

American College 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

Approved by the Board of Regents
March, 2002

American College of Trial Lawyers

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.



"In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships."

—Hon. Emil Gumpert,
Chancellor-Founder, ACTL

American College of Trial Lawyers
1990 MacArthur Boulevard, Suite 610
Irvine, California 92612
Telephone: (949) 752-1801
Facsimile: (949) 752-1674
E-Mail: nationaloffice@actl.com
Website: www.actl.com

Copyright © 2002
American College of Trial Lawyers
All Rights Reserved.

American College of Trial Lawyers

CHANCELLOR-FOUNDER

Hon. Emil Gumpert
(1895—1982)

OFFICERS

STUART D. SHANOR, *President*
WARREN B. LIGHTFOOT, *President-Elect*
DAVID W. SCOTT, Q.C., *Secretary*
JAMES W. MORRIS, III, *Treasurer*
EARL J. SILBERT, *Immediate Past President*

BOARD OF REGENTS

DAVID J. BECK Houston, Texas	CAMILLE F. SARROUF Boston, Massachusetts
PATRICIA C. BOBB Chicago, Illinois	JAMES P. SCHALLER Washington, District of Columbia
MICHAEL A. COOPER New York, New York	DAVID W. SCOTT, Q.C. Ottawa, Ontario
BRIAN P. CROSBY Buffalo, New York	STUART D. SHANOR Roswell, New Mexico
JOHN J. (JACK) DALTON Atlanta, Georgia	EARL J. SILBERT Washington, District of Columbia
FRANK N. GUNDLACH St. Louis, Missouri	TOM SLUTES Tucson, Arizona
DAVID O. LARSON San Francisco, California	PAYTON SMITH Seattle, Washington
WARREN B. LIGHTFOOT Birmingham, Alabama	MIKEL L. STOUT Wichita, Kansas
JAMES W. MORRIS, III Richmond, Virginia	DENNIS R. SUPLEE Philadelphia, Pennsylvania
EDWARD W. MULLINS, JR. Columbia, South Carolina	SHARON M. WOODS Detroit, Michigan

American College of Trial Lawyers

PAST PRESIDENTS

- 1950-51 EMIL GUMPERT*
Los Angeles, California
- 1951-52 C. RAY ROBINSON*
Merced, California
- 1952-53 CODY FOWLER*
Tampa, Florida
- 1953-54 E. D. BRONSON*
San Francisco, California
- 1954-55 CODY FOWLER*
Tampa, Florida
- 1955-56 WAYNE E. STICHTER*
Toledo, Ohio
- 1956-57 JESSE E. NICHOLS*
Oakland, California
- 1957-58 LEWIS C. RYAN*
Syracuse, New York
- 1958-59 ALBERT E. JENNER, JR.*
Chicago, Illinois
- 1959-60 SAMUEL P. SEARS*
Boston, Massachusetts
- 1960-61 LON HOCKER
Woods Hole, Massachusetts
- 1961-62 LEON JAWORSKI*
Houston, Texas
- 1962-63 GRANT B. COOPER*
Los Angeles, California
- 1963-64 WHITNEY NORTH SEYMOUR
New York, New York
- 1964-65 BERNARD G. SEGAL*
Philadelphia, Pennsylvania
- 1965-66 EDWARD L. WRIGHT*
Little Rock, Arkansas
- 1966-67 FRANK G. RAICHL*
Buffalo, New York
- 1967-68 JOSEPH A. BALL*
Long Beach, California
- 1968-69 ROBERT W. MESERVE*
Boston, Massachusetts
- 1969-70 HON. LEWIS F. POWELL, JR.*
Washington, District of Columbia
- 1970-71 BARNABAS F. SEARS*
Chicago, Illinois
- 1971-72 HICKS EPTON*
Wewoka, Oklahoma
- 1972-73 WILLIAM H. MORRISON*
Portland, Oregon
- 1973-74 ROBERT L. CLARE, JR.*
New York, New York
- 1974- AUSTIN W. LEWIS*
New Orleans, Louisiana
- 1975-76 THOMAS E. DEACY, JR.
Kansas City, Missouri
- 1976-77 SIMON H. RIFKIND*
New York, New York
- 1977-78 KRAFT W. EIDMAN*
Houston, Texas
- 1978-79 MARCUS MATTSON*
Los Angeles, California
- 1979-80 JAMES E. S. BAKER
Chicago, Illinois
- 1980-81 JOHN C. ELAM
Columbus, Ohio
- 1981-82 ALSTON JENNINGS
Little Rock, Arkansas
- 1982-83 LEON SILVERMAN
New York, New York
- 1983-84 GAEL MAHONY
Boston, Massachusetts
- 1984-85 GENE W. LAFITTE
New Orleans, Louisiana
- 1985-86 GRIFFIN B. BELL
Atlanta, Georgia
- 1986-87 R. HARVEY CHAPPELL, JR.
Richmond, Virginia
- 1987-88 MORRIS HARRELL*
Dallas, Texas
- 1988-89 PHILIP W. TONE*
Chicago, Illinois
- 1989-90 RALPH I. LANCASTER, JR.
Portland, Maine
- 1990-91 CHARLES E. HANGER*
San Francisco, California
- 1991-92 ROBERT B. FISKE, JR.
New York, New York
- 1992-93 FULTON HAIGHT*
Santa Monica, California
- 1993-94 FRANK C. JONES
Atlanta, Georgia
- 1994-95 LIVELY M. WILSON
Louisville, Kentucky
- 1995-96 CHARLES B. RENFREW
San Francisco, California
- 1996-97 ANDREW M. COATS
Oklahoma City, Oklahoma
- 1997-98 EDWARD BRODSKY*
New York, New York
- 1998-99 E. OSBORNE AYSCUE, JR.
Charlotte, North Carolina
- 1999-2000 MICHAEL E. MONE
Boston, Massachusetts
- 2000-2001 EARL J. SILBERT
Washington, District of Columbia

* Deceased

COMMITTEE ON FEDERAL RULES OF EVIDENCE

CHAIR

WILLIAM T. HANGLEY
Philadelphia, Pennsylvania

MEMBERS

ELKAN ABRAMOWITZ
New York, New York

JOHN M. BRAY
Washington, District of Columbia

PLATO CACHERIS
Washington, District of Columbia

ALAN J. DAVIS
Philadelphia, Pennsylvania

ROBERT W. DIBBLE, JR.
Columbia, South Carolina

DANNY E. GLASS
Evansville, Indiana

LAWRENCE S. GREENWALD
Baltimore, Maryland

SHELDON KARON
Chicago, Illinois

JOHN J. KENNEY
New York, New York

JOSEPH L. LYLE, JR.
Norfolk, Virginia

ROBERT MEADOWS
Houston, Texas

WILLIAM USHER NORWOOD, III
Atlanta, Georgia

SAMUEL H. PORTER
Columbus, Ohio

JOHN B. POUND
Santa Fe, New Mexico

JOHN A. PURVIS
Boulder, Colorado

PETER J. RUBIN
Portland, Maine

HOWARD D. SCHER
Philadelphia, Pennsylvania

JACK B. SWERLING
Columbia, South Carolina

STEPHEN A. WEINER
New York, New York

ROBERT F. WISE, JR.
New York, New York

DOUGLAS R. YOUNG
San Francisco, California

SHARON M. WOODS
Detroit, Michigan, *Regent Liaison*

TABLE OF CONTENTS

	Page
I. Introduction	1
II. Background	2
A. The Appellate Litigation Explosion	2
B. The Retreat From Reporter Publication And Circuit Binding Stature	4
III. Recommendations Of The American College of Trial Lawyers	7
A. The Rules And Procedures Governing The Publication Of And Resort To Nonbinding Opinions Should Be Uniform	7
i. Courts That Do Not Publish Their Nonbinding Opinions	9
ii. Courts That Publish Their “Unpublished” Opinions	11
iii. Other Complications	13
B. Nonbinding Opinions Should Be Published	19
C. Litigants Must Be Free To Cite Nonbinding Opinions	23
i. There Are Grave Doubts As To The Circuits’ Power to Impose Anti-Citation Rules	23
ii. The Nonbinding Opinions Are Not Uniformly Redundant, And Are Sometimes Needed	28
iii. The Courts Are Putting Cases in The Wrong Piles for the Wrong Reasons	35
iv. The Anti-Citation Rules Are Unworkable in Practice and Yield Absurd Results	39
v. The Fears of an Open Floodgate and a Loss of Quality Are Unfounded	43
IV. Conclusion	45

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*

I. INTRODUCTION

In *Anastasoff v. United States*,¹ a panel of the Eighth Circuit Court of Appeals ruled that Article III of the United States Constitution requires that all holdings of federal appellate courts be binding precedent within the respective circuits. In *Hart v. Massanari*,² a panel of the Ninth Circuit disagreed, holding that federal appellate courts can, in fact, continue to do what they have been doing with ever-increasing frequency over the past thirty years or so – deciding cases in opinions that bind the parties but are not binding precedents for future cases in the issuing circuits.³

The unresolved constitutional debate between Judge Arnold in *Anastasoff* and Judge Kozinski in *Hart* is learned, fascinating, and not a little testy. To trial and appellate lawyers, however, the graver import of *Hart* and another recent Ninth Circuit decision, *Sorchini v. City of Covina*,⁴ lies in their holdings that attorneys can be forbidden to talk to courts about the courts' own decisions, and will be punished if they do.

In *Sorchini*, a plaintiff-appellant in a Section 1983 civil rights action had argued that the police have a duty to warn a fugitive before releasing a police dog. In her brief, the appellees' counsel quoted a recent (and accurate) statement by a Ninth Circuit panel, in a similar police dog bite case, that there was neither Ninth Circuit nor Supreme Court support for the proposition urged by appellant. Because she mentioned a decision whose citation is prohibited, she was subjected to a sanctions proceeding and ordered to show cause why she should not be disciplined. In the more recent *Hart*, the same fate befell counsel for a Social Security benefits appellant who had cited a Ninth Circuit opinion deciding an earlier Social Security appeal.

To lawyers, the critical issue is not the *Anastasoff/Hart* question whether appellate judges have the constitutional power to pay less than total obeisance to their own past holdings, but whether lawyers have the right, and sometimes the duty, to discuss a court's past holdings and discussions when they believe that doing so is important to their clients' causes. The question

* The author of this report is William T. Hangley, Philadelphia, Pennsylvania, Chair of the Federal Rules of Evidence Committee of the American College of Trial Lawyers, which sponsored this report. This Report will also appear at 208 F.R.D. 645.

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

² 266 F.3d 1155 (9th Cir. 2001).

³ They will be referred to herein as “nonbinding opinions” or “non-circuit binding opinions.”

⁴ 250 F.3d 706 (9th Cir. 2001).

is whether the appellate courts are advancing or impeding justice and the rights of litigants when they either withhold opinions from the scrutiny of most lawyers or forbid lawyers, in advance, from citing the courts' own past opinions for whatever persuasive value those opinions may have in a present case.

This Report will argue:

1. That the rules governing access to and use of “unpublished” opinions in the circuit courts should be uniform. The existing circuit-by-circuit patchwork is confusing, perilous, and getting worse.
2. That all circuits should release their opinions for publication in Lexis, Westlaw, and other internet carriers. The growth of the law cannot help but be stunted if the great majority of decision making is occult. Worse yet, the present system in some circuits invites “organized litigants” – government agencies or special interest groups, by way of example – to build archives of the unpublished opinions and gain an unfair advantage.
3. That there should be no restriction upon litigants' citations to nonbinding opinions for whatever persuasive merit they are thought to have. Assuming that a circuit court can decide that a given holding will not be binding precedent for future cases, that court or any court can surely decide what weight it wishes to give to the reasoning behind that holding in a particular new factual context, rather than making the a priori judgment that nothing in the holding could possibly be pertinent to any future case. Courts signal a lack of confidence in their own decisions by prohibiting the public's representatives from even discussing them, and the law must inevitably suffer. The limited available information also demonstrates – not surprisingly – that appellate judges are quite fallible in their decisions that a given case adds nothing to the body of law and is “not precedent.” For some of these cases, indeed, it is impossible to accept the proposition that they were ever thought to be easy, redundant, and unimportant dispositions. Courts are declining to publish opinions that turn out to be the best authority in a given setting, then refusing to talk about them or permit their discussion. For a court to blind itself, in advance, to the persuasive power of its own reasoning simply makes no sense.

