
A MODEST PROPOSAL FOR REGULATING
UNPUBLISHED, NON-PRECEDENTIAL FEDERAL
APPELLATE OPINIONS WHILE COURTS AND
LITIGANTS ADAPT TO FEDERAL RULE OF
APPELLATE PROCEDURE 32.1

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I. INTRODUCTION

Federal appellate courts are overworked. To handle their overloaded dockets, appellate judges have adopted a wide variety of measures intended to promote efficiency, including deciding approximately eighty percent of appeals in non-precedential opinions. Courts and litigants currently are adapting to new Federal Rule of Appellate Procedure 32.1, which prohibits courts from restricting the citation of non-precedential opinions. Whether it is constitutional for federal appellate courts to issue non-precedential opinions is outside the scope of this essay. Putting the constitutional question aside, as a practical matter, at least for now non-precedential opinions should not be eliminated in favor of universal publication of opinions as precedent. That would be a dramatic break from several decades of federal appellate court practice. Moreover, universal publication as precedent would risk repetitive rulings and increased need for en banc overruling of inconsistent circuit precedent. However, as an interim measure, and without ruling

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out future structural reforms, this essay proposes that federal appellate courts modify their internal operating procedures or local rules. Circuit courts should expressly confer persuasive value on non-precedential opinions, provide specific criteria to guide the publication decision, and permit anyone—not just parties—to move the court to reissue a non-precedential opinion as a precedential opinion. The proposed modifications would help to better ensure that non-precedential opinions are consistent with precedential opinions from the same circuit, that like cases are treated alike, that issues resolved at the appellate level need not be relitigated before district courts, and that non-precedential opinions truly are limited to repetitive applications of settled law.

II. FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND CONFORMING RULE CHANGES

There were 66,618 appeals filed in the federal appellate courts in the twelve-month period ending June 30, 2006, compared to 40,893 during a comparable period in 1990.¹ The number of judges has not kept pace with the docket increase,² and each judge now handles more work than an individual judge did twenty or thirty years ago.³

1. Admin. Off. of U.S. Cts., *2006 Judicial Facts and Figures, Table 2.1*, <http://www.uscourts.gov/judicialfactsfigures/2006/Table201.pdf> (accessed Aug. 9, 2007).

2. Reasons for the increase have been well documented elsewhere. See e.g. Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation"*, 6 U. Pa. J. Const. L. 377, 378, 388-91 (2003) (suggesting that "reasons for the rise in the federal caseload— includ[e] population increases, congressional grants of federal jurisdiction to remedy employment discrimination, broader Supreme Court interpretations of 42 U.S.C. § 1983 and of habeas corpus doctrines"); see also Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 181-83 (1999); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. Rev. 3, 12-17.

3. David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 Wash. & Lee L. Rev. 1667, 1696 (2005) ("While the number of appellate judgeships has less than doubled over the past thirty years or so, the volume of appellate cases has risen far faster, moving from 11,662 in 1970 . . . to over 60,000 in 2002 (excluding the Federal Circuit). . . . [T]here is no dispute that the caseloads of the courts of appeals have grown to the point where notions of individualized judicial attention to each appeal are antiquated and unrealistic."); see also Ruggero J. Aldisert, *All Right, Retired Judges, Write!*, 8 J. App. Prac. & Process 227, 228 (2006) ("[W]hen I began as a member of the Third Circuit in 1968 each judge was responsible for deciding on the merits ninety

Federal appellate courts have adopted a wide range of administrative remedies to more efficiently dispose of their dockets, remedies which have been well documented by others.⁴ Federal appellate courts have increased the number of law clerks assisting each judge and created a new category of attorneys who work for the entire court (rather than for an individual judge). Federal appellate courts have reduced the frequency of oral argument and the time allotted for argument. They have invited district court judges to sit on appellate panels by designation and invited senior appellate judges to continue sitting on panels.⁵ Most significantly for this essay, as an experiment beginning in the 1970s, federal appellate courts began issuing some dispositions in “unpublished,” non-precedential opinions.⁶ Currently, non-precedential dispositions

appeals a year. But now, each active judge in the Third Circuit decides 400 cases every 365 days.”). Fourteen federal appellate judgeships were vacant as of December 2, 2007. See Admin. Off. of U.S. Cts., *Chart of Federal Judicial Vacancies*, http://www.uscourts.gov/cfapps/webnovada/CF_FB_301/index.cfm?fuseaction=Reports.ViewSummary (accessed Dec. 2, 2007).

4. See e.g. Richard A. Posner, *The Federal Courts* 130-32 (Harv. U. Press 1996); William M. Richman, *Much Ado about the Tip of an Iceberg*, 62 Wash. & Lee L. Rev. 1723, 1725 (2005) (“Beginning in the 1970s, in response to a geometrically increasing caseload, the judges began to abandon [the traditional appellate] model in favor of the two-track system of appellate justice that prevails today. Now, the courts apply the traditional model to about twenty percent of the caseload. The judges decide the remainder without oral argument, without the traditional panel conference, and without a signed, published, and precedential opinion.”) (footnotes omitted); see Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 Hastings L.J. 1235, 1235-36 (2004) (summarizing methods federal courts have used to accommodate increasing caseload); Robel, *supra* n. 2, at 37-57.

5. Posner, *supra* n. 4, at 135 (observing that in argued cases in 1993, “visiting judges (almost all of them either active or senior district court judges, whether from the same or a different circuit, or senior circuit judges from another circuit) sat on 49.6 percent of court of appeals panels”).

