2005) [hereinafter The Rulemaking Process]. If the advisory committee recommends a rule change, it must obtain the Standing Committee’s approval to publish the rule for notice and comment. The

the first attempt to create uniform citation procedures.<sup>159</sup> In April 1998, the Advisory Committee unanimously declined to regulate citations of unpublished opinions, reasoning that nearly every circuit court's chief judge opposed such regulations.<sup>160</sup> Nevertheless, just three years later, the Advisory Committee decided to reverse their stance amid accusations that revisiting the proposed rule would be fruitless and disrespectful towards the circuits' chief judges.<sup>161</sup>

#### A. A MODEST PROPOSAL

Despite the legal community's misguided perceptions, and in light of judicial activism within the circuits,<sup>162</sup> the Advisory Committee passed a motion by a six-to-three vote in the spring of 2002.<sup>163</sup> The motion proffered to amend the Appellate Rules to include a uniform standard of citation for unpublished opinions.<sup>164</sup> After drafting three forms of Proposed Rule 32.1,<sup>165</sup> the Committee finally agreed on a single version.<sup>166</sup>

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Rulemaking Process, *supra*. There is usually a minimum of seven stages of comment and review that can take up to three years to complete. *Id.* Once the public comment is complete, if the advisory committee votes to proceed, the proposal is sent to the Standing Committee. *Id.* The Standing Committee reviews the recommendations of the advisory committee and recommends to the Judicial Conference any proposed rule changes it feels may "be necessary to maintain consistency and otherwise promote the interests of justice." 28 U.S.C. § 2073(b). If accepted by the Judicial Conference, the rule must then be accepted by the Supreme Court and avoid any modification or rejection by Congress. The Rulemaking Process, *supra*. Congress need not publicly approve the rule for it to take effect. *Id.*

<sup>159</sup> The Advisory Committee on Appellate Rules kept Item No. 91-17 on its study agenda, which included, among other things, the question as to whether FRAP should regulate the citation of unpublished opinions, for seven years. ADVISORY COMM. ON APPELLATE RULES, 107TH CONG., MINUTES OF SPRING 2001 MEETING 64 (April 11, 2001), <http://www.uscourts.gov/rules/Minutes/app0401.pdf>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*; "Concerns about offending judges deeply opposed to the rule change remained the primary argument against the amendment . . ." Velamoor, *supra* note 19, at 566.

<sup>162</sup> ADVISORY COMM. ON APPELLATE RULES, 107TH CONG., MINUTES OF SPRING 2002 MEETING 23-24 (April 22, 2002), <http://www.uscourts.gov/rules/Minutes/app0402.pdf>. The committee specifically referenced the D.C. Circuit's recent rule change. *Id.* at 24. A survey conducted by the advisory committee revealed that there was no longer uniformity amongst the circuits regarding citation of unpublished opinions. *Id.* at 23.

<sup>163</sup> *Id.* at 25.

<sup>164</sup> *Id.*

<sup>165</sup> Memorandum from Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, to Judge Samuel A. Alito, Jr., Chair Advisory Committee on Appellate Rules (Dec. 6, 2002), <http://www.uscourts.gov/rules/Reports/AP12-2002.pdf>

<sup>166</sup> Memorandum from Judge Samuel A. Alito, Jr., Chair Advisory Committee on Appellate Rules, to Judge David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 42-43 (May 14, 2004), <http://www.uscourts.gov/rules/Reports/AP5-2004.pdf> [hereinafter May 14, 2004 Alito Memorandum]. The version of the rule appeared as follows:

*i. Legislative Shortcomings*

By its own admission, FRAP 32.1 is “extremely limited.”<sup>167</sup> It gives no opinion as to whether an unpublished opinion should be treated as precedent.<sup>168</sup> It also does not expressly grant power to the appellate courts to issue unpublished opinions, nor does it prescribe to a court the circumstances that should designate an opinion “unpublished.”<sup>169</sup> It *merely* addresses the citability of an *unpublished* judicial opinion.<sup>170</sup>

The Rule unsuccessfully tries to distinguish citability from precedential value. However, the Advisory Committee fails to recognize that “cases are cited almost exclusively for their precedential power.”<sup>171</sup> Because all cases under FRAP 32.1 will be citable, the Rule “is of necessity” saying that all prior decisions have some precedential effect.<sup>172</sup>

FRAP 32.1 is of little use to litigants and judges. Since the regulation does not prescribe the level of precedential value that a court should give an unpublished opinion, the focal point of contention is completely ignored. In short, FRAP 32.1 is a regulatory wash.

Rule 32.1. Citation of Judicial Dispositions

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

*Id.*

<sup>167</sup> *Id.* at 3.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 3–4.

<sup>171</sup> Kozinski Letter, *supra* note 89, at 4; *see also* Letter from the Judges of the Seventh Circuit Court of Appeals to Samuel A. Alito, Jr., Judge, Third Circuit Court of Appeals (Feb. 11, 2004) [hereinafter Letter from the Seventh Circuit], [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-396.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-396.pdf).

Under the proposed rule, while a court will no longer be allowed to forbid the citation of unpublished opinions, it will be allowed to deny precedential force to them, a combination that puzzles us. If the opinions have no force as precedent, their citation value is small. As a practical matter, we expect that they will be accorded significant precedential effect, simply because the judges of a court will be naturally reluctant to repudiate or ignore previous decisions.