II. BACKGROUND

A. THE APPELLATE LITIGATION EXPLOSION

The federal circuit courts can no longer give every panel decision the careful attention that, fifty years ago, was a staple of the appellate decision making process. The volume of appellate litigation has so far outstripped the growth of the circuit bench that the active judges simply do not have time to review all the proposed decisions of all the sitting panels before they are filed, and the panel members cannot craft every opinion as carefully as they would wish.

Traditionally, a federal circuit court opinion was the product of a broadly collegial process. After briefing, argument, and consideration by a three-judge panel, a draft opinion would be circulated to all the active judges on the circuit for review and comment. Only after that process had been completed would the opinion be filed and published in the official reporter, Federal Reporter.

Pre-issuance review by all the active judges made sense because, of course, a panel opinion would not merely adjudicate the interests of these litigants; each holding would be another brick in the wall of the corpus juris. Every holding found in the opinion would bind all courts within the circuit, including the circuit court itself, unless and until it was changed by the circuit en banc.

A recent law review article⁵ stresses that the pitch of an inherent tension between these two functions of appellate jurisprudence – “error-correction” for the present litigants and “law-making” for posterity – has been tuned to an ever-higher frequency as the appeals mount up. The courts’ “error-correction” jurisdiction is mandatory; they must accept and handle every case that comes to them. But the task of assuring that each and every panel opinion – more accurately, each and every *holding* found in each and every panel opinion – has been sufficiently debated and tested to bind judges and litigants forever has become an impossible one.

According to Professors Cooper and Berman, the circuit courts are handling 25 times as many cases now as they handled 40 years ago. While the circuit bench has grown during this period, it has not come close to keeping pace with the increasing volume of appellate litigation. Indeed, the average circuit judge today – assuming that cases are decided by three-judge panels – is handling a sextupled workload. In 1960, he had shared panel responsibility for about 150 cases. In 1999, he (or, now, she) had shared panel responsibility for about 900 cases.⁶ Judges Alex Kozinski and Stephen Reinhardt write that the average active judge in the Ninth Circuit wrote twenty binding precedent opinions in 2000 and, of course, participated as panel member in the formulation of 60 such opinions: “Writing 20 opinions a year is like writing a law review article every two and a half weeks; joining 40 opinions is akin to commenting extensively once a week or so on articles written by others.”⁷

⁵ Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brook. L. Rev. 685 (2001).

⁶ *Id.* at 693. 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.

It appears, too, that the opinions published in the official reports are longer than they used to be, as might be expected in a system where only the opinions deemed most significant are culled from the herd for publication in print. It took about fourteen years for the first hundred volumes of F.2d to be published (see *Rahilly v. O’Laughlin*, 1 F.2d 1 (8th Cir. 1924); *Red Star Laboratories Co. v. Pabst*, 100 F.2d 1 (7th Cir. 1938)), and only about three years for the first hundred volumes of F.3d to be published (see *Sweet Home Chapter of Cmty. for a Great Oregon v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993), *modified*, 17 F.3d 1463 (D.C. Cir. 1994), *reversed*, 515 U.S. 687 (1995); *United States v. Morla-Trinidad*, 100 F.3d 1 (1st Cir. 1996)). And, of course, the later volumes are fatter.

⁷ Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This! Why We Don’t Allow Citation to Unpublished Dispositions*, Cal. Law., June 2000, at 43-44.

The opportunities for off-the-bench reflection and brainstorming with colleagues or clerks must also, on a per-case basis, be dramatically fewer than in earlier times. The same crush of numbers has made oral argument a thing of the past in many cases and a formality in others, removing the judges' only opportunity to explore the case with their colleagues and counsel together.⁸

As the appellate benches have grown, they have probably also grown apart. In any organization, larger populations make it harder to maintain levels of comfort and mutual confidence. In addition to the larger number of active circuit judges, other judges – visiting judges, senior judges and district judges – are pressed into service to stack the sandbags against a rising appellate tide. Their contributions are undoubtedly invaluable but, once again, there must surely be loss of collegiality, intimacy and trust among the people deciding the cases. Similarly, there are now more law clerks and staff attorneys and – as incidents of the increased case load – they seem to have a larger role and greater independence in drafting opinions and “steering” decisions while, at the same time, they have a less intimate relationship with their mentors, the circuit judges, than in the past. The judges know less about what the other judges are doing, and even about what their law clerks are doing.⁹

We should not be surprised if today's circuit judges are less confident that the product that is going out the door has been tested and burnished enough to withstand the scrutiny of the ages and to determine the outcome of future cases.

B. THE RETREAT FROM REPORTER PUBLICATION AND CIRCUIT BINDING STATURE

It has never been the fact that every appellate disposition yielded a full fledged circuit binding opinion; some appeals have always been disposed of without any opinion at all, or by a mere approval of the trial court's reasoning, or with terse discussions falling somewhere along a sketchy continuum that included “orders,” “minute orders,” “bench memoranda,” “memoranda,” “per curiam opinions” and “opinions.” When a true appellate opinion was written, however, it was (i) considered to be circuit binding, and (ii) printed in the official reports.¹⁰ The rush of appellate litigation has changed that. The proportion of federal appellate cases disposed of without “reporter publication,” the printing of an opinion in the Federal Reporter, has grown dramatically.¹¹ And, one by one, the circuits have retreated from the

⁸ See Cooper & Berman, *supra* note 5 at 700-01 and authorities cited therein.

⁹ Cooper & Berman, *id* at 690, refer to the “extremely limited role that each individual circuit judge now plays in the development of the decisions and doctrines of the courts of appeals.” See *id.* at 694-99 for an excellent discussion of the differences between the practices in contemporary circuit courts and the idealized “Learned Hand” model of bygone days.

¹⁰ Judge Kozinski reviews the development and history of the doctrine of binding precedent in *Hart*, 266 F.3d at 1163-69, in concluding, contrary to the panel opinion in *Anastasoff*, that the judge-made doctrine is not constitutionally bottomed.

¹¹ “Reporter publishing,” as used in this Report, is to be distinguished from “internet publishing,” used to refer to the release of opinions for publication in a variety of unofficial systems such as Westlaw, Lexis, “niche” reporters, and the internet. Some circuits refer to all opinions that are not reporter published as “unpublished opinions.” If the cases can be read in Westlaw or Lexis, that is a misnomer. The potential for confusion has increased with the recent arrival of a new West Publishing series of printed volumes, West's Federal Appendix, to publish on paper the “unpublished” opinions that are already published on the internet.

The retreat from reporter publication began at the instance of the Judicial Conference. See Report of the Proceedings of the Judicial Conference of the United States 11 (1964) (recommending publication of only those opinions that are of “general precedential value”); Report of the Proceedings of the Judicial Conference of the United States 33 (1972) (directing circuits to develop plans to limit publication of opinions). Of course, these events predated the advent of internet publication and today's widespread access to Westlaw, Lexis and other portals to the virtual library.

traditional position that every holding in every opinion is circuit binding.

Generally, the circuits rationalize their decisions to reporter publish or not on the basis of the content of opinion; if the opinion has nothing to say that hasn't been said before, and will never be of interest to anyone other than the immediate parties, there would seem to be no point in adding more tonnage to the Federal Reporter. In the First Circuit, for example: "The policy [in favor of reporter publishing] may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants."¹²

If an opinion really does have none of the characteristics that might interest a litigant, advocate, or scholar, then the question whether it is binding precedent would seem to be wholly moot. If we assume that major premise – that the opinion doesn't say anything new, that it doesn't clarify or explain a rule of law within the circuit, that it involves no issue of public interest, that it does not criticize existing law, and that it is not in conflict with the decision of any other panel or any other circuit¹³ – it is difficult to imagine why anyone would care how much precedential value it was given; it is a redundancy. Hence the next step, deciding that the non-reporter published cases should not be circuit binding, may have seemed both easy and totally lacking in consequence.

It hasn't turned out that way. The decision not to reporter publish or circuit bind encouraged the courts to reduce the time and attention they were giving these opinions, freeing up badly needed time to work on other opinions. The idea is to research and write just enough to be sure that the outcome of the case is correct and that the result is explained to the litigants (who already know the facts) without attempting to create a document worthy of binding the courts and the citizens of several states in perpetuity on the legal propositions covered. Once it is decided that the opinion's holdings will not be circuit binding, the degree of attention and review drops off dramatically. In the Third Circuit, for example, circuit binding opinions (and even non-circuit binding opinions to which there is a dissent) are still subjected to the traditional full bench pre-filing review and comment process, but unanimous nonbinding opinions are not.¹⁴ After describing the rigors of preparing a circuit binding opinion (a "law review article") for reporter publication, Judges Kozinski and Reinhardt describe the very different

¹² 1st Cir. R. 36(b)(1). Other circuits have more detailed checklists to guide the judges in deciding whether their opinions will be reporter published or not, e.g., 4th Cir. R. 36(a):

Opinions delivered 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 this 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.

¹³ Cf. *supra* note 12.

¹⁴ See 3d Cir. Internal Operating Procedure ("IOP") § 5.5.4. Today, not all circuits follow the practice of circulating even draft binding precedent opinions for collegial review outside the panel. See 11th Cir. IOP 3-4 (following R. 36-3). Others still circulate drafts of all opinions, binding and nonbinding. See D.C. Cir. R. 36(c). One may wonder how a wholly redundant opinion can spark a dissent in the first place. That is a very good question.

treatment given to nonbinding opinions (“memdispos” in Ninth Circuit-speak), which are churned out at a rate of more than one per day per panel:

Most are drafted by law clerks with relatively few edits from the judges. Fully 40 percent of our memdispos are in screening cases, which are prepared by our central staff. Every month, three judges meet with the staff attorneys who present us with the briefs, records, and proposed memdispos in 100 to 150 screening cases. If we unanimously agree that the case can be resolved without oral argument, we make sure the result is correct, but we seldom edit the memdispo, much less rewrite it from scratch.¹⁵

No one can deny, however, that speeding up the production line while cutting back on quality control will increase the risk of mistakes in any operation. It is apparent (although almost never articulated) that some of the circuits’ attitudes toward their non-reporter published opinions is driven less by the belief that those opinions say nothing new than by the fear that they may say something that is *wrong*. It is also apparent that the circuits have often ignored their own articulated standards in deciding whether an opinion qualifies for reporter publication. Decisions in cases of first impression, or decisions that create or resolve an intercircuit or intracircuit conflict, are identified in circuit rules as opinions that should be reporter published. That does not always happen. More on these points, *infra*.

Looking back over the past thirty years, the explosion of the non-reporter published, nonbinding opinion phenomenon has been startling, as demonstrated by an unscientific perusal of the Federal Reporter tables of contents. West’s practice of listing case results in “table” form in the official reports, without printing the actual opinions, appears to have begun quietly around 1967 and grown with the caseloads. For example, Federal Reporter 2d listed about 350 dispositions by the Third Circuit in 1970. The only three “table” cases were vacatur by agreement of the judgments in a single district court case;¹⁶ all the other dispositions had reporter published, circuit binding opinions. By 1980, the non-reporter published opinion practice had hit its stride. For that year, the F.2d tables of contents reflect 339 published opinions from the Third Circuit but identify 753 unpublished dispositions. The 1990 count was 304 published opinions and 1,361 unpublished opinions. For 2000, there were 277 published opinions and 1,148 unpublished opinions. The dispositional iceberg had grown immensely while its tip – the visible number of published opinions – remained essentially constant.¹⁷

¹⁵ Kozinski & Reinhardt, *supra* note 7 at 44.

¹⁶ *Frankenfield v. United States*, 521 F.2d 1398 (3d Cir. 1970) (Table), *Rapp v. United States*, 521 F.2d 1399 (3d Cir. 1970) (Table) and *Scott v. United States*, 521 F.2d 1399 (3d Cir. 1970) (Table), *all vacating* *Rapp v. Eastern Air Lines, Inc.*, 264 F. Supp. 673 (E.D. Pa. 1967).

¹⁷ For circuits that do not release their unpublished opinions to Westlaw or Lexis, it cannot be determined how many table cases actually had written opinions. Another point of distortion is the fact that some unpublished opinions apparently never make it to the published tables. See the discussions of *Drinker v. Colonial School Dist.*, 78 F.3d 859 (3d Cir. 1996) and *Anastasoff*, *infra* at 20-21.