6. For history of the non-precedential opinion, see J. Lyn Entrikin Goering, *Legal Fiction of the “Unpublished” Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 Seton Hall Cir. Rev. 27, 35-47 (2005); 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, 1168-72 (1978); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 Ind. L.J. 711, 717-18 (2004); Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?* 26 Miss. C. L. Rev. 185, 189-91 (2007).

represent the way federal appellate courts decide about 80% of their docket.⁷

The Second Circuit's recent explanation for its reliance on non-precedential opinions succinctly states the prevailing, docket-driven justification of the practice. The Second Circuit's new local rule governing non-precedential opinions explains that "[t]he demands of contemporary case loads require the court to be conscious of the need to utilize judicial time effectively,"⁸ and therefore, the court will issue non-precedential opinions in cases where "a precedential opinion would serve no jurisprudential purpose because the result is dictated by pre-existing precedent,"⁹ in order "to devote more time to opinions whose publication will be jurisprudentially valuable."¹⁰ The Second Circuit elaborated in a sentence what most lawyers would have thought self-evident: "Denying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases."¹¹

New Rule 32.1 prohibits appellate courts from restricting the citation of "unpublished," non-precedential opinions issued after January 1, 2007.¹² It took more than fifteen years to enact

7. Admin. Off. of U.S. Cts., *Annual Report of the Director, Table S-3 (2006)*, <http://www.uscourts.gov/judbus2006/tables/s3.pdf> (accessed Aug. 9, 2007).

8. 2d Cir. Loc. R. 32.1(a) (available at http://www.ca2.uscourts.gov/Docs/Rules/FRAP_LR.pdf).

9. *Id.* cmt.

10. *Id.*

11. *Id.*

12. The full text of Federal Rule of Appellate Procedure 32.1 is set out below:

Citing Judicial Dispositions

(a) **Citation permitted.** A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

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

Fed. R. App. P. 32.1. Rule 32.1 often is discussed as referring to what parties may cite in briefs. See e.g. Patrick Schiltz, Panel Discussion, *The Philip D. Reed Lecture Series, Citation of Unpublished Opinions: The Appellate Judges Speak*, in 74 *Fordham L. Rev.* 1, 7 (2005). However, the Federal Rules of Appellate Procedure govern "procedure in the

the rule¹³ because opposition was vehement,¹⁴ for reasons that are well documented elsewhere.¹⁵ Briefly, opponents argued that permitting citation of non-precedential opinions would result in judges spending time improving the quality of non-precedential opinions, time better spent on law-making, precedential opinions; would result in attorneys spending time researching and distinguishing non-precedential opinions; and might result in treatment of non-precedential opinions as binding. Opponents of citation of non-precedential opinions also argued that unpublished opinions are useless because they are produced quickly, often by staff attorneys without careful judicial oversight, and are too brief and shorn of factual context to adequately explain the rationale, and therefore they are likely to be misinterpreted by strangers to the litigation. These arguments did not prevail, and Rule 32.1 eventually was enacted.

Rule 32.1 governs only the citation of unpublished opinions. Justice Samuel A. Alito, who as a circuit judge chaired the Advisory Committee on Appellate Rules, explained then that

United States courts of appeals,” Fed. R. App. P. 1(a), and because section (a) of the new Rule 32.1 does not specify citation by whom or what, it seems applicable to citation by either parties or the circuit itself. For that reason, the Third Circuit’s and Eleventh Circuit’s policies discouraging the courts’ citation of their own non-precedential opinions seem inconsistent with, and thus superseded by, Rule 32.1(a). See Stephen R. Barnett, *No-Citation Rules under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process 473, 495 n. 135 (2003) (noting that Rule 32.1 “presumably would ban the Third Circuit’s ‘tradition’ of non-citation, deeming it a forbidden ‘prohibition’ or ‘restriction’”); *id.* at 495 (suggesting that a court’s policy of noncitation should be eliminated because it may undermine litigants’ rights to cite non-precedential opinions). For the text of the relevant internal circuit procedures, see 3d Cir. I.O.P. 5.7 (available at <http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf>) (“The court by tradition does not cite to its not precedential opinions as authority.”) and 11th Cir. R. 36-3, I.O.P. 7, at 142 (available at <http://www.ca11.uscourts.gov/documents/pdfs/BlueAUG07.pdf>) (“The court generally does not cite to its ‘unpublished’ opinions because they are not binding precedent.”).

13. See *e.g.* Schiltz, *supra* n. 12, at 6.

14. Patrick Schiltz, at the time the Reporter for the Advisory Committee on Appellate Rules, stated that proposed Rule 32.1 generated “the second-most comments received in the history of federal rulemaking” and that comments were “marked by anger, by sarcasm, by apocalyptic predictions of what would happen if the Rule passed.” *Id.* at 7.

15. See *e.g.* Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 Fed. Law. 36, 37-41 (June 2004); Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This!, Why We Don’t Allow Citation to Unpublished Opinions*, 2000 Cal. Law. 43 (June 2000); Patrick J. Schiltz, *Response: The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 Fordham L. Rev. 23, 30-43 (2005) (summarizing opponents’ arguments).

the Rule does not take a position on “whether refusing to treat an unpublished opinion of a federal court as binding precedent is constitutional,” nor does it require the federal circuits to assign a particular value to the circuit’s own unpublished opinions, or to set criteria that appellate panels must weigh in determining whether to assign precedential value to a particular opinion.¹⁶

To comply with Rule 32.1, twelve of the federal circuits enacted new local rules or procedures concerning citation of unpublished, non-precedential opinions.¹⁷ The Sixth Circuit simply permitted citation of unpublished opinions without speaking to what value the unpublished opinions will carry.¹⁸ The Second,¹⁹ Fifth,²⁰ Seventh,²¹ and Ninth²² Circuits adopted

16. See Memo. from Samuel A. Alito, Chair, Advisory Committee on Appellate Rules, to David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, *Report of Advisory Committee on Appellate Rules 3* (May 6, 2005) (available at <http://www.nonpublication.com/alitomemo2.pdf>); *Proposed Rule Amendments of Significant Interest*, at 1 (Sept. 2005) (available at http://www.uscourts.gov/rules/supct1105/Controversial_Report.pdf; *select* Federal Rulemaking; *select* Archives for Rules Effective Dec. 1, 2006; *select* Controversial Report) (stating, “The rule expressly takes no position on whether unpublished opinions should have any precedential value, leaving that issue exclusively for the circuits to decide.”); Schiltz, *supra* n. 15, at 27 (explaining that Rule 32.1 “says nothing about what effect a court must give to one of its ‘unpublished’ opinions or to the ‘unpublished’ opinions of another court.”).