*Id.*

<sup>172</sup> Kozinski Letter, *supra* note 89, at 4 (emphasis in original); *see also* Letter from the Seventh Circuit, *supra* note 171 (“If we did ignore them [cited unpublished opinions], it would mean that the proposed rule had accomplished no purpose at all.”).

*ii. Call-Waiting for Citation*

Proposed Rule 32.1 of the Federal Rules of Appellate Procedure caused quite a stir during its rollout. Referred to as “the most controversial issue in the history of the judicial rule-making process,”<sup>173</sup> the *New York Times*<sup>174</sup> commented about the Rule and entire websites are dedicated to its discussion.<sup>175</sup> In fact, nearly 500 submissions were received when the Rule was published for comment in August 2003, in contrast to a mere twenty written comments submitted when other proposed amendments were published in August 2000.<sup>176</sup> Despite this intellectual reactivity, the Standing Rules Committee recommitted the Rule for further study in June 2004.

During this period, federal appellate courts were vocal in claiming that the Rule would foster an increase in workload and therefore an increase in “work time” dedicated to case disposal.<sup>177</sup> The Committee decided to defer approving the proposed rule in order to empirically study whether or not lifting the ban on citation would further burden the courts in the nine circuits that currently permit citation.<sup>178</sup>

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<sup>173</sup> Tony Mauro, *Unpublished Opinions: Inedible Sausage or Crazy Uncle*, LAW.COM, April 6, 2005, <http://www.law.com/jsp/article.jsp?id=1081348862446> (quoting Professor Patrick Schiltz).

<sup>174</sup> Adam Liptak, *Federal Appeals Court Decisions May Go Public*, N.Y. TIMES, Dec. 25, 2002, at A21.

<sup>175</sup> See, e.g., NonPublication.com, <http://www.nonpublication.com> (last visited Aug. 17, 2005); The Rule of Law, <http://www.rule-of-law.info> (last visited Aug. 17, 2005); Secret Justice, <http://www.secretjustice.org> (last visited Sept. 26, 2005).

<sup>176</sup> May 14, 2004 Alito Memorandum, *supra* note 164, at 1–2.

<sup>177</sup> Kozinski Letter, *supra* note 89, at 11.

Many of the [no-citation] rule changes have been recent, and most impose some limitations—such as the requirement that there be no published authority directly on point. Moreover, [it is] much too early to tell the effects of these changes; certainly no comprehensive study has been done. We do not know that some circuits have resorted to frequent use of judgment orders, which eliminates the problem, but also gives parties far less information than we do in our unpublished dispositions.

*Id.*

<sup>178</sup> 2004 CONFERENCE REPORT, *supra* note 33, at 7–13.

Several courts of appeals have expressed concerns with some aspects of the proposed rule. These concerns are mainly centered on the belief that permitting citation of non-precedential opinions will significantly increase the workload of the courts. In response to that increase, these courts predict that time to disposition will increase as will the number of summary judgment orders. These concerns can be tested empirically in the nine circuits that now permit citation. In an effort to reach a greater consensus among the courts, and in deference to the circuits that oppose the proposed rule, the Committee decided to defer approving the proposed new rule in favor of such an empirical study. The Committee concluded that some further consideration by the advisory committee would be helpful once the empirical study was completed. The further consideration would take into account the results of the empirical study but need not be limited to empirical issues. The Committee was particularly interested in the advisory committee’s further consideration of the application of the proposed rule to state court



*iii. A Surprising Study*

The Federal Judicial Center released the results of its study regarding citation to unpublished opinions in the federal courts of appeals in the early months of 2005.<sup>179</sup> The study's findings prematurely purported a dearth of evidence of harmful consequences that opponents of 32.1 claim the adoption of the Rule will bring.<sup>180</sup> Such findings were the basis for the Committee's April 18, 2005 approval of the proposed rule,<sup>181</sup> which eventually brought a subsequent nod from the Judicial Conference.<sup>182</sup> In its present form, the rule would be prospective—applying only to decisions issued by the courts on or after January 1, 2007.<sup>183</sup> However, before 32.1 takes effect, it not only needs the proverbial seal of approval from the Supreme Court, but must also survive inspection by Congress.<sup>184</sup>

However, the main crux of the citation-publication argument regarding the precedential value of such opinions is being ignored. In addition, the Federal Judicial Center's conclusory statements supporting the Committee's decision are a statistician's nightmare.<sup>185</sup> Requiring the entire federal appellate court

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unpublished decisions. The Committee was careful to state that the action was neutral and should not be understood to express disapproval of the proposal.

*Id.* at 13. Approval by the Committee at this stage does not guarantee that the Rule will be implemented; it still must be approved by the Supreme Court. *See supra* note 158 and accompanying text.

<sup>179</sup> TIM REAGAN ET AL., FED. JUDICIAL CTR., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS (2005), [http://www.fjc.gov/public/pdf.nsf/lookup/Citatio2.pdf/\\$File/Citatio2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Citatio2.pdf/$File/Citatio2.pdf) [hereinafter FED. JUDICIAL CTR. STUDY] (last visited Sept. 26, 2005).

<sup>180</sup> Memorandum from to Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules to Judge David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 5 (May 6, 2005), <http://www.uscourts.gov/rules/Reports/AP5-2005.pdf> [hereinafter May 6, 2005 Alito Memorandum]; *see also* FED. JUDICIAL CTR. STUDY, *supra* note 179, at 3–4 (claiming that in courts that permit citation, the length of unpublished opinions and the time spent preparing them would not change if attorneys were prohibited from citing unpublished opinions).