Although the proportions vary from circuit to circuit, during 2000 only about twenty percent of the dispositions by the thirteen circuit courts were accompanied by reporter published and circuit binding opinions.¹⁸

Some of the circuits internet publish their nonbinding opinions, that is, they release them for publication in computerized or internet systems like Westlaw and Lexis; other circuits do not. Of those that do internet publish, several have rules that, variously, forbid citing nonbinding opinions in the circuit court, or citing them in any court within the circuit or, for that matter, citing them anywhere or using them for any purpose. It is safe to say that more than half the total output of modern federal appellate courts can never be cited by attorneys, either because the cases cannot be found or because, once found, they may not be cited.

III. RECOMMENDATIONS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

A. THE RULES AND PROCEDURES GOVERNING THE PUBLICATION OF AND RESORT TO NONBINDING OPINIONS SHOULD BE UNIFORM.

At the district court level, a grand experiment with “local option” in procedural rules came to a quiet end with the December 1, 2000 effectiveness of amendments to Federal Rule of Civil Procedure 26 and certain other rules designed to make civil procedures uniform. Over the past thirty years or so, the circuits have created a crazy quilt of local rules and procedures governing access to and citation of their own and other courts’ product. This experiment, too, has outlived its time.

A hypothetical partner, preparing to brief a Section 1983 case for the District of Columbia Circuit, is instructing his hypothetical first year associate on the research he’d like done:

When you go into Westlaw or Lexis, you’re going to find that about 80% of the published federal appellate cases are marked “not published” or “not precedential,” or something like that. You have to be very careful about using these cases or we could get in trouble. First, you can cite the D.C. Circuit’s own cases of this type, but only if they were decided after 2001. Earlier D.C. Circuit cases should go on the “pantomime” pile – we may want to borrow their reasoning and argue from it, but we are not allowed actually to mention their names. We’ll have to pantomime. No, I don’t know what the difference is between the 2002 cases and the pre-2002 cases.

You can cite opinions of this type from the Fourth, Sixth, Eighth and Tenth Circuits if you really, really have to. You *could* also cite such cases from the Fifth and Eleventh Circuits but there aren’t

¹⁸ See *Hart v. Massanari*, 266 F.3d at 1155, 1177 (9th cir. 2001) (citing Administrative Office of the United States Court, Judicial Business of the United States Courts 44 table S-3 (2000)).

any; that is, you won't find them in Westlaw or Lexis. No, I don't know why that is, either. You'll find some Third Circuit "unpublished" cases, but they're all very recent. You can cite them in a pinch, I *think*. You'll also find a few such cases from the First Circuit, but they have to go on the pantomime pile too, because you can't mention the actual cases in the brief. There are lots of these cases from the Seventh, Ninth, and Federal Circuits, but you can't mention their names either. And, although Second Circuit cases are all over the internet, I don't think you're even allowed to think about them, much less talk about them. It's probably best that you not read them at all. Why do they publish them? I have no idea.

As you know, state courts also handle Section 1983 cases, and I *think* the D.C. Circuit will allow you to cite the state court "unpublished" opinions, even if the state courts themselves say you can't. That may be unethical, but not citing them may also be unethical, so pick your poison. You can also cite any opinions, published or not, from lower state courts, but that's not true of lower federal courts. For some reason, we're not allowed to cite any federal district court case that isn't printed in F. Supp. or F.R.D. Same answer: No idea.

I hope you can keep track of all these rules. If you make a mistake, we might be in contempt of court.

Unless the associate is Rainman, he probably will *not* be able to keep track.

It is surprising that the circuits' approaches vary as much as they do, because the questions faced by the circuit judicial conferences in formulating their local policies were limited and straightforward. Once having determined that some opinions would not be reporter published and that those opinions' holdings would not be circuit binding, the circuits had, essentially, only two more decisions to make:

1. They either would or would not release the nonbinding opinions to the Federal Reporter's electronic sister, Westlaw, to Lexis, and to other internet providers;
2. They would either discourage citation to these opinions or they would go further and forbid it.¹⁹

¹⁹ No circuit actively encourages it.

The circuits have managed to choose from this very limited menu in a bewildering variety of combinations, some of them indigestible. Their instructions to litigants and lawyers might be any of the following:

3. “You **cannot** read our nonbinding opinions and . . .
 - a. *You must not talk about them.*” (First Circuit, until very recently)
 - b. *You may talk about them, but first you have to find them.*” (Eleventh Circuit and Fifth Circuit (some cases))
 - c. *We discourage you from talking about them even if you find them. However, they are binding and we will apply them against your client.*” (Fifth Circuit (the other cases))
 - d. *You are welcome to talk about them if you can find them. However, we will not pay any attention.*” (Third Circuit, until very recently)

4. “You **can** read our nonbinding opinions, but . . .
 - a. *We prefer that you not talk about them.*” (Fourth, Sixth, Eighth, Tenth and (for some cases) District of Columbia Circuits)
 - b. *You must not talk about them.*” (Second, Seventh, Ninth, Federal, and (for its other cases) District of Columbia Circuits, as well as (recently) First Circuit)
 - c. *We still will not pay any attention* (Third Circuit, very recently).

Complicated? Actually, it is a lot more complicated than that.

i. COURTS THAT DO NOT PUBLISH THEIR NONBINDING OPINIONS

Until September, 2001, the First Circuit withheld its nonbinding opinions from Lexis and Westlaw. Both before and since, the First Circuit has forbidden lawyers from citing the nonbinding opinions “except in related cases.”²⁰ Of course circuits that withhold opinions from the electronic sources do make them “public.” Non-reporter published opinions are distributed to counsel, are in a public file in the clerk’s office, and are available to anyone who wishes to take the time to go and read them, including the news media.²¹ In any sense that is meaningful to most lawyers doing research for their clients’ cases, however, these opinions cannot be read because they cannot be found. They are needles in haystacks whose holdings cannot be found in any digest or database.

²⁰ On September 24, 2001, the 1st Circuit adopted and published for comment an interim amendment to its Rule 36(b)(2)(F) “in response to West Group’s announced intention to provide in print format the full text of federal court of appeals decisions that have not been selected for publication.” See Notice of Adoption of Interim Amendment to Local Rule 36(B)(2)(f), available at <http://www.ca1.uscourts.gov/rules/local1.pdf>. The amendment simply reiterates that only F.3d cases are considered “published.” See *id.* The circuit has now begun releasing non-circuit binding opinions to both the print and electronic publishers.

²¹ Further, specialized or niche reporters will pick up some of these cases and publish them to a more limited audience. See discussion of *Drinker*, *infra* at 20.

The Eleventh Circuit continues to withhold all its nonbinding opinions from Lexis and Westlaw, but allows their citation as persuasive authority.²² Just how counsel are supposed to find them in order to cite them is not explained.

The Third Circuit – another circuit that did not release its nonbinding opinions to Westlaw or Lexis before 2002 – does not speak to the practice of lawyers citing these opinions, but does say that it, the court, does not intend to cite them:

Because the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority.²³

In December 2001, when the circuit finally decided to begin releasing its non-circuit binding opinions to Westlaw and Lexis, Chief Judge Becker made clear that the IOP (then numbered 5.8) did not speak to the conduct of lawyers, but only of the court itself: “The court will continue to observe Internal Operating Procedure 5.8, which provides that the *court* will not cite to non-precedential opinions as authority.”²⁴ Fine. The lawyer can cite the case. But what happens next? Will the Third Circuit disregard the citation and the citation-based argument (making the exercise pointless), or will the court consider the point but take pains to write its opinion in a manner that doesn’t let on to that (making the exercise disingenuous)? Neither answer is comforting to scholars, but the absence of an answer is particularly discomfiting to people with clients to advise.

The last of the nonpublishing circuits, the Fifth Circuit, has the most frightening of all the strange combinations: The Fifth Circuit declines to release its “unpublished” opinions to Westlaw and Lexis. They are truly unpublished. The slip opinions state that they have “no precedential value.” Yet, until fairly recently, that court also treated those occult opinions as binding precedent. They were, oxymoronically, binding precedents without precedential value, and they were hidden from view. A lawyer in the Fifth Circuit operated in the worst of all worlds; she did not know what the law was but her client was bound by it.²⁵

In *United States v. Melancon*, a Fifth Circuit panel held that its decision was controlled by an earlier unpublished panel decision, *United States v. Sierra*.²⁶ The *Sierra* opinion was published for the first time (still sporting its “no precedential value” sticker) as an attachment to *Melancon*. One *Melancon* panel member concurred specially (he believed he could not dissent):

²² 11th Cir. R. 36-2.

²³ 3d Cir. IOP § 5.7. Cooper & Berman, *supra* note 5 at 754, report that lawyers in the Third Circuit occasionally do cite the court’s nonbinding opinions in their briefs. With the non-circuit binding opinions available on the net, there will surely be more of this.

²⁴ Press Release, Third Circuit Court of Appeals (Dec. 5, 2001), available at <http://www.ca3.uscourts.gov/press%20release/nonprec.opinion.pdf> (emphasis in original).

²⁵ See *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992); *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 467 n.2, *rehearing denied*, 936 F.2d 571 (5th Cir. 1991).

²⁶ 951 F.2d 345 (5th Cir., 1991) (unpublished table decision).

Aside from the question of *Sierra's* wisdom, or lack thereof, I note too the problems inherent in giving precedential effect to unpublished opinions. See 5th Cir. R. 47.5.3. Since, by definition, a decision is unpublished only if it “has no precedential value” (5th Cir. R. 47.5.1), making such a decision binding runs the risk of having it unintentionally make new law. *Sierra* does not, in fact, merely reiterate settled principles of law

Because the *Sierra* opinion is unpublished and unavailable, Appellant Melancon may have been completely unaware that this Court had embraced the rule articulated therein. (While the government managed to cite *Sierra* in its brief, the opinion cannot be found in the Federal Reporter and cannot be obtained through the two public computerized legal networks.) Yet *Sierra* does not simply reaffirm the law of the Circuit. . . .²⁷

Since *Melancon*, the Fifth Circuit has contained but not cured the “stealth precedent” problem. The circuit rule now provides that new unpublished opinions – specifically, those filed after January 1, 1996 – are not binding precedent. Apparently unwilling to decommit an entire body of theretofore binding precedent, however, the judges left the old rule in place for the earlier opinions. They remain binding and they remain occult.²⁸

Thus, the *Melancon/Sierra* paradox could strike again in the Fifth Circuit.

ii. COURTS THAT PUBLISH THEIR “UNPUBLISHED” OPINIONS

The Fourth, Sixth, Eighth and Tenth Circuits (and lately the Third as well) release their nonbinding opinions to Westlaw and Lexis, and allow counsel to discuss them for whatever persuasive merit they may have, while making clear that they are not circuit binding prece-

²⁷ *Melancon v. United States*, 972 F.2d at 570 n.2 (Parker, D.J., concurring specially); see also *Pruitt v. Levi Strauss*, 932 F.2d at 467 n.2 (Johnson, J., dissenting in part).

²⁸ Fifth Circuit Local Rules 47.5.3 and 47.5.4 are set forth below. The articulation of the “precedential” force of the pre-’96 opinions is the stuff of migraines:

47.5.3 Unpublished Opinions Issued Before January 1, 1996.

Unpublished opinions issued before January 1, 1996 are precedent. However, because every opinion believed to have precedential value is published, such an unpublished opinion should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney’s fees, or the like).

47.5.4 Unpublished Opinions Issued on or After January 1, 1996.

Unpublished opinions issued on or after January 1, 1996 are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney’s fees, or the like). An unpublished opinion may, however, be persuasive.

dent.²⁹ In other words, the nonbinding opinions are treated about as one might expect them to be treated – as members of a lesser class of opinion, red-headed stepchildren that can be talked about if counsel thinks it necessary but will be considered only reluctantly, with the clear understanding that they do not carry the power that a circuit binding opinion has.³⁰ Implicitly, these schemes acknowledge the obvious, that an opinion thought to be unremarkable when written and filed will turn out to have something to teach in the unknown context of a future controversy, something that cannot be gleaned from the reporter published opinions.