17. The Third Circuit has not amended its pre-existing internal procedures, which already permitted citation of non-precedential opinions—except by the Third Circuit itself. See 3d Cir. I.O.P. 5.7. For discussion of the Fourth Circuit rule, see *infra* n. 32.

18. See 6th Cir. R. 28(g) (available at http://www.ca6.uscourts.gov/internet/rules_and_procedures/documents/Rules28g45a7.pdf).

19. See 2d Cir. Loc. R. 32.1(a), (b) (“[I]n those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by an opinion (i.e., a ruling having precedential effect), the ruling may be by summary order instead of by opinion. . . . Rulings by summary order do not have precedential effect.”).

20. See 5th Cir. R. 47.5.4 (available at <http://www.ca5.uscourts.gov/clerk/docs/frap2006.pdf>) (“Unpublished opinions issued on or after January 1, 1996*, are not precedent . . .”). Curiously, the Fifth Circuit’s unpublished decisions issued before 1996 “are precedent.” See 5th Cir. R. 47.5.3 (available at <http://www.ca5.uscourts.gov/clerk/docs/frap2006.pdf>); see generally Solomon, *supra* n. 6.

21. See 7th Cir. R. 32.1(a), (b) (available at http://www.ca7.uscourts.gov/Rules/rules.htm#cr32_1) (“It is the policy of the circuit to avoid issuing unnecessary opinions. . . . The court may dispose of an appeal by an opinion or an order. Opinions, which may be signed or per curiam, are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit. Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents.”).

22. See 9th Cir. R. 36-3(a) (2007 amendment to 9th Cir. R. 36-3) (available at [http://www.ca9.uscourts.gov/ca9/Documents.nsf/467208b8514252e58825643e00658d33/\\$FILE/2007_January_chngs_1st.pdf](http://www.ca9.uscourts.gov/ca9/Documents.nsf/467208b8514252e58825643e00658d33/$FILE/2007_January_chngs_1st.pdf)) (“Not Precedent: Unpublished dispositions and orders of this

local rules expressly stating that unpublished opinions are not precedential, without mentioning potential persuasive value.

By contrast, the First,²³ Eighth²⁴, Tenth,²⁵ Eleventh,²⁶ and Federal²⁷ Circuits each expressly confer “persuasive” value on the circuit’s own non-precedential opinions issued since January 1, 2007. Further, the First and Tenth Circuits give retroactive effect to the rule, according persuasive value to *all* of their non-precedential opinions, regardless of the issue date.²⁸

Only the District of Columbia Circuit expressly permits citation of its own current non-precedential opinions *as*

Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.”) (emphasis omitted).

23. See 1st Cir. Loc. R. 32.1.0(a) (available at <http://www.ca1.uscourts.gov/>; *select Rules and Procedures, path* United States Court of Appeals for the First Circuit Rulebook) (“An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. The court will consider such dispositions for their persuasive value but not as binding precedent.”).

24. See 8th Cir. R. 32.1A (available at <http://www.ca8.uscourts.gov/newrules/coa/localrules.pdf>) (providing that “[u]npublished opinions . . . are not precedent. . . . Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.”). The text of the rule does not make clear whether “persuasive” value is limited to pre-2007 non-precedential opinions or instead also applies to post-January 1, 2007 non-precedential opinions.

25. See 10th Cir. R. 32.1 (available at http://www.ca10.uscourts.gov/downloads/2007_Rules.pdf) (“(A) Precedential value. . . . Unpublished decisions are not precedential, but may be cited for their persuasive value. . . . (C) Retroactive effect. Parties may cite unpublished decisions issued prior to January 1, 2007, in the same manner and under the same circumstances as are allowed by Fed. R. App. P. 32.1(a)(i) and part (A) of this local rule.”).

26. See 11th Cir. R. 36-2 (available at <http://www.ca11.uscourts.gov/documents/pdfs/BlueAPR07.pdf>) (“An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.”); 11th Cir. R. 36-3, I.O.P. 6 (available at <http://www.ca11.uscourts.gov/documents/pdfs/BlueAPR07.pdf>) (“Although unpublished opinions may be cited as persuasive authority, they are not considered binding precedent.”).

27. See Fed. Cir. R. 32.1(d) (available at <http://fedcir.gov/jan5.pdf> until Dec. 31, 2007; thereafter, at <http://www.cafc.uscourts.gov>) (“The court may refer to a nonprecedential disposition in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent.”). While the Federal Circuit rule regulates what authority the authoring court may rely on, the same principles necessarily will guide litigants attempting to persuade the court.