<sup>181</sup> *Id.* at 1, 8–13.

<sup>182</sup> News Release, Judicial Conference of the United States, Conference Memorializes Late Chief Justice, Acts on Administrative, Legislative Matters (Sept. 20, 2005), [http://www.uscourts.gov/Press\\_Releases/judconf092005.html](http://www.uscourts.gov/Press_Releases/judconf092005.html).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> The Federal Judicial Center's self-described empirical study and methodology appears as follows:

At its June 2004 meeting, the Standing Committee on Rules of Practice and Procedure asked the Appellate Rules Advisory Committee to ask the Federal Judicial Center to conduct empirical research that would yield results helpful to the Standing Committee's consideration of the Appellate Rules Advisory Committee's proposed rule. We undertook a research effort with three components: (1) a survey of judges, (2) a survey of attorneys, and (3) a survey of case files.

We surveyed all 257 sitting circuit judges and asked how citation rules are likely to af-

system to abide by a rule based on answers of four judges is problematic.<sup>186</sup>

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fect the time it takes to prepare unpublished opinions, the length of unpublished opinions, and the frequency of unpublished opinions. We also asked judges in circuits whose courts permit citation to unpublished opinions in unrelated cases—the discouraging circuits and the permissive circuits—whether these citations require additional work, are helpful, and are inconsistent with published authority. We asked judges in restrictive circuits whether special characteristics of their circuits would create problems if attorneys were permitted to cite unpublished opinions in related cases. The courts of appeals in both the First and the District of Columbia Circuits changed their local rules recently to relax restrictions on citations to unpublished opinions.

To get a representative sample of appellate attorneys who practice in each circuit, we selected the authors of briefs filed in a random sample of appeals in each circuit where a counseled brief was filed on both sides—cases we call fully briefed appeals. We asked attorneys about their desires to cite unpublished opinions in the cases selected, and we asked them about the probable impact of a rule permitting citation to unpublished opinions.

We examined a random sample of cases filed in each circuit to determine how often attorneys and courts cite unpublished opinions in unrelated cases. We have also collected data on whether the cases are resolved by published or unpublished opinions, or without opinions, and how long the published and unpublished opinions are.

FED. JUDICIAL CTR. STUDY, *supra* note 179, at 1. Although 257 sitting circuit judges were surveyed, only 222 responded; ten of the responding judges did not answer any of the questions. *Id.* at 3. Most disturbing about the survey was its failure to address the effect of judges who opted out of answering certain questions. *See, e.g., id.* at 5 (“We received answers to these questions from 72% of the judges asked.”); *id.* at 10 (“We received answers to this question from 75% of the judges asked.”); *id.* at 12 (“We received answers to this question from 36% of the judges in the District of Columbia Circuit.”). No reference was made regarding subsequent attempts to retrieve answers from judges that did not respond, nor was any reference made as to how, if at all, certain judges chose to self-select out of the survey or certain questions could skew the results.

The Oxford English Dictionary defines empirical in the context of a practice or work habit as something “guided by mere experience, without scientific knowledge.” THE OXFORD ENGLISH DICTIONARY 188 (2d ed. 1989). Many of the questions asked in the study did not relate to experience, rather, they asked for pure conjecture. *See, e.g., FED. JUDICIAL CTR. STUDY, supra* note 179, at 6 (“If no restrictions were placed on the ability of an attorney to cite an unpublished opinion of your court for its persuasive value, do you think that the number of unpublished opinions that you author would increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.”); *id.* at 8 (“If attorneys in your circuit were allowed to cite unpublished opinions in your court for its persuasive value, would the amount of time spent in your chambers in preparing unpublished opinions increase, decrease, or stay the same?”); *id.* at 9 (“Would a rule allowing citation of unpublished opinions in your circuit cause problems because of any special characteristics of your court or its practices?”); *id.* at 17 (“What effect on your appellate work would a new rule of appellate procedure freely permitting citations to unpublished opinions in all circuits (but not changing whether such opinions are binding precedent or not) have on your federal appellate work?”); *id.* at 18 (“The Appellate Rules Advisory Committee has proposed a new national rule, which would permit citation to the courts of appeals’ unpublished opinions; what impact would you expect such a rule to have?”).

<sup>186</sup> FED. JUDICIAL CTR. STUDY, *supra* note 179, at 12 (“We received answers to these questions from 36% of the judges in the District of Columbia Circuit. All four judges said that the amount of time they spend drafting unpublished opinions has not changed since the

#### IV. IS UNIFORMITY THE SOLUTION?

*“A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of the opinion that the first judgment was according to law; for any Court may err; and if a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to the law.”*<sup>187</sup>

FRAP 32.1 merely focuses on a uniform solution to the citability of unpublished opinions, yet remains silent as to their uses as precedent. The Committee has left this decision to the individual circuits. This thought process colors over the true conundrum and heart of the 32.1 debate: precedential power.<sup>188</sup> The idea of two separate categories of opinions, precedential and non-precedential, is useful and utilitarian and worth retaining. Indeed, the call for a uniform publication plan from so many years earlier is a call that now all should heed.