However, courts in the largest group of circuits – the First, Second, Seventh, Ninth, Federal and (for all but the most recent opinions) District of Columbia Circuits – reject that possibility a priori. They publish their decisions in Westlaw and Lexis but forbid themselves, the lawyers and the public from citing them.³¹ It is even a more frustrating situation than in the nonpublishing circuits. In nonpublishing circuits, the attorney probably does not know about the case he is missing. To a lawyer in, say, Seattle (where both federal and state courts forbid the citation of nonbinding appellate opinions, and punish disobedience),³² Westlaw and Lexis are rather like a Soviet era department store, crammed with goods that can be seen but never attained. Moreover, several anti-citation circuits have no useful mechanism by which a litigant in a future case might ask them to reconsider their first-blush conclusion that the opinion contained nothing worth talking about. The Second Circuit appears to have no set procedure by which attorneys can ask the court to reconsider an initial “don’t cite me” labeling decision, once made. The Ninth, D.C., and Federal Circuits have such provisions, but they all have early sunsets – just one or two months after filing of the nonbinding opinions.³³ There is no mechanism by which an attorney can ask the court to allow him to cite a useful discussion that he has encountered in his research if the nonbinding opinion is more than a couple of months old.³⁴

²⁹ See 3d Cir. IOP 5.7; 4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28A(h); 10th Cir. R. 36.3. The 4th Circuit rule articulates the court’s reluctance to cite such cases, and tells counsel to exercise a like restraint:

In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court’s unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court.

^{4th} Cir. R. 36(c). As discussed *infra*, the D.C. Circuit also now allows some non-reporter published opinions to be cited as precedent.

³⁰ All the publishing circuits affix the nonbinding opinions with disclaimers of one sort or another, sometimes in the form of a statement that the opinion they are publishing is “not published.”

³¹ See 1st Cir. R. 36(b)(2)(F); 2d Cir. R. § 0.23; 7th Cir. R. 53(b)(2)(iv); 9th Cir. R. 36-3; D.C. Cir. R 28(c); Fed. Cir. R. 47.6. The rules contain narrow exceptions allowing citation in case-related or party-related situations – preclusion, law of the case, and the like.

³² See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001); *Dwyer v. J.I. Kislak Mortg. Corp.*, 13 P.3d 240, 244 (Wash. Ct. App. 2000).

³³ See 9th Cir. R. 36-4 and Fed. Cir. R. 47.6(c) (60 days after filing); D.C. Cir. R. 28(d) (30 days).

³⁴ In a recent Federal Circuit case, *Symbol Technologies, Inc. v. Lemelson Med. Found.*, 277 F.3d 1361 (Fed. Cir. 2002), the panel allowed counsel, on motion, to argue that it should be permitted to cite two non-reporter published cases for the limited purpose of arguing that they were circuit binding under *Anastasoff*. According to the dissent, even this limited exception was granted grudgingly. *Id.* at 1370 (Newman, J., dissenting). The majority rejected the *Anastasoff* argument and refused to consider the earlier opinions. See discussion, *infra* at 36-38.

Historically, the District of Columbia Circuit was squarely in the anti-citation camp and, with respect to almost all of its opinions, that remains the case. Today, however, that circuit appears to be embracing *Anastasoff's* thinking for some opinions and *Hart's* for others. Effective January 1, 2002, the D.C. Circuit amended its rules to provide that:

(A) . . . Unpublished orders or judgments of this court . . . entered before January 1, 2002, are not to be cited as precedent. . . .

(B) . . . All unpublished dispositions entered on or after January 1, 2002 . . . may be cited as precedent. Counsel should review the criteria governing published and unpublished opinions in Circuit Rule 36 in connection with reliance upon unpublished dispositions of this court.³⁵

The D.C. Circuit's posture on circuit bindingness thus almost inverts the Fifth Circuit's. In the Fifth Circuit, older opinions are circuit binding and more recent ones are not. Here, older opinions are not circuit binding while more recent ones may be. We say "may be" because another new D.C. Circuit rule is a knuckleball:

While unpublished orders and judgments may be cited to the court in accordance with Rule 28(c)(1)(B), a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.³⁶

In other words, the post-2001 non-reporter published opinions may or may not be circuit binding. Counsel is free to make an *Anastasoff* argument, but the court is not ready to commit itself just yet.³⁷

The wisdom or unwisdom of anti-citation rules is discussed elsewhere in this Report. For present purposes, it is sufficient to observe that there is no sound policy reason why lawyers should be able to read some circuits' nonbinding opinions but not others, or why they should be entitled to cite some of them but not others, or why all 1995 opinions should be either more legitimate (as in the Fifth Circuit) or less legitimate (as in the D.C. Circuit) than all 2002 opinions.

iii. OTHER COMPLICATIONS

The confusion does not stop with the question of reading and citing the circuits' own respective opinions, although those discrepancies are concern enough. There are other mad-

³⁵ D.C. Cir. R. 28(c)(1). By "precedent," the circuit appears to mean circuit binding precedent. See note 37, *infra*.

³⁶ D.C. Cir. R. 36(c)(2).

³⁷ The circuit's handbook was amended to underscore the court's ambivalence, stating that "counsel will now be permitted to argue that an unpublished disposition is binding precedent on a particular issue," but that "counsel are reminded that the Court's decision to issue an unpublished disposition means that the Court sees no precedential value in that disposition. . . ." D.C. Cir. Handbook of Practice and Internal Procedures, §IX.A.7.

dening differences among the circuit rules. One problem is that some circuits' rules explicitly profess to govern the conduct of lawyers and litigants in remote forums.

The Second Circuit's anti-citation rule is the most territorially ambitious. Taken literally, it says that a lawyer who cites a Second Circuit nonbinding opinion in, say, the Fourth Circuit (which permits citation of nonbinding opinions), may be violating the appellate rules of a court where he is not even appearing. The rule proclaims that nonbinding Second Circuit opinions "shall not be cited or otherwise used [whatever that means] in unrelated cases before this or any other court."³⁸ They cannot be "used" in, say, the United States Supreme Court, or the Hague.

By way of comparison, the Seventh and Ninth Circuits' citation bans do not expressly attempt to operate outside the respective circuits' geographic boundaries, but do reach down into the lower courts within the circuits; those circuits explicitly prohibit the citation of their nonbinding opinions by or to in-circuit lower courts, and by lawyers practicing in those courts, regardless of the opinions' apparent pertinence to the matter before the lower courts. In *Thomas v. Newton Int'l Enters.*,³⁹ the Ninth Circuit made clear that it is not kidding about this prohibition. Reversing a district court's grant of summary judgment, the court said:

Both Newton in its motion for summary judgment and the district court in its disposition violated this rule by citing extensively to [a nonbinding opinion]. We remind both the parties and the district court that the terms of Circuit Rule 36-3 must be strictly followed.

Stop and think about this. The trial judge found the reasoning of one of the Ninth Circuit's non-circuit binding opinions sufficiently illuminating that he discussed it in his opinion. The higher court, which wrote the opinion in the first place and released it for publication, is telling him that he broke the rules by doing that.⁴⁰

The First Circuit and the District of Columbia Circuit are silent as to both the geographic and the hierarchical scope of their prohibitions on citation of nonbinding opinions. It is not clear whether their prohibitions reach down to the district courts (as in the Second, Seventh, and Ninth Circuits) or attempt to reach beyond the circuit borders (as in the Second Circuit).

The Federal Circuit, too, is silent on the question of what courts and what proceedings are covered by its ban on the citation of nonbinding holdings, saying only that they "must not

³⁸ 2d Cir. R. § 0.23. Until recently, the purported reach of the rule was not apparent from the faces of Second Circuit nonbinding opinions published on the internet, which stated only that they were "unpublished" and referred the reader to the local rules. See, e.g., *Burtis v. Annan*, 2001 WL 345174 (2d Cir. Apr. 5, 2001). The most recent opinions articulate the ban on out-of-circuit citation. See, e.g., *Alvarez v. Coughlin*, 2002 WL 1333210 (2d Cir. June 18, 2002).

³⁹ 42 F.3d 1266, 1272 (9th Cir. 1994).

⁴⁰ Compare *Thomas* with *Caron v. United States*, 183 F. Supp. 2d 149, 158 n.7 (D. Mass. 2001), and *Griffy's Landscape Maint., LLC v. United States*, 51 Fed. Cl. 667, 672-73 (2001), both discussed in text *infra* at notes 90-91, questioning a circuit's power to impose such prohibitions on lower courts.

be employed [whatever *that* means] or cited as precedent.”⁴¹ This is particularly perplexing because the Federal Circuit’s bailiwick is topical, not territorial. It has appellate jurisdiction over particular cases (or, more precisely, over cases presenting certain controversies on appeal) from all the districts. May a Federal Circuit nonbinding opinion be cited in a patent case in the District of Delaware? In a non-patent case in that court? A uniform approach would either clarify or moot that issue.

Still we have not completed our list of befuddling differences among circuit practices and prohibitions. To complicate matters even further, the Seventh and District of Columbia Circuits have a sort of “courtesy” rule that embraces the anti-citation rules of other appellate courts. The Seventh Circuit forbids attorneys (and itself) from citing opinions “if citation is prohibited in the rendering court.”⁴² On its face, the rule is not limited to the opinions of federal courts, appellate courts, or even American courts.⁴³ District of Columbia Circuit Rule 28(c)(2) appears to reach federal circuit court of appeals opinions, but to allow citation to state appellate court opinions regardless of whether those opinions could be cited in the forum from whence they came. Why the circuit draws this distinction is not explained.

For some unfathomable reason, too, D.C. Circuit Rule 28(h) goes on to do new mischief by draping the cloak of silence not only upon its own opinions (pre-2002) and those of other circuit courts, but also upon all non-reporter published *district court* opinions.⁴⁴ But non-reporter published district court opinions (opinions published on the internet but not in Federal Supplement or Federal Rules Decisions) and non-reporter published appeals court opinions are just different animals. The process by which district judges decide whether to submit their opinions to West Publishing Company (or, more accurately, which “dropoff” window they choose at West’s – the F. Supp. window or the Westlaw window) is very different from the deliberate culling process that is supposed to be performed in the circuit courts according to their rules.⁴⁵ Indeed, the whole pivotal concept of “bindingness” that drives the court of appeals process is alien to district court opinions. No district court decision is binding on the next judge, in the next courtroom or even in the next unrelated case before the opinion’s author. In the district court, the difference between precedent and binding precedent is fundamental and ever present: Everything is precedent and nothing is binding (except to the parties) unless it comes from a higher court in the controlling jurisdiction.

⁴¹ Fed. Cir. R. 47.6(b).

⁴² 7th Cir. R. 53(e).

⁴³ Although state appellate court rules and procedures are outside the scope of this Report, it is worth mentioning that many states have nonpublication and anti-citation rules comparable to the most repressive of the federal circuit rules.

⁴⁴ D.C. Cir. R. 28(c)(2): “[U]npublished opinions by other courts of appeals may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts may not be cited.”

⁴⁵ Conversations with a number of district judges disclose that their “window picking” procedures are anything but uniform. Some judges select the opinions they consider most significant for reporter publication, some leave that task to their clerks, and others leave the entire selection process to West Publishing. Coupled with a rule such as the D.C. Circuit’s, this means that a party’s right to discuss a case may depend on the long ago decision of a private commercial publishing company. In no case did a district judge state that her decision not to reporter publish bespoke a view that the holdings in her non-reporter published opinions were not reliable law worthy of being cited as persuasive precedent if they were deemed apposite by an attorney. *But see* Diaz Reyes v. United States, 770 F. Supp. 58, 60 (D.P.R. 1991), *aff’d*, 971 F.2d 744 (1st Cir. 1992) (Table), discussed *infra* at note 58.

This ban on citations of district court opinions is particularly troubling if (like the Second, Seventh and Ninth Circuit's rules) the D.C. Circuit's rule is interpreted to govern practices in the lower courts. Does the D.C. Circuit rule mean that a D.C. District judge cannot cite one of his own unpublished decisions if he considers it pertinent? That counsel cannot cite that case in his trial court brief? If that is the D.C. Circuit's intention, a subparagraph of a local circuit rule governing the form of appellate briefs is a strange place to tell us about it.