28. 1st Cir. Loc. R. 32.1.0(a); 10th Cir. R. 32.1.

precedent.²⁹ That is not an oxymoron. In a local rule that pre-dates the new national rule, and only slightly amended since, the District of Columbia Circuit states that “[a]ll unpublished orders or judgments of this court . . . entered on or after January 1, 2002, may be cited as precedent,”³⁰ but also cautions that “[w]hile unpublished dispositions may be cited to the court in accordance with FRAP 32.1 and Circuit Rule 32.1(b)(1) [the latter permitting citation as precedent], a panel’s decision to issue an unpublished disposition *means that the panel sees no precedential value in that disposition*.”³¹ The District of Columbia Circuit rule implicitly recognizes that the precedential significance of an opinion should not be determined solely at the time it is issued and solely by the appellate panel that authored it, as is the usual practice of the federal appellate courts. Instead, the opinion’s precedential significance should be reassessed by the court or litigant seeking to apply the opinion - as is more consistent with the common law tradition.³²

III. AN INTERIM PROPOSAL FOR REGULATING NON- PRECEDENTIAL OPINIONS

A national rule prescribing uniform criteria for deciding whether an opinion should be issued as precedent and permitting non-precedential opinions to be cited as precedent (as the District of Columbia Circuit now does), would reduce confusion

29. While the Fifth Circuit permits citation of its older, pre-1996 unpublished opinions as precedent, it does not permit such citation for unpublished opinions issued since 1996. See 5th Cir. R. 47.5.4; Solomon, *supra* n. 6, at 201-02.

30. D.C. Cir. R. 32.1(b)(1)(B) (available at [http://www.cadc.uscourts.gov/ select Rules & Operating Procedures](http://www.cadc.uscourts.gov/select%20Rules%20&%20Operating%20Procedures), *select* Circuit Rules).

31. D.C. Cir. R. 36(c)(2) (available at [http://www.cadc.uscourts.gov/select Rules & Operating Procedures](http://www.cadc.uscourts.gov/select%20Rules%20&%20Operating%20Procedures), *select* Circuit Rules) (emphasis added).

32. See *infra* nn. 36-65 and accompanying text. Like the Fifth Circuit local rule, the Fourth Circuit local rule also is a curious hybrid. It takes no position on the value of opinions issued *since* 2007, but provides that citation of non-precedential opinions issued before 2007 is permitted (though disfavored) “[i]f a party believes . . . that an unpublished disposition of this Court . . . has *precedential value* in relation to a material issue and that there is no published opinion that would serve as well.” 4th Cir. Loc. R. 32.1 (available at <http://www.ca4.uscourts.gov/pdf/rules.pdf>) (emphasis added). The latter language in Fourth Circuit Local Rule 32.1 implicitly suggests that all Fourth Circuit opinions may be read to have “precedential” value.

caused by divergent rules of the circuits, and thus serve a goal of Rule 32.1. However, Professor Stephen Barnett contends that, as a practical matter, “the considerable variation in circuit practice probably makes it too soon to impose a uniform rule” ascribing particular weight to non-precedential opinions.³³ Moreover, given the controversy that preceded adoption of the rule permitting citation of non-precedential opinions,³⁴ there likely is little will for the adoption of such a rule. Supporters of Rule 32.1 built consensus for the new rule in part by promising that it did not regulate the value of opinions or determine when a precedential opinion should issue, promises that the circuits would remain free to determine both independently.³⁵ Courts and litigants need time to adapt to new Rule 32.1, even though the new rule likely is not a permanent solution. While courts and litigants adapt to the new rule, as an interim measure—and without ruling out future structural reforms—federal appellate courts should modify their internal procedures in the following ways.

Following the lead of the First,³⁶ Eighth,³⁷ Tenth,³⁸ Eleventh,³⁹ and Federal Circuits,⁴⁰ each of which gives express permission to cite non-precedential opinions for their “persuasive” value, the other federal circuit courts should expressly confer persuasive value on non-precedential opinions, without being compelled to do so by uniform federal rule. Attorneys, district courts, and future appellate panels find non-precedential opinions helpful in predicting how settled law will

33. Barnett, *supra* n. 12, at 490.

34. *Supra* nn. 14-15 and accompanying text.

35. See e.g. Alito, *supra* n. 16, at 3; *Proposed Rule Amendments of Significant Interest*, *supra* n. 16, at 1; Schiltz, *supra* n. 15, at 27 (quoting Committee Note to Rule 32.1); see also Michael Boudin, Panel Discussion, *The Philip D. Reed Lecture Series, Citation of Unpublished Opinions: The Appellate Judges Speak*, in 74 *Fordham L. Rev.* 1, 17 (2005) (commenting that “denominating an opinion as binding the panel does have considerable significance, and . . . would raise a constitutional problem . . . if the Congress or the Rules Committee ever sought to prescribe weight”).

36. 1st Cir. Loc. R. 32.1.0(a).

37. 8th Cir. R. 32.1A; see *supra* n. 24 (quoting rule but noting ambiguity about whether “persuasive” value applies to non-precedential opinions issued post-January 1, 2007).

38. 10th Cir. R. 32.1.

39. 11th Cir. R. 36-2.

40. Fed. Cir. R. 32.1(d).

apply to novel facts,⁴¹ in assessing how settled a particular rule of law is,⁴² in thinking through the legal issues,⁴³ and in assessing settlement values.⁴⁴ As Seventh Circuit Judge Richard A. Posner explains, a full picture of the legal landscape may require familiarity with the circuit's non-precedential applications of a doctrine:

[T]he court's published opinions alone give a misleading impression of the judges' views. For example, reversals are more likely to be published than affirmances, so in a field in which the vast majority of decisions appealed are affirmed, an appellant's prospects will seem much brighter if all his lawyer has to go on is the court's published opinions.⁴⁵

Persuasive value is not precedential value. A precedent binds the applying court whether or not the applying court agrees.⁴⁶ By contrast, a persuasive opinion "must persuade on its

41. See *Proposed Rule Amendments of Significant Interest*, *supra* n. 16, at 2 ("Unpublished opinions are widely read by both attorneys and judges and often cited by attorneys, district court judges, and appellate court judges. . . . Unpublished opinions can be particularly helpful to district court judges, who so often must exercise discretion in applying relatively settled law to an infinite variety of facts."); *id.* at 3 (describing Federal Judicial Center study that showed a large minority of surveyed judges (55) found citations to unpublished opinions to be "occasionally," "often," or "very often" helpful).