#### A. THE ADDAGE “DO AS I SAY AND NOT AS I DO” DOES NOT VIOLATE THE CONSTITUTION

From the first day of law school, students are inculcated into the mystique of the common law. Law has developed for centuries, incrementally, from case to case. Principles first enunciated in “landmark” cases are elaborated, over time, in subsequent cases, which apply those principles to a range of factual and procedural contexts. In this way, the law develops organically, collaboratively, as a logical and necessary consequence of the adjudication of real-life legal contests. Or so we thought . . . .<sup>189</sup>

##### *i. The True Role of Precedent in Our Judicial System*

*“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”*<sup>190</sup>

Stare decisis, “the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation,”<sup>191</sup> is not constitutionally prescribed but rather an outgrowth of “wise judicial practice, procedure, and policy.”<sup>192</sup> Courts follow this doctrine because it fosters “reliance, predictability, [and] stability” in our judicial system while

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opinions became citable.”).

<sup>187</sup> Kerlin’s Lessee v. Bull, 1 U.S. (1 Dall.) 175, 178 (Pa. 1786).

<sup>188</sup> DuVivier, *supra* note 73, at 410.

<sup>189</sup> Gerken, *supra* note 70, at 475.

<sup>190</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1896).

<sup>191</sup> BLACK’S, *supra* note 2, at 1414.

<sup>192</sup> Paulsen, *supra* note 8, at 1538.

simultaneously restraining the discretionary power of the judiciary.<sup>193</sup> Furthermore, adherence to precedent “expedites the work of the court by preventing the constant reconsideration of settled questions[;]”<sup>194</sup> the court need not reinvent the wheel every time.

Dissenters of publication and no-citation plans incorrectly believe that the Constitution mandates all opinions to be published and viewed as precedent.<sup>195</sup> The Constitution neither promotes nor prohibits reliance on legal precedent. Nevertheless, reformers have dissected the raw language of the Constitution in attempts to massage constitutional violations into existence. Additionally, the treatment of unpublished opinions as precedent does not promote predictability and stability of the law for which the doctrine of stare decisis calls. “Rather, unpredictability and instability would seem to follow.”<sup>196</sup> To allow the use of precedent to which an average person would have difficulty accessing would make the law “capricious and unpredictable.”<sup>197</sup>

*ii. The Rise of an Official Publisher*

From its inception, the American common law system has never mandated the publication of every appellate decision.<sup>198</sup> In fact, the First Congress laid the groundwork for the entire federal judiciary without providing for an official reporter for the highest court of the land.<sup>199</sup> The Justices agreed informally amongst themselves that a reporter was necessary to memorialize their decisions.<sup>200</sup> Not surprisingly, the Supreme Court recorded less than 50% of its decisions in the first ten years.<sup>201</sup> Yet, this number is exceedingly high when juxtaposed with the fact that the Court reduced very few of its oral opinions to

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<sup>193</sup> *Id.* at 1540.

<sup>194</sup> Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 410 (1924).

<sup>195</sup> *Anastoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000) *citing* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803) (explaining that “inherent in every judicial decision” is a declaration or interpretation of a principle of law and therefore it is precedent).

<sup>196</sup> *Yellow Book of N.Y. v. Dimilia*, 729 N.Y.S.2d 286, 288 (2001).

<sup>197</sup> *Id.*

<sup>198</sup> Weresh, *supra* note 38, at 186.

<sup>199</sup> Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1294 (1985).

<sup>200</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 614–15 (1834) (assertion of counsel that the Justices “invited [a Reporter] to attend [hearings] at his own expense and report the cases; and there was at least a tacit engagement on their part to furnish him with such notes or written opinions as they might draw up”).

<sup>201</sup> J. GOEBEL, JR., *ANTECEDENTS AND BEGINNINGS TO 1801*, at 662, 799 (arguing that the figure “probably exceeds 70 percent” when the inquiry focuses on cases adjudicated on the merits or jurisdictional grounds).

written opinions.<sup>202</sup> Furthermore, Reporters used their own discretion in selecting opinions for publication. It appears that the Reporters alone decided which opinions were to receive binding precedence on subsequent cases.<sup>203</sup>

The idea of officially recording judicial opinions in written form was foreign and slow to ignite among the burgeoning states.<sup>204</sup> It was not until 1817 that an Act of Congress established an official Reporter for the United States Supreme Court.<sup>205</sup> Upon its creation, the common association of published judicial opinions with the notion of public accessibility through a court reporter was established.<sup>206</sup>

### *iii. The Bloat of the Federal Appellate Docket and Its Effect on the Opinion Writing Process*

Adjudication at the court of appeals level *ideally* consists of seven phases. Often referred to as the “Learned Hand Tradition,”<sup>207</sup> each of the three judges on the appellate panel are required to participate in: (1) reviewing party briefs; (2) attending oral argument; (3) participating in judicial conference; (4) memorializing their personal assessment of the case, with such memorandum being circulated simultaneously with the argument and conference; (5) drafting opinion(s); (6) circulating opinion(s) for comment; and (7) finalizing the opinion for subsequent publication.<sup>208</sup> In the case of a controversial or contested claim, the drafted opinions may be circulated to the entire judiciary of that circuit for

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<sup>202</sup> 5 U.S. (1 Cranch) iv–v (1804). It was not until 1834 that the Court ordered the filing of written opinions with the Clerk. 33 U.S. (8 Pet.) vii (1834).