These are not mere academic concerns, particularly after *Hart* and *Sorchini*. A lawyer reported an experience of a sort that may be familiar to many: When an alleged inventor is trying to invalidate another person's patent on the theory that his invention came first, he cannot prove his case simply by testifying that "I was first." Some corroborating evidence is required. The issue in the lawyer's case was whether the testimony of his six nonparty witnesses – to the effect that they had made, used, or sold articles embodying the invention years before the patent was applied for – would be sufficient to make out his invalidity claim despite the absence of physical evidence (sales receipts, dated exemplars, inventor's journals or the like). During trial, his opponent was seeking a directed verdict on the theory that, without physical-evidence corroboration, the testimony could not be considered. The problem was that the most recent Federal Circuit binding precedents were difficult if not impossible to harmonize. In one, *Thomson S.A. v. Quixote Corp.*,⁴⁶ the Federal Circuit had held squarely that no other corroboration was required when two nonparty inventors testified:

[C]orroboration is required only when the testifying inventor is asserting a claim of derivation or priority of his or her invention and is a named party, an employee of or assignor to a named party, or otherwise is in a position where he or she stands to directly and substantially gain by his or her invention being found to have priority over the patent claims at issue. In the current case, the purported inventors who testified were non-parties and their testimony concerned an unpatented prior invention.⁴⁷

Shortly thereafter, though, in *Finnigan v. Int'l Trade Comm'n*,⁴⁸ also a reporter published case, another panel of the same court stated that corroboration *was* required "regardless whether the party testifying concerning the invalidating activity is interested in the outcome of the litigation (e.g., because that party is the accused infringer) or is uninterested [sic] but testifying on behalf of an interested party." *Finnigan* excluded evidence that consisted of a single disinterested witness's testimony without corroborating physical evidence. Was the problem simply that there was no second witness, or was it that physical, non-testimony evidence is indispensable? Had the law changed in the short time between *Quixote* and *Finnigan* without an en banc overruling of *Quixote*?⁴⁹

⁴⁶ 166 F.3d 1172, 1174-75 (Fed. Cir. 1999).

⁴⁷ *Quixote*, 166 F.3d at 1176.

⁴⁸ 180 F.3d 1354, 1367 (Fed. Cir. 1999).

⁴⁹ Interestingly, Judge Rich wrote *Quixote* and joined in *Finnigan*. And, since Fed. Cir. R. 36(c) requires that all opinions be circulated before filing, we must presume that all members of both panels saw both opinions a few months apart.

The trial judge was leaning toward granting the directed verdict. He read the later opinion, *Finnigan*, as requiring physical evidence, of which there was none, and as tacitly overruling *Quixote*.

The good news was that counsel found a third and even later 1999 case, *Berry Sterling Corp. v. Pescor Plastics, Inc.*,⁵⁰ a nonbinding opinion that embraced his position:

As we have recently stated, “corroboration is required of any witness whose testimony alone is asserted to invalidate a patent, regardless of his or her level of interest.” [citing *Finnigan*]. *Such corroboration of Kevin Kilpatrick’s testimony was provided by his brother, Tim Kilpatrick.* The jury was entitled to credit such testimony.⁵¹

Both Kilpatrick brothers were interested witnesses. The opinion was squarely on point.⁵²

The bad news, of course, was Federal Circuit Rule 47.6(b), quoted *supra*, which said *Berry Sterling* could not be cited, at least in the appellate court.

Counsel had to decide what rules applied in the trial court: the written rules of the circuit in which his trial was located (a circuit that allowed citation of nonbinding opinions), or the rules of the Federal Circuit. If the latter, he also had to figure out whether the Federal Circuit’s rule reached down into the district court to forbid citing *Berry Sterling* there.

Other drafting and meaning problems abound in the intercircuit Babel – problems of just the sort that would be ameliorated by a uniform lexicon and the development through case law of a uniform interpretation of the more elusive terminology. For example, the circuits cannot even agree on the meaning of that very central term, “precedent.” To a trial lawyer or a trial judge, a precedent is any earlier decision; it may be binding, merely persuasive or wholly unpersuasive but it is “precedent” withal.⁵³ Some circuits apparently see it the same way, expressly or tacitly acknowledging that an opinion can have precedential value without being binding.⁵⁴ However, several other circuits use the word “precedent” as a synonym for “binding precedent.”⁵⁵ To make matters worse, several of the circuits decline to refer to their nonbinding opinions as “opinions,” even though that is what they are. Perhaps troubled by

⁵⁰ 215 F.3d 1351 (Table) (No. 98-1381), 1999 WL 674514 (Fed. Cir. August 30, 1999).

⁵¹ *Berry Sterling*, 1999 WL 674514, at *4 (emphasis added, citation omitted).

⁵² Judge Rich heard argument in *Berry Sterling* as he had in *Quixote* and *Finnigan*, but died before the two surviving panel members filed their opinion.

⁵³ This is consistent with lay perceptions. When the dog is allowed to sleep under the covers, that is a precedent. It may not dictate future events, but the dog will not let you forget it.

⁵⁴ See 4th Cir. R. 36(c)(allowing citation of nonbinding opinions for their “precedential value”); 6th Cir. R. 28(g), 206(c) (reporter published opinions “binding;” non-reporter published opinions may be cited for “precedential value”); 11th Cir. R. 36-3, IOP §5 (non-reporter published opinions “not considered binding precedent” but “may be cited as persuasive authority”).

⁵⁵ See 3d Cir. IOP §§ 5.3, 5.7 (non-reporter published opinions designated “not precedential” and do not bind the court); 5th Cir. R. 47.5.4 (non-reporter published opinions “not precedent;” they “may, however, be persuasive”); 8th Cir. R. 28(A)(i) (non-reporter published opinions are “not precedent,” but may have “persuasive value on a material issue”); see also D.C. Cir. Rules 28(c)(1), 36(c)(2), discussed *supra* at notes 36-37.

the idea of not giving proper respect to their own opinions, they finesse the problem by calling them something else, and attempt to reserve the label “opinion” to reporter published, circuit binding opinions. In the Second Circuit, nonbinding opinions are called “statements.” In the Seventh, they are “unpublished orders,” even though “order” already has a different, important meaning, and even though the actual dispositions of the cases have, in fact, been reported both in F.3d and on the internet, while the accompanying opinions are published only on the net.⁵⁶ In the Ninth Circuit, too, they appear to be either “memoranda” or “orders” (the language of the rule is not pellucid).

Now, the circuits are free to call their opinions anything they like. But a problem arises when they use ambiguous language in their anti-citation rules and wind up imposing prohibitions that, read literally, are even more draconian than they could conceivably have intended. Thus, Ninth Circuit Rule 36-3 says that “[u]npublished dispositions and orders of this court may not be cited to or by the courts of this circuit” Surely the Ninth Circuit cannot have meant that literally. The circuit cannot have intended, for example, to forbid attorneys from citing the subsequent appellate history of a district court decision, or from telling a trial court that it will have to reopen a case because it has been reversed by the Ninth Circuit. But that is what the rule says, and this *is* the circuit of *Hart* and *Sorchini*, where sanctions lurk. The Second Circuit’s rule also reaches beyond the use of nonbinding “statements” as precedents, saying broadly that they must not be “cited or otherwise used.” The Seventh Circuit’s rule is ambiguous, but it too could be read to ban the citation of judgment orders, as distinguished from the related nonbinding opinions.⁵⁷

Regrettably, too, these circuit-level policies are leaching down into the district courts themselves without apparent examination, despite the absence (outside the D.C. Circuit) of rules addressing the citation-worthiness of district court opinions. In one recent case, a district judge referred to one of his own court’s non-reporter published opinions, but suggested that there is something wrong with doing so in the ordinary course.⁵⁸ He did not say why, and there is no rule of his circuit (the First) or his district court that says anything of the kind. Other district courts have had to deal with arguments that they could not consider or cite non-reporter published state court decisions, or non-reporter published district court opinions, or even subsequent histories of cases when the affirmance or reversal was not accompanied by a reporter published appellate opinion.⁵⁹

⁵⁶ Beginning with cases decided after approximately December 31, 2000, some circuits’ non-reporter published dispositions are no longer listed in F.3d tables; they are now reported only in the computer services and in West’s Federal Appendix. *Compare, e.g.*, *United States v. Lampien*, 2001 WL 32753 (7th Cir. Jan. 10, 2001), *with, e.g.*, *Crosby v. Apfel*, 248 F.3d 1157 (Table), 2000 WL 1909641 (7th Cir. Dec. 29, 2000). Perhaps the table system will be limited to circuits that do not internet publish or to cases without opinions.

⁵⁷ 7th Cir. R. 53(2) says that “unpublished orders” shall not be “cited or used as precedent.” The disjunctive “cited or used as precedent” is ambiguous, particularly given the murky meaning of the word “used.” Is the ban limited to citing cases as precedent, or is it not? Of course, it could be argued that the rule speaks only to unpublished orders, and that the Seventh Circuit’s orders are reporter published (as table cases) even though the opinions are not. This, of course, would result in the Seventh Circuit’s having no rule relating to the citation of nonbinding opinions, which is not what they had in mind.

⁵⁸ “We would not ordinarily sanction reference to an unpublished opinion, but in this situation the existence of the case, as such, helps to explain plaintiff’s theory on this point.” *Diaz Reyes v. United States*, 770 F. Supp. 58, 60 n.1 (D.P.R. 1991), *aff’d*, 971 F.2d 744 (1st Cir. 1992) (Table). *Contra*, *Estate of Warner v. United States*, 743 F. Supp. 551, 556 (N.D. Ill. 1990).

⁵⁹ *North Am. Sec. Life Ins. Co. v. Harris Trust Bank*, 859 F. Supp. 1163, 1165 n.1 (N.D. Ill. 1994); *Estate of Warner*, 743 F. Supp. at 555-56.

Deciding under penalty of sanctions what opinions cannot be discussed, and where they cannot be discussed, is not a sport for the timid. Traditionally, even the most conscientious lawyers preparing for argument or trial have not felt compelled to study the appellate rules of all courts – state or federal – whose opinions (or whose subordinate courts’ opinions) they may have occasion to cite, but this is what we are coming to, and there is just no good reason for it.

At the April 2002 meeting of the Advisory Committee on Appellate Rules, a majority of participating members went on record as favoring a Justice Department proposal that a national rule of appellate procedure, allowing citation of non-reporter published opinions, be adopted.⁶⁰ However, it is too early to tell whether anything will come of this. The members have yet to agree on, *e.g.*, the specific language of such a rule, or the circumstances in which nonbinding opinions would be citable, or whether circuits would be permitted to opt out, and the Committee action is probably best viewed as a “straw vote” and little more.⁶¹ Of course, any resolution approved by the Committee would then embark on the long course of publication, public comment and hearings, followed by consideration by the Committee on Rules of Practice and Procedure, by the Judicial Conference, by the Supreme Court, and finally by Congress.⁶² The quest, if it ever begins, is sure to be perilous.⁶³

Even more recently, the House Committee on the Judiciary Subcommittee on Courts, The Internet, and Intellectual Property conducted an Oversight Hearing on Unpublished Judicial Opinions.⁶⁴ Whether that will lead to legislative activity remains to be seen.

B. NONBINDING OPINIONS SHOULD BE PUBLISHED.

Modern judges have too many opinions to write and modern lawyers have too many opinions to read, and a world in which the lawyers knew they could safely disregard eighty percent of the opinions would be a nicer place. That world does not exist. The courts should stop withholding their opinions from the public eye.

⁶⁰ Draft Minutes of the April 22, 2002 Meeting of the Advisory Committee on Appellate Rules of the United States Judicial Conference, at pp. 39-43 (*on file with the author*).

⁶¹ *See id.* The author’s views are based in part on conversations and correspondence with the Committee Reporter, Dean Patrick J. Schiltz, and others.

⁶² *See* 28 U.S.C. §§ 2071-77. A guide, *The Rulemaking Process – A Summary for the Bench and Bar*, may be found online at <http://www.uscourts.gov/rules/procedursum.htm>.

⁶³ Before a Congressional subcommittee, Professor Arthur Hellman discussed the reactions of some anti-citation circuit members of the Advisory Committee and, particularly, their position that individual circuits should be able to “opt out” of any such rule. Arthur D. Hellman, Statement to the House Committee on the Judiciary Subcommittee on Courts, The Internet, and Intellectual Property, Oversight Hearing on Unpublished Judicial Opinions, at 28-29 (June 27, 2002)(*on file with the author and available at <http://www.house.gov/judiciary/hellman062702.htm>*). The draft minutes themselves mention that circuit chief judges make up half the membership of the Judicial Conference of the United States, that several of those chief judges are opposed to a national rule, and that the district judges on the Conference might be likely to defer to the chiefs.