42. See *e.g.* Reynolds & Richman, *supra* n. 6, at 1190 ("[T]he weight of precedent on a point of law hardens it[.]"); Robel, *supra* n. 2, at 52 (noting that unpublished opinions "can . . . mask significant disagreement on a court").

43. Edward R. Becker, Panel Discussion, *The Philip D. Reed Lecture Series, Citation of Unpublished Opinions: The Appellate Judges Speak*, in 74 *Fordham L. Rev.* 1, 9 (2005) (observing that non-precedential opinions "give us the benefit of the thinking of a previous panel and help us to focus on or think through the issues. For busy judges this is a great boon.").

44. *Id.* at 11 (noting that "[t]he bottom line is the lawyers want [non-precedential opinions], the market has spoken . . . [a]nd, indeed, [non-precedential opinions] help lawyers in other ways . . . [such as] in evaluating a case for settlement purposes.").

45. Posner, *supra* n. 4, at 167; see *e.g.* 6th Cir. R. 206(a)(5) (available at http://www.ca6.uscourts.gov/internet/rules_and_procedures/pdf/rules2004.pdf) (setting out criteria that panel "shall" consider in deciding whether to publish opinion as precedent, including "whether it reverses the decision below").

46. See *e.g.* Evan H. Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 *Tex. L. Rev.* 1, 3 (1994); Richard B. Cappalli, *The Common Law's Case against Non-Precedential Opinions*, 76 *S. Cal. L. Rev.* 755, 764 (2003) ("A precedent is not somewhat binding or almost binding. It either controls or it does not. Once distinguishing facts move a later court out of a precedent's force field, the court is free to create the rule it considers most appropriate for the resolution of that new fact configuration."); Pearson, *supra* n. 4, at 1250; Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571 (1987).

own argumentative merits, without regard for its status as a precedent or for any notions of *stare decisis*.⁴⁷

Yet the difference is not always straightforward. Since “[n]o two events are exactly alike[,]” the constraint of precedent depends on how similar the later case is to the earlier case, and thus “the relevance of an earlier precedent depends upon how we characterize the facts arising in the earlier case.”⁴⁸ Professor Martha Dragich Pearson argues that the internal court rules drawing a clear line between “precedential” and “non-precedential” opinions, “as if precedent were an all-or-nothing proposition,” lack a “nuanced understanding of precedent,” because “the ability to draw compelling analogies to non-binding precedents, or to distinguish away apparently binding precedents, is the ‘hallmark’ of the lawyer’s art.”⁴⁹ Additionally, Professor Barnett explains that “the concepts of precedent and persuasiveness may overlap” because the existence of a prior decision on point “tends to be more persuasive than the absence of such a decision . . . [and] it is easier to follow a lead than to blaze one’s own trail.”⁵⁰ While all of a federal circuit’s decisions are precedents as historical *fact* – meaning that a real

47. Stephen R. Barnett, *From Anastasoff To Hart To West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. App. Prac. & Process 1, 11 (2002).

48. Schauer, *supra* n. 46, at 577.

49. Pearson, *supra* n. 4, at 1236-37 (citation omitted).

50. Stephen R. Barnett, *In Support Of Proposed Federal Rule Of Appellate Procedure 32.1: A Reply To Judge Alex Kozinski*, 51 Fed. Law. 32, 34 (Dec. 2004); see Stephen R. Barnett, *The Dog That Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders*, 62 Wash. & Lee L. Rev. 1491, 1539-40 (2005) [hereinafter Barnett, *Dog*] (finding in informal survey that none of thirty-six federal public defenders in circuits permitting citation of non-precedential opinions believed that citation for precedential value would inevitably follow from permitting citation at all); Schiltz, *supra* n. 15, at 57 (“District court judges . . . are quite capable of understanding and respecting the limitations of unpublished opinions.”); Becker, *supra* n. 43, at 9 (explaining that non-precedential opinions “help district judges in the same way that they help us. District judges know they are not bound by [non-precedential opinions], they are judges of Article III, and they exercise independent judgment.”); Boudin, *supra* n. 35, at 17 (observing that “[p]recedential weight . . . is not an ‘on’ or ‘off’ switch . . . [as] opinions get very different weight depending on . . . who wrote them, how recently, [and] how persuasive they are”); cf. Barnett, *supra* n. 12, at 490 n. 119 (suggesting that “the ‘persuasive’ effect of any prior decision may be impossible to disentangle, in the mind of a common law judge, from the fact that it is a prior decision—and hence, in fact, a precedent”) (citation omitted).

litigant's claim "was once decided a particular way"⁵¹—not all prior decisions are precedents *as rules*: "[P]rior decisions are 'precedent' for a later decision only if the 'past [decision] is sufficiently similar to the present facts to justify assimilation' of the two."⁵² When a situation similar to a non-precedential decision arises, litigants, district courts, and a later panel applying the earlier panel decision all should be able to rely with confidence on the earlier panel's decision both as a historical fact and as persuasive as to how the later, similar situation should be decided.

Expressly conferring persuasive value on an appellate court's non-precedential opinions can promote judicial efficiency by reducing the chance that issues already decided at the appellate level will be relitigated before a district court or a future appellate panel⁵³ and can promote intra-circuit consistency⁵⁴ by signaling to the bar, district courts, and future appellate panels that reliance on non-precedential opinions is permissible. That is important because attorneys and district courts may be influenced by a "general culture of hostility to unpublished [non-precedential] opinions."⁵⁵ Explicit persuasive value for the court's non-precedential opinions can further promote judicial efficiency by reducing the need for subsequent appellate panels and district courts to articulate alternate grounds

51. Pearson, *supra* n. 4, at 1253 (quoting Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 Green Bag 2d 17, 23 (2002)).