<sup>203</sup> “The same discretion has been exercised in omitting to report cases turning on mere questions of fact, and from which no important principle, or general rule, could be extracted . . . . [They are, therefore,] inapplicable, as precedents, to future cases.” 25 U.S. (1 Wheat.) iii–iv (1827); *see also* Joyce, *supra* note 199, at 1329 (claiming that this practice was continued “in later volumes, with almost no criticism”).

<sup>204</sup> Joyce, *supra* note 199, at 1342–43 (“By 1814, there was precedent for the official appointment of a salaried reporter to the highest court of the state not only in Massachusetts (1803), but also in New York (1804), New Jersey (1806) and apparently Kentucky (1804) as well.”).

<sup>205</sup> Act of Mar. 3, 1817, ch. 63, § 1, 3 Stat. 376.

<sup>206</sup> “Writing, not custom, was thus the best guardian of the common law.” Denis P. Duffey, Jr., Symposium, *Genre and Authority: The Rise of Case Reporting in the Early United States*, 74 CHI.-KENT L. REV. 263, 272 (1998).

<sup>207</sup> Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371, 380 (1988) (reminiscing about a time when a judge could, as his predecessor Learned Hand did, talk in-depth about a case, “with his feet on the desk and hands behind his head, . . . [and] having reached his decision, . . . write the entire opinion in longhand.”).

<sup>208</sup> Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 690 (2001).

input.<sup>209</sup>

This ideal process of appellate review is “a rare pleasure indeed.”<sup>210</sup> The reality of this procedure includes a heavy reliance on law clerks and staff attorneys,<sup>211</sup> a dramatic decline in oral argument,<sup>212</sup> and an increased use of unpublished opinions.<sup>213</sup>

Courts universally hold that a reported decision, prepared by a panel of appellate judges, may be overturned by a ruling en banc—a proceeding where, “all of the active judges in the court participate.”<sup>214</sup> En banc reviews, however, are rare. Consequently, restricting a panel from issuing an unpublished opinion gives the impression that the panel’s opinion “represent[s] the entire court in the case at hand.”<sup>215</sup> This restriction further “commands the allegiance of all future panels in the consideration of subsequent cases” even though they had no direct participation.<sup>216</sup>

It is vital for federal courts to rely upon limited publication in order to keep the wheels of justice turning. The “press of unmeritorious appeals” forces judges “to ration their talents and to rely unduly on their law clerks.”<sup>217</sup> The astronomical influx of habitual appeals also forces the bench to seek routine methods to dispose easily of these cases.<sup>218</sup>

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<sup>209</sup> *Id.* at 691 (indicating that this usually happens when there is a possible “redirection of circuit precedent”).

<sup>210</sup> Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1491 (1995) (reviewing THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994)).

<sup>211</sup> Cooper & Berman, *supra* note 208, at 697–99.

<sup>212</sup> *Id.* at 700 (claiming that sixty percent of all appeals are decided by the judges “after reading the parties’ briefs but without hearing argument”).

<sup>213</sup> *Id.* at 703.

This treatment arises out of the courts’ rationale for the unpublished opinions: the notion that, where a case is easily resolved on the basis of existing law, there is no need for the court to take the time to write a polished, published opinion because the case adds nothing new to the body of law, and there is no need for anyone to cite the court’s decision because other precedent exists to establish the pertinent point.

*Id.*

<sup>214</sup> *Id.* at 721.

<sup>215</sup> *Id.* at 722.

<sup>216</sup> *Id.*

<sup>217</sup> Jones, *supra* note 210, at 1493.

<sup>218</sup> *Id.*

Terse orders and memoranda may be the only possible judicial response to a large number of cases in an overcrowded system, but we must be careful that our decisions do not deteriorate into standardized forms. If a choice must be made, I personally would prefer expanding the judge’s in-chambers staff, because it is far more accountable to the judge, or relying more on brief memorandum opinions so long as they are still authored by judges.

Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 779 (1983).

The precedential effect afforded opinions “turns on the exposition of the relevant facts (and the omission of irrelevant ones), the precise phrasing of propositions of law.”<sup>219</sup> Therefore, judges give much time, thought, and consideration to every word<sup>220</sup> and must be conscious of how their language may be construed *or* misconstrued. They must act like seers and anticipate how their language might be interpreted by future litigants and courts “and how small variations in wording might be imbued with meanings never intended.”<sup>221</sup> This process takes up immense amounts of judicial time and therefore, given the staggering caseload, is reserved only for opinions designated as published.<sup>222</sup>

#### B. THE NEED TO BALANCE JUDICIAL EFFICIENCY AGAINST FAIRNESS TO THE LITIGANTS

*“[W]e can and must limit advocacy in order to ensure the fair administration of justice—allowing each side to have its say without undue expense, delay or distraction.”*<sup>223</sup>

To say that an assault on judicial efficiency is insufficient to support publication plans and no-citation rules is naïve. Numerous trial procedural rules list judicial efficiency as a goal of the courts.<sup>224</sup> In fact, Congress mandates efficiency in the court system.<sup>225</sup> Additionally, there is a “practical limit on law-

<sup>219</sup> Kozinski Letter, *supra* note 89, at 5.

<sup>220</sup> STANDARDS FOR PUBLICATION, *supra* note 19, at 3 (“[T]he judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision.”).

<sup>221</sup> Kozinski Letter, *supra* note 89, at 5.