⁶⁴ The statements of the four witnesses who testified before the subcommittee — Third Circuit Judge Samuel A. Alito, Jr., Chairman of the Advisory Committee on Appellate Rules, Judge Kozinski, Kenneth Schmier, plaintiff in the cases discussed *infra* note 99 and Chairman of the Committee for the Rule of Law (an organization opposed to nonbindingness and anti-citation rules), and Professor Hellman – are available online at <http://www.house.gov/judiciary>, and on file with the author.

First, there is the problem of unequal access to opinions. *United States v. Melancon*, the Fifth Circuit “stealth precedent” case discussed earlier,⁶⁵ is a perfect example of a case where an institutional litigant had an unfair edge as a result of the circuit’s publication blackout. In *Melancon*, it will be recalled, Judge Parker noted that the controlling *Sierra* opinion was “unpublished and unavailable,” that Mr. Melancon’s lawyers were probably unaware of it, and that the government’s lawyers had brought it to the court’s attention.⁶⁶ It would be surprising if the AUSAs in a federal district did not keep files – department by department – of the pertinent unpublished opinions they received as counsel for a party.⁶⁷ In *Drinker v. Colonial School Dist.*,⁶⁸ the Third Circuit followed, as a “paradigm,” a non-reporter published decision that could be found only in a “niche” reporter, the Individuals with Disabilities Education Law Report.⁶⁹

Even the seminal *Anastasoff* points up the difficulty of finding unpublished cases. But for Judge Arnold’s constitutional pronouncements, *Anastasoff* would have been an inconspicuous case; it involved the timeliness of a taxpayer’s claim for a \$6,000 refund and centered on the familiar “mailing or receipt” issue that comes up when limitations or deadlines are in play. The panel invalidated (temporarily) the Eighth Circuit’s “nonbindingness” rule and held that all circuit opinions must be given binding precedential force. The court then concluded that its opinion was controlled by its earlier, purportedly nonbinding decision in *Christie v. United States*.⁷⁰ The *Christie* panel had ruled, favorably to the Internal Revenue Service, that the date of receipt was controlling.

The *Christie* opinion was not published in Westlaw, and is not listed in the tables in the Federal Reporter. Although it is now published in Lexis, there is some doubt as to whether that was so before the issuance of *Anastasoff*.⁷¹ In other words, it was either difficult or impossible for a researching attorney to find.⁷² But *Christie* was, of course, in the files of the IRS and its attorneys. They received it in the mail because they were a party and counsel. And those

⁶⁵ *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992). See discussion *supra* at 10-11.

⁶⁶ 972 F.2d at 570 n.2 (Parker, D.J., concurring specially).

⁶⁷ A recent article makes the heroic statement that

[b]etween Lexis and Westlaw, Internet sites maintained by universities and some of the circuit courts of appeals, and networks of attorneys practicing in particular fields, it is the rare opinion that is not disseminated for mass consumption.

Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 Green Bag 2d 17, 18 (2000), quoted in *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 261 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc). Lawyers practicing in the non-publishing circuits would disagree; they would contend that the opinions are available for “special interest” consumption, not “mass” consumption.

⁶⁸ 78 F.3d 859, 864 (3d Cir. 1996).

⁶⁹ See discussion, *infra* at 39. The paradigmatic opinion was not in Lexis or Westlaw, and was not even listed as an F.2d table case. The appellees in *Drinker*, who favored the application of the unreported case as precedent, were represented by staff lawyers from a public interest law firm, the Public Interest Law Center of Philadelphia, whose practice emphasizes the education rights of the disabled.

⁷⁰ No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992).

⁷¹ At least one commentator believes that *Christie* was not published in Lexis until after *Anastasoff* had made it famous, some 8 years after *Christie*’s filing. Hellman, *supra* note 63 at 11 n. 11. That is certainly likely, in view of the fact that *Anastasoff* itself does not supply a publicly accessible citation for the precedent that ruled its decision.

⁷² Even if *Christie* was in Lexis all the time, but not in Westlaw, it is fair to suppose that most lawyers doing research in Westlaw do not duplicate their research in Lexis, or vice versa.

interested specialists had surely built a file of pertinent “nonbinding” tax-related opinions over the years.

In both *Anastasoff* and *Melancon* (and probably in *Drinker*), the unpublished opinions were favorable to the litigant whose counsel had it in her possession. What if they had not been? Would they have been brought to the courts’ attention? In *Melancon*, ABA Model Rule of Professional Conduct 3.3 would probably have required that *Sierra* be brought to the court’s attention, because pre-1996 unpublished opinions are circuit binding in the Fifth Circuit, and because the government’s lawyer knew about *Sierra*.⁷³ That result is far from clear in the *Anastasoff* and *Drinker* contexts, where the earlier opinions were thought to be non-circuit binding and the court was actively discouraging discussing them. The knowing lawyer could probably have put the opinion back in the file drawer without telling her opponent or the court about it even if (as in *Drinker*) it was a “paradigm.” That is troubling.

The unfairness of nonpublication is not eliminated by having an anti-citation rule; the institutional litigant’s counsel still has a leg up. Knowing how the court has ruled and reasoned in the past, as his adversary does not, he can simply parrot the logic of the prior opinion without breaking taboo by naming the case. As one chief judge has pointed out, that is a useful weapon to have when the other side does not:

Commentators have argued that the no-citation rule may work to increase rather than decrease the unfairness to the uninitiated lawyer. “If . . . the sophisticated attorney uses arguments or language drawn from the unreported case without citing it, his uninitiated opponent is unlikely to learn of its existence. . . . In sum, if unreported opinions are cited, the uninitiated lawyer can remedy his deficiency; if they cannot be cited, he may not even know a deficiency exists.”⁷⁴

⁷³ ABA Model Rule of Professional Conduct 3.3(a) states that a lawyer “shall not knowingly . . . (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.” Read literally, this rule appears to require the disclosure of both circuit binding and non-circuit binding opinions; it talks about controlling *jurisdictions*, not controlling *holdings*. On the other hand, a 1994 ethics opinion stated that it was “ethically improper” for a lawyer to cite an unpublished opinion in violation of the forum court’s rule, although it *was* ethical to cite it in a court that did not forbid it, even if citation were forbidden by the issuing court. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-386R (1995). The author believes the Formal Opinion is not just wrong but the direct opposite of right; citation of such opinions may sometimes be ethically *required* by duty to client if they are the most persuasive precedents available in common sense terms. In 2001, the ABA House of Delegates adopted a resolution urging the circuit courts to make their unpublished decisions available through print or electronic media and to permit citation to relevant unpublished opinions. ABA Res. 115 (2001).

⁷⁴ In re Rules of the United States Court of Appeals for the Tenth Circuit, Adopted November 18, 1986, 955 F.2d 36, 37 n. 2 (10th Cir. 1992) (Holloway, C.J., dissenting), (quoting Reynolds & Richman, *The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the United States Court of Appeals* 78 Col. L. Rev. 1167, 1199 (1978). Survey research conducted in 1989 – a time when unpublished still meant unpublished – demonstrated, predictably, that institutional litigants do in fact collect, catalog and use unpublished opinions in ways not available to other litigants. See 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, 955-59 (1989).

Professor Robel also pointed out that institutional litigants have every incentive to “stack the precedential deck” by moving for reporter publication (and hence circuit-bindingness) of unpublished cases with favorable outcomes, while allowing the unfavorable decisions to remain occult. *Id.* at 958. She concluded that rules limiting citation of these opinions, far from helping the situation, actually “exacerbate the advantages that the selective publication plans give frequent litigants.” *Id.* at 940. Actually, she may be underestimating the advantage because, as mentioned earlier (*see* discussion *supra* in text at notes 33-34), some circuit rules require that motions for reporter publication be made shortly after an opinion is filed. For practical purposes, that would make the device available to institutional litigants and unavailable to the litigants in future cases.

Another concern is that, even if none of the lawyers knows about the occult opinion, the court or its law clerks *will* know about it. The court will not cite it, but it requires an enormous leap of faith to assume that a circuit judge, when faced with a fact pattern or legal issues that seem awfully familiar, will scrub his mind clean of all the nonbinding opinions he has written or read, and of all the thinking steps he or other judges took in reaching those earlier decisions, much less that his law clerks will be equally efficient at policing their own memories. Lawyers who cannot research the day-to-day rulings of the appellate bench in a particular area will be that much less prepared to counsel their clients. Binding or not, the unpublished opinions are a pretty good indicator of what Judge X thinks about a particular issue in a particular context, and a faithful recordation of what he does in eighty percent of his cases. If one lawyer can get that information and the other cannot, that is not fair.

A deeper problem must also be conjured with: Although the circuit rules may rationalize the nonbindingness of some opinions on the theory that they have nothing new to say, the inescapable fact, discussed throughout this Report, is that they often do break new legal ground. The widely felt suspicion that there are important decisions out there, but that they cannot be accessed, cannot be good for the law as an institution. As argued elsewhere in this Report, the anti-citation rules of some circuits are destructive to law and respect for law, but the practice of simply burying cases is comparably destructive.⁷⁵ Some commentators would disagree sharply with an assertion that the non-circuit binding opinions are reached on the same basis as binding, reporter published ones: “[W]e discovered that outcomes among unpublished opinions showed significant associations with political party affiliation, specific professional experiences, and other characteristics of judges adjudicating the cases.”⁷⁶ That suspicion can only be aggravated by a circuit’s unwillingness to tell the public what cases it is deciding, and how it is deciding them.

A New York Law School professor interested in “lesbian, gay, bisexual and transgendered legal issues” suspects that the courts are deliberately burying their decisions in these areas:

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.⁷⁷

⁷⁵ “[The nonbinding] decision must be able to withstand the scrutiny of analysis, against the record evidence, as to its soundness under the Constitution and the statutory and decisional law we must follow, and as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination.”

In re Rules of the United States Court of Appeals for the Tenth Circuit, Adopted November 18, 1986, 955 F.2d at 38 (Holloway, C.J., dissenting).

⁷⁶ Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 119 (2001). See also Robel, *supra* note 74 at 947-53. Like many writers, the authors of the *Stalking* article use the term “unpublished opinion,” to refer to both internet published and non-internet published nonbinding opinions, *i.e.*, synonymously with the present Report’s “nonbinding opinion.” It is not clear, from a layman’s reading of the authors’ multivariate analysis, that the inconsistencies noted in the nonbinding opinions are all that much more frequent than inconsistencies in binding opinions from the same database. That does not affect the legitimacy of the authors’ point; *all* adjudications that look like the rule of men rather than the rule of law – and not just the adjudications that are bound in the Federal Reporter – should be open to discussion, analysis and criticism, and either hiding them from the public *or* prohibiting discussion of them is dangerous to our cherished institutions.

⁷⁷ Arthur S. Leonard, Letter, *National Law Journal*, July 15, 2002 at p. A21.

Surely not. Surely, this is the good-faith but mistaken reaction of a passionate advocate who is frustrated by the law's failure to develop quickly enough, and in the direction he wants it to take. The problem, of course, is that his suspicion cannot be disproven, because all the data is under the haystack.

Many years ago, Justice Brandeis observed that “sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”⁷⁸ A core reason why judges write and publish opinions in the first place is that doing so will inspire public confidence in our courts and our system of laws. Are the nonpublishing circuit courts favoring friends or ruling willy nilly, secure in the knowledge that no one will know? Of course not, but a blackout of the great bulk of the opinion base cannot help but undermine public confidence, and a workable system of laws and courts depends on that confidence; there will always be the suspicion that nonpublication is a too-easy out for a judge who thinks that what she wants to do and what the law demands she do may not be exactly the same thing. In the nonpublishing circuits, a long and honored tradition of working in the sunshine has quietly slipped away. For circuit courts to tell the public and the bar that they cannot see four out of every five judicial opinions corrodes our jurisprudence and disservices the law, the public, the lawyers and the judges themselves.

The rotunda of the University of Pennsylvania Law School is graced by a quotation from Sir Edwin Coke: “The law is unknown to him that knoweth not the reason therefor, and the known certainty of the law is the safety of all.” Telling the public that 1,500 cases have been decided, but letting them know the “reason therefor” in only 300 of those cases, is not a wise policy.