52. *Id.* at 1254 (quoting Schauer, *supra* n. 46, at 577).

53. See e.g. Cappalli, *supra* n. 46, at 769-70 (considering the volume of non-precedential opinions, "[i]t is difficult to doubt that considerable numbers of issues have been unnecessarily and inefficiently relitigated in both appellate and trial courts."); Schiltz, *supra* n. 15, at 53.

54. See Alito, *supra* n. 16, at 10 (noting that Federal Judicial Center study of federal judges in circuits permitting citation of non-precedential opinions found that a "not insignificant minority (36) said that unpublished opinions are 'occasionally,' 'often,' or 'very often' inconsistent with published precedent").

55. *Id.* at 11. According to a Federal Judicial Center study, even in circuits which permitted citation of non-precedential opinions before the advent of the new Rule 32.1, some attorneys did not cite a non-precedential opinion that they wanted to rely on because "judges and lawyers were unaware of the terms of their own citation rules" and because "some attorneys . . . may be more influenced by the general culture of hostility to unpublished opinions than by the specific terms of their circuit's local rules." *Id.*

for opinions that rely on non-precedential circuit court reasoning.⁵⁶

Explicitly approving persuasive value for a circuit court's non-precedential opinions is consistent with the common law tradition of permitting the applying court to assess the persuasive value of an earlier opinion. Explaining the general concept of "precedent," Judge Posner states that, in a common law system, "a precedent is the joint creation of the court that decides the case later recognized as a precedent and the courts that interpret that case in the later cases The precedent will be declared, and its scope delineated, in later cases that rely on the opinion."⁵⁷ In the specific context of non-precedential opinions, the District of Columbia Circuit rule, for example, seems to acknowledge the role of the audience or "market"⁵⁸ for non-precedential opinions by anticipating that a future court or

56. Conversely, issuing non-precedential opinions when district courts and the bar need appellate guidance may result in short-term efficiency for appellate courts but result in long-term inefficiency for district courts and litigants, by encouraging more litigation and discouraging settlement. See Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 Wash. L. Rev. 217, 246-49, 254-55, 259-61, 267-69 (2006); see e.g. Cappalli, *supra* n. 46, at 769 ("The current appellate practice of hiding precedents may have an adverse effect on the courts' workload. The greater the number of precedents, . . . the greater the number of solutions to legal issues, and the easier it would be to determine whether an authoritative answer to a legal issue has been judicially sanctioned."); Pearson, *supra* n. 4, at 1289 ("Arguments about the costs of producing publishable opinions overlook the time *savings* created by relying on precedent. . . . Relying on a precedent allows the decisionmaker to 'relax, in the sense of engaging in less scrutiny of the [instant] case.'" (quoting Schauer, *supra* n. 46, at 599); see also Posner, *supra* n. 4, at 166 ("[M]ost federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are too few on point.").

57. Posner, *supra* n. 4, at 374; see also Cappalli, *supra* n. 46, at 772-73 (explaining that "[t]he non-precedent regimen starkly reverses centuries of common law tradition" under which "[t]he duty of determining the precedential impact of the decision-with-opinion belonged not to the precedent-setting court but to the precedent-applying court"); Pearson *supra* n. 4, at 1258-60 ("[I]t is the subsequent court, not the precedent court, that ultimately determines the extent to which it is bound by the earlier decision. . . . The question of the identity between the [prior and subsequent] cases is one in which both the precedent court and the subsequent court have important roles to play.").

58. See also Schiltz, *supra* n. 15, at 47-48 (favoring citation of non-precedential opinions because that "lets the 'market' determine the[ir] value").

litigant may recognize precedential value in an opinion that the authoring panel predicted did not merit precedential status.⁵⁹

Both lower courts within the circuit's jurisdiction and future appellate panels are bound by a panel's precedential decision, unless overruled by the en banc court or the Supreme Court, even if the lower court or the future appellate panel would have decided the issue differently.⁶⁰ The merit of expressly assigning persuasive value to non-precedential opinions is that future appellate panels can disagree with the authoring panel without en banc overruling.⁶¹ That would conserve judicial resources, even if, as seems likely, explicitly conferring persuasive value on non-precedential opinions would encourage reliance on them and, in turn, encourage both judges and lawyers to devote more attention to them.⁶²

The countervailing view that all opinions of federal appellate courts should carry precedential weight has considerable force. That was the view of the late Eighth Circuit Judge Richard S. Arnold, as famously explained in *Anastasoff v. United States*.⁶³ More recently, Professor Pearson argued that federal appellate courts "cannot legitimately declare decisions 'non-precedential'" and that limited publication rules "are fundamentally incompatible with a system based on the rule of precedent"⁶⁴ because rules declaring opinions to be non-precedential do not recognize that in a system built on precedent, a decision's "actual effect is for the subsequent court to determine" by "consider[ing] the similarity of the cases, the applicability of analogical reasoning" and the hierarchy of

59. *Supra* nn. 30-32 and accompanying text.

60. The Seventh Circuit is unusual in not abiding by the en banc requirement for a subsequent panel to overrule the decision of an panel. 7th Cir. R. 40(e) (available at <http://www.ca7.uscourts.gov/Rules/rules.htm#cr40>).

61. Barnett, *supra* n. 47, at 12, 22-23 (suggesting that non-precedential opinions are not subject to the "law-of-the-circuit rule" and can be overruled—or simply rejected as unpersuasive—by subsequent panels of the same circuit).

62. While proponents of Rule 32.1 rejected the view that permitting citation of non-precedential opinions would increase judicial drafting time and attorney research time, *see* Alito, *supra* n. 16, at 5-6, that cost, if realized, seems worth the benefit of increasing intra-circuit uniformity.