<sup>222</sup> *Id.*

While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising. Frequently, this process brings to light new issues, calling for further research, which may sometimes send the author all the way back to square one. In short, writing an opinion is a tough, delicate, exacting, time-consuming process. Circuit judges devote something like half their time, and half the time of their clerks, to cases in which they write opinions, dissents, or concurrences.

Kozinski, *supra* note 38, at 39.

<sup>223</sup> *Id.* at 20.

<sup>224</sup> *See, e.g.*, FED. R. CIV. P. 1 (stating that the rules are to be “construed and administered to secure the just, speedy, and inexpensive determination of every action”); FED. R. EVID. 102 (stating that the rules should be construed to eliminate “unjustifiable expense and delay”); FED. R. CRIM. P. 2 (stating that the rules are to be interpreted to “eliminate unjustifiable expense and delay”).

<sup>225</sup> *See generally* Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471 *et seq.* (2000). This statute required all 94 federal district courts to implement “civil justice expense and delay reduction plan[s] . . . [that would] facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inex-

yers' and judges' ability to obtain and assimilate judicial opinions."<sup>226</sup> A reduction in precedent brings the enhanced efficiency that flows from a reduced number of cases to sift through, and improves the quality of the limited number of published opinions.

Proponents of FRAP 32.1 do not realize that the abandonment of no-citation rules will "cripple our court system."<sup>227</sup> They seem to forget that every litigant has the right to an appeal,<sup>228</sup> the Federal Courts of Appeals are not certiorari courts like the Supreme Court. Couple this with the staggering statistic that there has been a "seventeen-fold increase in appeals since 1950 while the number of federal appellate judges has not even tripled,"<sup>229</sup> and one begins to see how it is true that the judges *are* "being eaten alive."<sup>230</sup> Abandonment by the circuits of the practice of unpublished opinions or no-citation rules would leave parties with one of two options: summary dispositions or backlogged court systems.<sup>231</sup>

### *i. Summary Dispositions*

To be sure, not all district court proceedings are decided incorrectly or merit a lengthy legal dissertation. In fact, numerous jurisdictions still allow appellate panels to resolve cases (without an opinion) with one word: "affirmed" or "reversed." Reformers should take caution. An attack on no-citation rules and unpublished opinions will likely force judges to rely more heavily on the brevity and ease of a summary disposition to counter caseload pressure.

Precedence of a case is "dependent on the manner of transmission."<sup>232</sup> The ability to recite a case holding does not sway a tribunal; "rather, the facts and reasoning of a case are vital to the use of that case" for subsequent parties and future conflicts.<sup>233</sup> At a minimum, unpublished decisions give a skeletal presentation of the case facts and the court's reasoning. These opinions naturally provide some protection against the nonpublication of clearly precedential decisions,<sup>234</sup> which would not be the case in summary dispositions.

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pensive resolutions of civil disputes." *Id.* § 471.

<sup>226</sup> Tusk, *supra* note 3, at 1208 (internal citation omitted).

<sup>227</sup> DuVivier, *supra* note 73, at 397.

<sup>228</sup> 28 U.S.C. § 1291.

<sup>229</sup> Jones, *supra* note 210, at 1486.

<sup>230</sup> *Id.* at 1491 (quoting Thomas Gibbs Gee, former chief judge of the Fifth Circuit).

<sup>231</sup> The author intentionally omits arguments calling for an increase in judgeships or decrease in federal jurisdiction, leaving those articles for another ambitious student of law.

<sup>232</sup> Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037, 1053 (2002).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*



*ii. Backlogged Courts*

*“If we are to keep our democracy, there must be one commandment: Though shall not ration justice.”*<sup>235</sup>

Reformers call for a return to the Learned Hand traditional appellate review.<sup>236</sup> The fact is Judge Hand never wrote more than sixty opinions per year.<sup>237</sup> In contrast, the Fifth Circuit’s per-judge case filings increased from a mere 57 per judge in 1960 to a whopping 220 in 1990.<sup>238</sup>

Unsurprisingly, the skyrocketing number of cases has affected the length of time it takes for a court to dispose of a case. The amount of time between when an appellate court received the last appellate brief until it rendered a final decision more than doubled between 1950 and 1990.<sup>239</sup> This rise in caseload has caused a “serious, systematic delay” in appellate decision-making time.<sup>240</sup> Ironically, proponents of FRAP 32.1 contend that the inability to cite a case is unfair and in violation of the Constitution.<sup>241</sup> Yet, an increase in “decision time from 2.2 to 5.6 months,” which burdens “civil litigants for whom delay costs money or criminal defendants who might be entitled to release if their convictions were reversed,” is just as disadvantageous, if not more.<sup>242</sup>

C. AUTHOR’S PROPOSED UNIFORM PUBLICATION AND CITATION PLAN

Standards for determining whether to publish an opinion are frequently criticized as being overbroad.<sup>243</sup> In fact, some publication guidelines do not mandate that publication of opinions meet relevant criteria.<sup>244</sup> Critics fear that this

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<sup>235</sup> Jones, *supra* note 210, at 1487 (quoting Learned Hand, Thou Shall not Ration Justice, Address Before the Legal Aid Society of New York (Feb. 16, 1951), in LEGAL AID BRIEF CASE, at 3, 5 (1951)).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 1488.

<sup>239</sup> *Id.* at 1489 (finding that final decisions in 1950 were issued within 2.2 months of receipt of the final appellate brief but jumped to 5.6 months for cases with oral arguments and 4.2 months for cases without oral arguments in 1990).