C. LITIGANTS MUST BE FREE TO CITE NONBINDING OPINIONS.

i. THERE ARE GRAVE DOUBTS AS TO THE CIRCUITS' POWER TO IMPOSE ANTI-CITATION RULES.

Stated as an abstract proposition, a rule that lawyers cannot cite judicial statements they consider persuasive or criticize judicial statements they consider erroneous is unthinkable. Imposing prior restraints upon citizen references to the public words or acts of any public official – any judge, any mayor, any crossing guard – seems undeniably contrary to our treasured notions of freedom of speech and of the compact between citizens and their government. More narrowly, the common law and stare decisis are built on the premise that lawyers will use one judge's reasoning to persuade the next judge not that the first case controls the decision in the second case – that is relatively rare – but that its reasoning lights one step on the path the court should follow in addressing the present dispute. To tell lawyers (and therefore the public for whom they speak) that they must forswear eighty percent of the available reasoning is a remarkably radical step. It becomes even more radical when one considers the fact

⁷⁸ L. Brandeis, *Other People's Money* 62 (1933).

that these same circuits are willing to consider, as persuasive precedents, other courts' opinions that are just as nonbinding as their own.⁷⁹ The thinking cannot be that all less-than-optimally vetted analyses are to be eschewed but, rather, that the rulemaking tribunal does not want to risk being embarrassed by one of *its* less-than-optimally vetted holdings. That is a paltry excuse for gagging lawyers and their clients.

If one does not think of the nonbinding opinions as “precedents,” but merely as the recorded thoughts of sapient scholars, the common law tradition is that they can be cited as persuasive tools, just as the thoughts of Coke or Lewis Carroll, of Yogi Berra or Jonathan Swift, are so frequently cited in briefs and opinions.⁸⁰ A decision by courts to enjoin references to their own utterances should be examined very carefully.

Courts and commentators have grave doubts about the constitutionality of an anti-citation rule. In *Jones v. Superintendent, Virginia State Farm*,⁸¹ the Fourth Circuit acknowledged that its procedure for separating binding from nonbinding opinions was “imperfect” (although it was thought to pass constitutional muster) and went on to “concede, of course, that any decision is by definition a precedent, and that we cannot deny litigants and the bar the right to urge upon us what we have previously done.”

When the Tenth Circuit adopted (for a time) an anti-citation rule, its chief judge and others joined in a dissent, questioning the rule's constitutionality:

No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule.⁸²

The dissenters also noted that “at least one commentator has expressed concern over the due process and equal protection implications of no-citation rules adopted in the federal

⁷⁹ The rules of the Seventh and D.C. Circuits barring citation of non-reporter published cases from anti-citation tribunals smack more of courtesy or the golden rule than of an evaluation of the cases. As mentioned elsewhere, those circuits do cite non-circuit binding decisions of circuits that do not have anti-citation rules.

⁸⁰ See, e.g., *Zadvydus v. Davis*, 533 U.S. 678, 699 (1991) (Coke); *Rector v. Approved Fed. Sav. Bank*, 265 F.3d 248, 255 n.2 (4th Cir. 2001) (King, J., dissenting) (Carroll); *ACLU v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 305 (6th Cir. 2001) (Berra); *Newton v. Barish Chrysler-Plymouth Medical Plan*, No. 93-55575, 1994 WL 650013, at *2 (9th Cir. Nov. 15, 1994) (Swift); see also Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. Rev. 695, 711-12 (2000) (citations omitted):

None of the circuit rules prohibit litigants from citing to English cases, newspaper articles, international treaties, legislative histories, treatises and hornbooks, dictionaries, law review and journal articles, and even the works of philosophers and playwrights. To add further irony . . . these citable sources can themselves extensively discuss unpublished opinions while still serving as citable authority.

⁸¹ 465 F.2d 1091, 1094 (4th Cir. 1972).

⁸² In re Rules of the United States Court of Appeals for the Tenth Circuit, Adopted November 18, 1986, 955 F.2d at 37 (Holloway, C.J., dissenting).

courts.”⁸³ A recent article in the *Journal of Appellate Practice and Process* argues persuasively that anti-citation rules offend the speech and petition clauses of the First Amendment, violate the separation of powers and are ultra vires the federal courts’ Article III powers,⁸⁴ and a thoughtful student note in the *Boston College Law Review* takes the position that the anti-citation circuits, unlike the circuits that allow citation, are denying procedural due process to litigants.⁸⁵ Analogizing to cases condemning the truncation of, e.g., appellate review of punitive damages awards, the author opines that anti-citation rules fail a four-part test of procedural due process:

[T]he practice of citing prior judicial decisions: (1) is deeply rooted in common law tradition; (2) creates a presumption of unconstitutionality if removed; (3) lacks an adequate replacement procedure; and (4) was not abrogated in response to constitutionally justifiable societal transformation.⁸⁶

Other scholars stop just short of accusing the keepers of the Constitution from flouting it, but state strongly that anti-citation rules are offensive to deeply felt societal values and destructive of both law and courts.⁸⁷ And still others have questioned both the wisdom and the legality of anti-citation rules. In *County of Los Angeles v. Kling*,⁸⁸ Justice Stevens dissented from the summary reversal of a Ninth Circuit decision, but observed that reversal had been made easier by the circuit court’s use of a non-reporter published opinion:

As this Court’s summary disposition today demonstrates, the Court of Appeals would have been well advised to discuss the record in greater depth. One reason it failed to do so is that the members of the panel decided that the issues presented by this case did not warrant discussion in a published opinion that could be “cited to or by the courts of this circuit”. . . . That decision not to publish the opinion or permit it to be cited — like the decision to promulgate a rule spawning a body of secret law — was plainly wrong.⁸⁹

⁸³ *Id.* at n. 1 (citing Note, *Unreported Decisions in the United States Courts of Appeals*, 63 *Cornell L. Rev.* 128, 141-145 (1977)).

⁸⁴ Salem M. Katsch & Alex V. Chachkes, *Constitutionality of “No Citation” Rules*, 3 *J. App. Prac. & Process* 287 (2001).

⁸⁵ Wade, *supra* note 80 at 721-32.

⁸⁶ *Id.* at 721.

⁸⁷ For comments just this year, see, e.g., Jeffrey O. Cooper, *Citability and the Nature of Precedent in Courts of Appeals: A Response to Dean Robel*, 35 *Ind. L. Rev.* 423 (2002) (the assertion that some cases can be denuded of precedential force “seems to push the boundaries of judicial propriety, if not of constitutional principle;” Judge Kozinski “arguably demands too much of his own sources to support his argument that no-citation rules face no constitutional obstacle”); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 *Ind. L. Rev.* 399, 412-17 (2002) (a ban on citation is unacceptable to both judges and lawyers in real-world terms because it “strikes at the metaphorical heart of the common-law system”); Hellman, *supra* note 63 at 25 (“Although I would not argue that non-citation rules violate the First Amendment, they do implicate First Amendment concerns”).

⁸⁸ 474 U.S. 936 (1985) (mem.).

⁸⁹ *Kling*, 474 U.S. at 938 (Stevens, J., dissenting). In *Browder v. Director, Dep. of Corrections*, 434 U.S. 257, 258 (1978), the Supreme Court granted certiorari to review the Seventh Circuit’s anti-citation rule, but ultimately decided in the petitioner’s favor on other grounds, noting that “petitioner questioned the validity of the Seventh Circuit’s ‘unpublished opinion’ rule. We leave these questions to another day.” See Wade, *supra* note 80 at 713.

Judges have also questioned the *power* of circuit courts to adopt local appellate rules that – like the Second, Seventh and Ninth Circuit rules – purport to govern the conduct of judges and litigants in other tribunals, either because such rules exceed the appropriate scope of appellate rules,⁹⁰ or because they are inconsistent with a trial judge’s duty under Federal Rule of Civil Procedure 52(a) and Federal Rule of Criminal Procedure 12 to explain his reasoning: “I would violate these rules were I to fail to cite a source I actually used to inform my reasoning.”⁹¹ This clash between the judge’s conscience, honed by common law traditions, and the dictates of the anti-citation rules is very real. A respected trial judge in an anti-citation, non-internet publishing jurisdiction spoke of his dilemma: His refusal to give a certain jury instruction had led to a reversal by the intermediate appellate court, with a nonbinding, noncitable opinion. Now he faced the same issue in another case. He believed that his earlier ruling had been right, and he understood that he was perfectly free to rule the same way this time. He actually intended to do just that. On the other hand, he was incapable of erasing the earlier appellate ruling from his mind, and he believed strongly that he was obliged to inform counsel of that appellate decision because, among other reasons, it might inform both sides in assessing, trying, or settling the case. In other words, it was a precedent that both sides were entitled to know about and obliged to think about. Ultimately, conscience won. He did not follow the nonbinding opinion, but he did tell the lawyers of its existence.⁹²

The district judge’s remarks in *Caron v. United States*,⁹³ quoted earlier, might be read as suggesting that it is acceptable for anti-citation rules to muzzle the lawyers so long as they do not muzzle the trial judge. That reasoning, too, is unacceptable. Is not the lawyer’s duty to cite an authority the tribunal might or ought to find persuasive at least as solemn as the tribunal’s duty to cite the authority it does find persuasive? Is not the lawyer placed in an intellectually and ethically intolerable position if she is prevented from telling the judge – at any level of the system – about reasoning she finds persuasive and helpful to her client? Finally, is it not the client’s right to have the most persuasive authorities cited and considered by tribunals without the interference of a priori restrictions?

It is regrettable that the two recent Ninth Circuit sanctions opinions, *Sorchini* and *Hart v. Massanari*,⁹⁴ fail to address the constitutionality or legality of anti-citation rules. *Sorchini* does not mention those topics at all. *Hart* promises to do so, and then does not.

Hart has been most widely discussed for its holding that, contrary to the Eighth Circuit’s short lived *Anastasoff* holding, circuit courts are not constitutionally bound to make all their holdings circuit binding, but the immediate issue in *Hart* was whether an attorney should be

⁹⁰ *Griffy’s Landscape Maint., LLC v. United States*, 51 Fed. Cl. 667, 672 (2001) (dictum) (citing Fed. R. App. 1).

⁹¹ *Caron v. United States*, 183 F. Supp. 2d 156, n.7 (D. Mass. 2001). In a less measured tone, and in a different case, the same district judge referred readers to *Sorchini v. City of Covina*, 250 F.3d 706 (9th Cir. 2001), the dog bite sanctions case, “for an example of the silliness these non-citation rules cause.” *McGuinness v. Pepe*, 150 F. Supp. 2d 227, 235 n. 16 (D. Mass. 2001).

⁹² Of course, this simply took a burden off the judge’s shoulders and placed it on those of counsel, who now knew about the occult case but were told by the rule that they could not talk about it on appeal.

⁹³ 183 F. Supp. 2d at 156 n.7, discussed in text *supra* at note 91.

⁹⁴ 266 F.3d 1155 (9th Cir. 2001).

sanctioned for citing a nonbinding Ninth Circuit opinion in a Social Security appeal. It will be recalled that the earlier Eighth Circuit *Anastasoff* panel opinion was vacated as moot after the Internal Revenue Service changed its position on the mailing/receipt issue in deference to a recent decision in another judicial circuit. Ms. Anastasoff was given her refund and there was nothing left to fight about.⁹⁵ Thus, *Anastasoff's* constitutionality holding had died an indecisive death. When Mrs. Hart's attorney cited a nonbinding opinion, and the court issued an order to show cause, counsel defended his conduct on the theory that Ninth Circuit Rule 36-3 "might be unconstitutional." In the sanctions proceedings, Judge Kozinski launched his opinion with the following:

Anastasoff, while vacated, continues to have persuasive force. It may seduce members of our bar into violating our Rule 36-3 under the mistaken impression that it is unconstitutional. We write to lay these speculations to rest.⁹⁶

Sadly, Judge Kozinski's opinion does not deliver on its promise. It does not lay to rest the brooding question whether anti-citation rules are constitutional – indeed, it does not even talk about it. *Hart's* constitutional excursion ends with its conclusion that there can be nonbinding circuit opinions, and never reaches the questions whether litigants can constitutionally be enjoined from talking about them, or whether such prior restraints are within the powers of appellate courts.⁹⁷ One law professor, asked to comment on *Hart* just after the opinion was announced, had this to say:

It's a fine, scholarly opinion that effectively shoots down the weakest part of *Anastasoff*. But Judge Kozinski doesn't address the possible constitutional problems with a rule that bars even citing a prior court opinion.