63. 223 F.3d 898 (8th Cir.), *vacated as moot on rehearing*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

64. Pearson, *supra* n. 4, at 1240.

authority.⁶⁵ But as a policy matter, at least for now, it is impractical to eliminate non-precedential opinions in favor of universal publication of opinions as precedent because that would be a dramatic break from several decades of federal appellate court practice while implementation of Rule 32.1 is still underway, and would risk repetitive rulings and increased need for en banc overruling of inconsistent circuit precedent.

To further promote intra-circuit uniformity, in addition to endorsing persuasive value, circuits should provide specific criteria to guide the publication decision, as many circuits already do. Building on existing publication guidelines, circuits should publish an opinion as precedent when it:

- establishes, alters, modifies, clarifies, criticizes, or explains a rule of law;
- applies an established rule to novel facts or otherwise serves as a significant guide to future litigants and district courts;
- contains a historical review of a legal rule that is not duplicative;
- resolves an apparent conflict between panels of that circuit, or creates a conflict with a decision in another circuit; or
- is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.⁶⁶

65. *Id.* at 1280. Additionally, Pearson argues that “[t]o declare in advance that a decision will have no ‘precedential value,’ no matter how assimilable a later case may be, is to flout the notion of constraint by precedent under the guise of expediency in handling cases deemed in advance as not of the lawmaking ilk.” *Id.* at 1264. *Cf.* Solomon, *supra* n. 6, at 185 n. 1, 220-23 (while taking no position on whether readily available unpublished opinions should be precedential, warning about the dangers of making unpublished opinions precedential before those opinions are readily available).

66. The criteria suggested above are based on the Model Rule drafted by the Advisory Council on Appellate Justice, *see* Reynolds & Richman, *supra* n. 6, at 1171 n. 28, 1176-77; on the circuit rules and/or internal operating procedures of the First, Fourth, Fifth, Sixth, Ninth, and District of Columbia Circuits, and on the recently rescinded publication rule of

While Judge Posner likely is correct that “the formal criteria of publication [adopted by many circuits] are vague and anyway often ignored,”⁶⁷ such criteria can still advance the goal of intra-circuit uniformity by guiding the authoring panel’s initial publication decision, any motion to reissue the opinion as precedential, and the authoring panel’s reconsideration of the publication decision.⁶⁸

To further ensure doctrinal uniformity between precedential and non-precedential opinions, the Third Circuit and the Eleventh Circuit should amend their internal rules discouraging citation of their own non-precedential opinions.⁶⁹

The circuit courts’ internal rules should permit anyone—not just parties—to move for publication of an otherwise non-precedential opinion. Those best positioned to recognize whether an opinion makes new law or fleshes out a settled legal standard by applying it to new facts may not be parties but attorneys who practice in that field. The authoring panel also may not accurately predict the precedential significance of an opinion. For these reasons, and following the lead of the District of Columbia,⁷⁰ First,⁷¹ Seventh,⁷² Ninth,⁷³ and Federal⁷⁴ circuits,

the Seventh Circuit. *See* 1st Cir. Loc. R. 36; 4th Cir. Loc. R. 36(a)-(b); 5th Cir. R. 47.5; 6th Cir. R. 206(a); 9th Cir. R. 36-2 (available at <http://www.ca9.uscourts.gov/>; *select* FRAP & Local Circuit Rules, *path* Federal Rules of Appellate Procedure (FRAP) & Local Circuit Rules-July 2007 version available for download); D.C. Cir. R. 36; Notice of Circuit Rule Change and Opportunity for Comment (available at http://www.ca7.uscourts.gov/Rules/CircuitRule32_1.pdf) (accessed Sept. 6, 2007) (reproducing rescinded 7th Cir. R. 53). The above-suggested criteria do not address all factors that circuits have addressed in publication plans. Similar criteria are set out in a document titled *Appendix I* to the Eighth Circuit rules; however, because this document is not posted on the Eighth Circuit website and appears not to have been updated since the enactment of Rule 32.1, it is not referenced above. Thank you to Amy Sloan for bringing the Eighth Circuit Appendix to my attention.

67. *See* Posner, *supra* n. 4, at 167.

68. *See infra* nn. 70-74 and accompanying text.

69. *See* Barnett, *supra* n. 12 (arguing such internal procedures are superseded by Rule 32.1).

70. D.C. Cir. R. 36(d) (“Any person may, by motion made within 30 days after judgment . . . request that an unpublished opinion be published Motions for publication must be based upon one or more of the criteria listed . . .”).

71. 1st Cir. Loc. R. 36(b)(2)(d) (“Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.”).

72. 7th Cir. R. 32.1(c) (“Any person may request by motion that an order be reissued as an opinion. The motion should state why this change would be appropriate.”).

any person should be permitted to request within a reasonable time that a non-precedential opinion be reissued as a precedential opinion.

It may be true that permitting any person to move for precedential status of an opinion would advantage repeat litigants. As Judge Posner argues, “Some institutional litigants . . . systematically . . . request publication of [unpublished opinions] that favor their litigation interests . . . [resulting in] bias, in favor of the institutional litigant, in the creation of precedent.”⁷⁵ However, Professor Amy Sloan suggests that repeat and institutional litigants may be advantaged by limiting reissuance requests solely to parties because they “are more likely to be the parties in prior cases they want converted to precedential status.”⁷⁶ Moreover, repeat litigants are not limited to government and institutional clients but also may be members of the plaintiffs’ bar who frequently litigate similar claims. Finally, the ultimate discretion to issue precedential opinions would remain with the court, pursuant to its own criteria for precedential status.

Scholars have suggested that judges can conserve judicial resources by writing shorter precedential and non-precedential opinions,⁷⁷ a position endorsed by the Eleventh Circuit.⁷⁸ While

73. 9th Cir. R. 36-4 (available at <http://www.ca9.uscourts.gov/>; *select* FRAP & Local Circuit Rules, *path* Federal Rules of Appellate Procedure (FRAP) & Local Circuit Rules-July 2007 version available for download) (“Publication of any unpublished disposition may be requested by letter, . . . stating concisely the reasons for publication. . . . A copy of the request for publication must be served on the parties to the case.”).