<sup>240</sup> *Id.*

<sup>241</sup> See generally discussion *supra* Part II.

<sup>242</sup> Jones, *supra* note 210, at 1490.

<sup>243</sup> POSNER, *supra* note 151, at 165 (maintaining that these standards “amount to little more than saying that an opinion should not be published unless it is likely to have value as precedent”).

<sup>244</sup> See 11TH CIR. R. 36-2 (stating that an “opinion shall be unpublished unless a majority of the panel decides to publish it”). *But see* 1ST CIR. LOC. R. 36(b)(1) (establishing a presumption in favor of publishing opinions).

amount of discretion leads to a loss of judicial accountability resulting in judges deciding cases contrary to established precedent.<sup>245</sup>

Rather than allowing local rules of each circuit to regulate the procedures in the various courts of appeals, the implementation of a uniform publication plan<sup>246</sup> would keep with the salutary purpose of the Federal Rules of Appellate Procedure and provide a uniform solution. The following is the author's conservative proposal for a uniform publication plan.

*i. Proposed Rule*

Rule 32.1: Publication of Judicial Opinions

(1) Authority. A court of appeals may designate an opinion as unpublished, non-precedential, not for publication, or the like.

(2) Mandatory Publication. An opinion will be ordered published, and be treated as precedential, if it:

- (a) Establishes a new rule of law;<sup>247</sup>
- (b) Alters, modifies, clarifies, or explains an existing law;<sup>248</sup>
- (c) Resolves or identifies an apparent conflict of authority, either within the circuit or between the circuit and another, or creates a conflict between the circuit and another;<sup>249</sup>
- (d) Concerns an issue of substantial or continuing public interest or importance;
- (e) Is a case of first impression in the court with regard to the substantial issue it resolves;<sup>250</sup>
- (f) Draws attention to a rule of law that appears to have been generally overlooked;<sup>251</sup>
- (g) Applies an existing rule of law in a novel factual context, differing materially from those in previously published opinions of the court applying the rule;<sup>252</sup>
- (h) Contributes significantly to the legal literature by reviewing the legislative, judicial, administrative, or electoral history of an existing rule of

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<sup>245</sup> Martineau, *supra* note 15, at 123.

<sup>246</sup> See generally Jonathon Ward, *The Federal Rules of Appellate Procedure*, 54 A.B.A. J. 661 (1968); FED. R. APP. P. 1, 47.

<sup>247</sup> See, e.g., Fed. CIR. R. APP. 10(4); Weresh, *supra* note 38, at 179.

<sup>248</sup> See sources cited *supra* note 247.

<sup>249</sup> See sources cited *supra* note 247.

<sup>250</sup> See, e.g., Fed. CIR. R. APP. 10(4); Weresh, *supra* note 38, at 180.

<sup>251</sup> See sources cited *supra* note 247.

<sup>252</sup> See sources cited *supra* note 247.

law; or<sup>253</sup>

- (i) Reverses, modifies, or denies enforcement of a lower court or administrative agency decision, or affirms it on a substantive ground different from those previously set forth.<sup>254</sup>

(3) Citation Disfavored. An opinion designated as nonprecedential is prohibited from being cited in appellate briefs and opinions. However, an opinion designated as nonprecedential may be cited to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Additionally, after timely notification is given to the opposing party, an unpublished opinion may be cited for its persuasive value only if a reasonable person in good faith could conclude that an intra-circuit conflict exists in resolving a material fact in the case at bar.

(4) Publication Decisions. Opinions of the court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out in section (2) of this rule is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published if the dissenting judge determines that a standard for publication as set out in section (2) of this rule is satisfied.<sup>255</sup>

(5) Collateral Attack. Any person, with good cause, may petition the deciding court to reclassify a nonprecedential opinion. A party that wishes the court to revisit the case must file their motion within one (1) year of the date of the decision.<sup>256</sup>

#### *ii. Comments Regarding Statutory Publication*

Section 32.1(1) is a new rule that delegates authority to courts of appeals to issue unpublished opinions. This rule is merely a codification of the common practice exercised by the circuits for years. In fact, estimates reveal that 80% of all opinions issued by the courts of appeals in recent years are unpublished.<sup>257</sup>

Section 32.1(2) lists the criteria an opinion must meet in order to be deemed *published*. An explicit publication policy that prescribes publication in firm

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<sup>253</sup> 7TH CIR. R. 53(c)(1); Weresh, *supra* note 38, at 180.

<sup>254</sup> Nichols, Jr., *supra* note 32, at 925–26; Weresh, *supra* note 38, at 180.

<sup>255</sup> STANDARDS FOR PUBLICATION, *supra* note 19, at 22.

<sup>256</sup> Eloshway, *supra* note 24, at 646–47.

<sup>257</sup> ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2001, tbl.S-3 (2001), <http://www.uscourts.gov/judbus2001/tables/s03sep01.pdf>.

decisive instances narrows a judge's discretion.<sup>258</sup>

Section 32.1(4) requires a majority panel vote to designate an opinion as published, unless a concurring or dissenting opinion is issued or the lower court's opinion is vacated or modified. This requirement is already in effect in various circuits.<sup>259</sup> A majority vote ensures that the decision is one to which the judges of the panel choose to be bound. This quorum also guarantees that the panel gives precedential value to only the truly worthy cases. Correct application of this rule should limit nonpublication to affirmances where it is reasonable to conclude that a valid reason for appeal never existed.<sup>260</sup>

### *iii. Comments Regarding Statutory Prohibition on Citation*

Section 32.1(3) prohibits the citation of unpublished opinions by an appellate court as well as by a litigant to an appellate court except in circumscribed situations. First, it uniformly codifies the practice of all the circuits that have allowed citation to unpublished opinions in support of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees.<sup>261</sup> Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an unpublished opinion under these circumstances.<sup>262</sup>

Section 32.1(3) also allows for citation of unpublished opinions in the rare instance of an intra-circuit conflict. Simply stated, if conflicting holdings regarding an issue of material fact for a litigant exist in the circuit's unpublished opinions, then the litigant is free to cite to these cases in order to bring the inconsistency to the attention of the panel. This section puts litigants on notice; however, that citation can only occur if he or she has a good faith belief as to the existence of a conflict. The court makes the final decision as to whether or not an intra-circuit conflict exists.

Of the ten circuits that currently allow citation to unpublished opinions,<sup>263</sup>

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<sup>258</sup> STIENSTRA, *supra* note 100, at 28–29.

<sup>259</sup> See sources cited *supra* note 244.

<sup>260</sup> Nichols, Jr., *supra* note 32, at 926; 11TH CIR. R. 36-1 (stating that the court can issue an affirmance without an opinion if the court determines any of the following exist: “the judgment . . . is based on findings of fact . . . not clearly erroneous; the evidence . . . is sufficient; the order of an administrative agency is supported by substantial evidence . . . ; a summary judgment, directed verdict, or . . . pleading[] is supported by the record; the judgment has been entered without reversible error of law”).

<sup>261</sup> Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report & Analysis*, 5 J. APP. PRAC. & PROCESS 473, 474 n.3 (2003).

<sup>262</sup> *Id.*

<sup>263</sup> See discussion *supra* Part II.D.

only one treats them as full-fledged binding precedent: the D.C. Circuit.<sup>264</sup> The remaining circuits differ widely as to the weight they give these opinions.<sup>265</sup> Section 32.1(3) intends to replace these conflicting practices as well as codify what is recognized in the remaining twelve circuits: unpublished opinions are not binding precedents. Prohibition on citation attempts to level the judicial playing field. If litigants were able to cite to unpublished opinions without limitation, those with the fewest resources would be disproportionately disadvantaged.<sup>266</sup>

This rule also urges the circuits to replace the term *unpublished opinion* with the term *nonprecedential opinion* in order to dispel the confusion associated with these terms.<sup>267</sup>

#### *iv. Comments Regarding the Statutory Right to Collaterally Attack a Designation*

Currently, many circuits allow litigants to attack an *unpublished* opinion.<sup>268</sup> Section 32.1(5) allows any person to petition the court to change an opinion's designation. This petitioning option allows the public to decide whether an opinion is worthy of precedent. With this, judges monitor deviations from the publication guidelines. The court makes the final decision as to whether or not the request for publication is for good cause. Good cause is found if the unpublished opinion meets any of the criteria set forth in section 32.1(2). Parties have one year to attack the publication designation.

#### V. WHERE DO WE GO FROM HERE?

Federal court rulemaking has consistently been a "consensus or near-consensus process."<sup>269</sup> If the division of the circuits is any indicator, FRAP 32.1 should never have survived the rulemaking process. FRAP 32.1 is a direct attack on judicial efficiency. If judges are forced to implement this rule, one-

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<sup>264</sup> *Id.*; see also D.C. CIR. R. 28(c)(1)(B).

<sup>265</sup> See discussion *supra* Part II.D.

<sup>266</sup> Kozinski Letter, *supra* note 89, at 13.

<sup>267</sup> See discussion *supra* Parts II.B, IV.A.i-ii.

<sup>268</sup> See Letter from the Seventh Circuit, *supra* note 171.

Our circuit rule 53(d)(3) authorizes any person to move for the publication of any unpublished decision of the court, and these motions are usually granted. The rule could be strengthened to make clear that if the movant shows that publication would be consistent with the criteria for publication set forth in the rule . . . , the motion shall be granted; at present the decision whether to grant is discretionary.

*Id.*

<sup>269</sup> ADVISORY COMM. ON APPELLATE RULES, 109TH CONG., MINUTES OF SPRING 2004 MEETING 8 (2004) <http://www.uscourts.gov/rules/Minutes/app0404.pdf>.

word dispositions, oral dispositions from the bench, and the time to dispose of an appeal will rise sharply. Yet, implementation of FRAP 32.1 continues to ignore the most important issue in the publication-citation debate: the issue of precedent.

Courts and litigants should continue to recognize two types of opinions: precedential and unprecedential. Yet, improved technology has made both types of opinions accessible to those with enough time and money on their hands. This is exactly the reason why universal citation should be rejected.

The implementation of a specific uniform publication plan address the concerns surrounding the proper designation of precedent. Since proponents of FRAP 32.1 believe that all decisions have precedential value, they believe it is unfair and unconstitutional to prevent litigants from citing unpublished opinions. In actuality, the reverse is true. Granting precedence to unpublished opinions creates a systematic unfairness that is directed at the have-nots. With a uniform publication plan in place, litigants can be comforted by the fact that precedent is methodically added to existing case law under specific guidelines. That way, litigants will know they have the authority of the Nation's law on their lips when they decide to quote a judge.