74. Fed. Cir. Loc. R. 47.6(c) (available at <http://fedcir.gov/contents.html>; *path* Federal Circuit Rules of Practice available for download) (“[A]ny person may request, with accompanying reasons, that the opinion or order be reissued as precedential. . . . The requestor must notify the court and the parties of any case that person knows to be pending that would be determined or affected by reissuance as precedential. Parties to pending cases who have a stake in the outcome of a decision to make precedential must be given an opportunity to respond.”).

75. Posner, *supra* n. 4, at 167; *see e.g.* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 Mich. L. Rev. 940, 956-958 (1989) (arguing from results of empirical study that issuing non-precedential opinions results in bias in favor of institutional litigants because they selectively move for publication of favorable opinions).

76. E-mail from Amy Sloan (Sept. 27, 2007) (on file with author).

77. Cappalli, *supra* n. 46, at 789, 793-96; Schiltz, *supra* n. 15, at 52-54; *see also* Posner *supra* n. 4, at 156; *id.* at 146 (arguing that opinions written by law clerks tend to be longer than those written by judges because they have fewer demands on their time, do not know

Professor Pearson goes farther, proposing that courts abandon non-precedential opinions in favor of abbreviated precedential opinions that briefly cite the existing authorities that dictate the decision,⁷⁹ as long as non-precedential opinions are the dominant method of appellate decisionmaking, shorter opinions could save judges time without sacrificing quality.

Federal appellate courts should not address their docket overburden by disposing of more appeals through one-line orders. One argument against the enactment of Rule 32.1 was that it would result in more one-line dispositions, or judgment orders, which fail to explain to parties why the appeal lost⁸⁰ or give the parties “assurance that their arguments were taken seriously . . . result[ing] in less transparency and less confidence in the judicial system.”⁸¹ While judgment orders and non-precedential opinions both may help courts efficiently dispose of appeals, the late Third Circuit Chief Judge Edward Becker persuasively explained the Third Circuit’s reasons for “jettison[ing]” their former practice of deciding a substantial percentage of their docket by one-line judgment orders in favor

what to leave out, and lack the experience to recognize when a point is too settled to require proof); *id.* at 351 (arguing that “the excessive length of opinions . . . is . . . inconsiderate of the time of the busy professionals who must wade through [them] and of the clients who must pay for their time”).

78. 11th Cir. R. 36-3, I.O.P. 5 (“Judges of this court will exercise appropriate discipline to reduce the length of opinions by the use of those techniques which result in brevity without sacrifice of quality.”).

79. Pearson, *supra* n. 4, at 1298; *see also* Cappalli, *supra* n. 46, at 769 (suggesting the usual publication ratio be reversed, so that eighty percent are precedential and twenty percent are “summary affirmances”).

80. *See e.g.* Robel, *supra* n. 75, at 943; Schiltz, *supra* n. 15, at 26-27 (noting that in 2004, only about 3% of federal appellate court merit dispositions resulted in judgment orders).

81. Schiltz, *supra* n. 15, at 39 (in summary of arguments against Rule 32.1); *id.* at 73 (“To be clear, I am not advocating for an increase in one-line dispositions . . . [but] providing reasons for every appellate decision may no longer be possible, given that the resources of the courts are not keeping pace with rising caseloads.”). Other supporters of Rule 32.1 insisted that citation of non-precedential opinions would not result in courts resorting to one-line judgment orders, *see e.g.* Barnett, *Dog*, *supra* n. 50, at 1539 (finding in informal survey that federal public defenders in circuits permitting citation of non-precedential opinions did not believe that circuits where citation of non-precedential opinions was prohibited would react to removal of prohibition on citation by resorting to one-line judgment orders), and the federal courts’ own empirical study supported that prediction. *See also* Schiltz, *supra* n. 15, at 64; *but see infra* n. 82 (noting one circuit’s former reliance on judgment orders to dispose of sixty percent of its docket).

of issuing non-precedential opinions: “I persuaded my colleagues that we owe a greater duty to our colleagues of the bar and to their clients . . . as a matter of respect . . . [and] as a matter of responsibility and accountability.”⁸² For appeals decided on the merits, those reasons are sound.

IV. CONCLUSION

Scholars have proposed many structural reforms to remedy the docket pressures on the federal appellate courts, ranging from increasing the size of the federal appellate judiciary,⁸³ to restricting diversity jurisdiction, to creating specialized federal courts, to suggesting the possibility of appellate magistrate-level judges. The future possibility of structural reform should not be ruled out. But as an interim measure, akin to Rule 32.1 itself, federal courts should adopt the proposed internal procedures and local rules to better ensure that precedential and non-precedential opinions are consistent within a circuit, that issues resolved at the appellate level need not be relitigated, and that non-precedential opinions are limited to repetitive applications of settled law.⁸⁴



82. Becker, *supra* n. 43, at 11-12; *see also* Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 *Law & Contemp. Probs.* 157, 162 (1998) (from 1989–96, the Third Circuit used dispositions without comment in sixty percent of its cases; that percentage had dropped to 32.8 percent by 1998; and it fell below five percent in 1999).

83. *See e.g.* Richman, *supra* n. 4, at 1728-30; William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 *Cornell L. Rev.* 273, 297-300 (1996); *cf.* Posner, *supra* n. 4, at 132 -36 (summarizing arguments against expanding federal appellate judgeships, including the difficulty of effective en banc deliberation).

84. The author proposed these reforms in an earlier article. *See* Ricks, *supra* n. 56, at 272-78.