⁹⁵ In an opinion authored by Judge Arnold – the same respected jurist who had written the panel decision – the en banc court granted the rehearing petition, declared the controversy moot, vacated the panel holding and remanded the case to the district court for the vacation of the original judgment in favor of the government.

It is surely correct that the "mailing or receipt" issue and the attendant prayer for relief had been mooted after the panel decision. But it is less clear, as a procedural or jurisdictional matter, why the en banc court did not simply deny the petition for rehearing as moot instead of granting it and vacating panel and district court decisions that were rendered at times when the case and controversy were very real. *Cf., e.g., Selcke v. New England Ins. Co.*, 2 F.3d 790 (7th Cir. 1993) (error to vacate circuit court decision that became moot after decision was rendered).

⁹⁶ *Hart*, 266 F.3d at 1159 (citations omitted). The dissonance is remarkable: The court tells us in *Hart* that the vacated holding of a sister circuit has "persuasive force," and in *Sorchini*, 250 F.3d at 708-08, that a decision-in-good-standing of the deciding court itself a priori has no persuasive force.

⁹⁷ Because Eighth Circuit Rule 28A permits citation of nonbinding opinions, the *Anastasoff* panel itself did not have to rule on the constitutionality of an anti-citation rule. In dictum, the court said:

Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat.

Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000).

A litigant has the right to tell the court how an earlier litigant was treated.⁹⁸

Because the *Hart* and *Sorchini* panels ultimately decided not to impose sanctions, there can be no direct Supreme Court review of their anti-citation holdings. Someone will actually have to be sanctioned, or a party will actually have to claim that it was denied its fair rights by operation of an anti-citation rule, before such a case is ripe. It will require a courageous attorney and client.⁹⁹

But the circuit courts should consider these issues without being pushed into it. Courts are the guardians and repositories of civil liberties. It ill behooves them to put in place, and then to refuse to discuss, a system of rules that forbids discussion of the Courts' own words and deeds.

ii. THE NONBINDING OPINIONS ARE NOT UNIFORMLY REDUNDANT, AND ARE SOMETIMES NEEDED.

The anti-citation circuits use two main arguments to justify the wholesale quarantine of their own decisions. One, of course, is the rationale articulated in the rules of the various circuits – that these cases add nothing to the body of law: We put the important decisions in the “A” pile and the unimportant ones in the “B” pile and you shouldn’t even look at the “B” pile decisions, much less talk about them. The prior restraint will not hurt you or your client because you really have no use for those “B” pile decisions. Everything you will ever need is over here in the “A” pile. The second rationale is articulated by Judge Kozinski in *Hart*, and by Judges Kozinski and Reinhardt in their article, *Please Don't Cite This!*¹⁰⁰ – that the nonbinding decisions are correct (of course), but are not written for the ages, or calculated to lay down principles for all cases; that the judges are too busy to write better or more universally applicable nonbinding opinions; that, if lawyers start citing these “B” pile opinions, the judges will work harder to write better ones; and that this, in turn, will lead to a degradation in the quality

⁹⁸ Statement of Stephen Barnett, Boalt Hall School of Law Professor, *quoted in* Jason Hoppin, *Circuit Sticks with its Opinion Policy*, Phila. Legal Intelligencer, Sept. 27, 2001, at 1.

A recent Federal Circuit opinion, *Symbol Technologies, Inc. v. Lemelson Med. Foundation*, 277 F.3d 1361. (D.C. Cir. 2002) follows *Hart's* reasoning, resulting in a similarly incomplete analysis, even though the immediate issue was whether the court should consider two non-circuit binding opinions that were squarely on point. The court refused to consider or discuss the cases. *See discussion infra* at 36.

⁹⁹ In separate federal and state court suits, a California attorney sued the Ninth Circuit and the California Supreme Court, asserting that those courts' nonbindingness and anti-citation rules were unconstitutional. Both cases were dismissed with prejudice on standing grounds because the plaintiff-attorney had not cited a nonbinding opinion in a case, had not sought leave to cite one and had leave denied, and had not baited the bear by citing nonbinding opinions in his suit papers. The dismissals were affirmed on appeal. *Schmier v. United States Court of Appeals*, 279 F.3d 817 (9th Cir. 2002), *affirming* 136 F. Supp. 2d 1048 (N.D. Cal. 2001); *Schmier v. Supreme Court*, 93 Cal. Rptr. 2d 580 (Cal. App. 2000). The state court appellate opinion does address federal and state constitutional issues, but suffers from the same infirmities as *Hart* in that it seems to assume that answering the “bindingness” question answers the very different anti-citation question. *See Schmier v. Supreme Court*, 93 Cal. Rptr. 2d at 584-87.

¹⁰⁰ Kozinski & Reinhardt, *supra* note 7.

of the “A” pile opinions, the circuit binding ones, because the judges will not have time to do them justice.¹⁰¹

Neither argument is persuasive.

The fundamental problem with the first thesis is that it is wrong: The judges and their screening clerks are not and never will be infallible in determining what is or is not a novel holding or a helpful discussion, or what will be one when considered in the context of a legal dispute that hasn’t happened yet, and the functions for which past decisions may or must be cited are infinitely variable and largely unpredictable.

A recent article points out that

[a]s an empirical matter, plenty of unpublished decisions have been accepted for review and reversed by the Supreme Court, demonstrating that it is difficult to make prospective judgments about which legal issues are ‘easy’ in the abstract. . . . Consider [also] the number of unpublished opinions that involve lengthy dissents.¹⁰²

Similarly, the fact that many nonbinding opinions are accompanied by dissents speaks volumes:

In the first half of 2001, this circuit has declined to publish at least four opinions in which a judge dissented, indicating that at least one of our number felt that each of those cases was not an easy application of existing law to indistinguishable facts.¹⁰³

In *Nat’l Classification Comm. v. United States*, Judge Wald pointed to data reporting that “[a]fter reviewing the unpublished decisions issued by the court in 1983, the subcommittee [of

¹⁰¹ These days, no one even attempts to defend non-reporter publishing on its original rationales – that it would limit expense, save space and simplify research. Those considerations have been mooted by the passage of time and the march of technology. *See Caron v. United States*, 183 F. Supp. 2d 149, 156 n.7 (D. Mass. 2001):

Ironically, citation rules have had no effect whatsoever on actual publication and the associated legal research costs. Lawbook publishers have simply gone ahead and published the so-called “unpublished” judicial decisions, noting them as such. . . . Indeed, the lawbook publishers must relish the additional pages of decisions now being devoted to debating the propriety of the no-citation rules.

¹⁰² *Boggs & Brooks*, *supra* note 67 at 20-21 (citations omitted). The fact that a significant number of nonbinding decisions are reviewed and reversed is particularly striking when one considers that these cases are the most likely to escape the attention of tribunals – either circuit courts *en banc* or the Supreme Court – considering requests for further review:

Given the large number of suggestions for rehearing *en banc* which come through the court in a year – 244 during 1984 – an unpublished opinion with no precedential effect and no opinion to highlight the issues and reasoning of the court is not likely to draw significant attention from the overburdened judges in our court. *See generally Reynolds & Richman*, [*supra* note 74 at] 1203 (discussing reasons why unpublished opinions are less likely to be reviewed by the Supreme Court).

Nat’l Classification Comm. v. United States, 765 F.2d 164, 174 (D.C. Cir. 1985) (separate statement of Wald, J.).

¹⁰³ *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 262 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing *en banc*) (citations omitted)

the Court’s Advisory Committee] concluded that 40 percent of the decisions arguably should have been published under the court’s governing criteria.”¹⁰⁴

A conspicuous example of a case whose groundbreaking import was misperceived is *Christie v. United States*,¹⁰⁵ the unreported tax refund opinion that was held to be controlling by the panel in *Anastasoff*. *Christie* was not just pertinent to *Anastasoff*, it was on all fours with *Anastasoff*. Moreover, *Christie* must have broken new ground in the Eighth Circuit; otherwise, the parties would have been citing earlier reporter published cases on the topic instead of the obscure *Christie*, and the entire constitutional contretemps would not have been triggered, at least not by *Anastasoff*.

Of course, one need not accept the *Anastasoff* panel’s view that *Christie* had to be *binding* precedent in order to concede the obvious, that it was *relevant* precedent because it addressed the same statutory provision and same mailing/receipt issue that was before the court in *Anastasoff*, and appears to have had very similar facts. Nor, of course, must one concede that *Christie*’s outcome was *correct* in order for this to be so. In the event that the *Anastasoff* panel disagreed with a relevant but nonbinding *Christie*, it could have either distinguished *Christie* or, if it was indistinguishable, declined to follow it. Either way, a discussion of *Christie*’s analysis could and should have figured in any discussion of the issues in *Anastasoff*. Trial judges and appellate judges understand that persuasive logic can be found anywhere, even in nonbinding opinions. Even those courts that most categorically abjure the citation of their own nonbinding precedents will borrow from the nonbinding opinions of other courts.¹⁰⁶

Imagine, though, what would have happened if *Christie* (and later *Anastasoff*) had arisen in the Ninth Circuit, where nonbinding opinions are published in Westlaw and Lexis but cannot be cited. Everyone would have known about *Christie* but no one – not plaintiff, not defendant, not even the court – would have been allowed to talk about it. A one-time “A” pile - “B” pile predictive decision, possibly made by a screening clerk, would have precluded any reference to the only in-circuit decision that was close to being on all fours with the pending *Anastasoff*. Imagine an appellate lawyer trying to explain to his client that yes, our circuit court recently decided a case that had operative facts very much like your facts, and yes, the judges embraced the precise application of law to facts for which we are arguing, and yes, you will win your case if the same court rules the same way a second time and yes, the opinion seems very well reasoned, but no, I will not remind the court of its decision because I would be punished if I did that. The court says the case was decided correctly, but that I am not allowed to talk about it. Actually, I am sorry I told you about the case because it doesn’t actually exist as far as you are concerned.

¹⁰⁴ *National Classification Comm.*, 765 F.2d at 173 (separate opinion of Wald, J.).

¹⁰⁵ No. 01-1564, 1992 U.S. App. LEXIS 38446 (8th Cir. March 20, 1992).

¹⁰⁶ See, e.g., *Acosta v. Artuz*, 221 F.3d 117, 123 n.4 (2d Cir. 2000); *Barnes v. United States*, 199 F.3d 386, 389 (7th Cir. 1999); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 831 (9th Cir. 1999) (all anti-citation courts citing non-reporter-published 10th Circuit opinions for their “persuasive value” on a “material issue”); cf., *City of Newark v. United States Dep’t. of Labor*, 2 F.3d 31, 33 n.3 (3d Cir. 1993) (citing unpublished 6th Circuit opinion: “Although we recognize that this unpublished opinion lacks precedential authority, we nonetheless consider persuasive its evaluation of a factual scenario virtually identical to the one before us in this case”).

Moreover, the circuits are naive if they believe that forbidding discussion of their non-binding opinions will prevent lawyers and their clients from giving them precedential consideration outside the courtroom – in evaluating and taking positions. Precedents have lives beyond the precincts of appellate briefs and opinions. Once opinions are released by the courts, the courts no longer own them and can control them in only one narrow corner of the world.

Consider *Williams v. Dallas Area Rapid Transit*.¹⁰⁷ Two years before *Williams*, in a case of first impression, a Fifth Circuit panel had ruled that the transit authority was an arm of the state and had Eleventh Amendment immunity to an employment discrimination suit. *Anderson v. Dallas Area Rapid Transit*.¹⁰⁸ In *Williams*, an age discrimination case, the Fifth Circuit panel analyzed *Anderson's* reasoning, decided it was wrong, and held in a circuit binding opinion that DART was not an arm of the state after all, and that it had no Eleventh Amendment immunity.¹⁰⁹

Judge Jerry E. Smith wrote the *Williams* panel opinion refusing to follow *Anderson*, but he dissented vigorously from the later decision to deny rehearing en banc, because he recognized that lawyers and clients do read unpublished opinions – lawyers have a duty to read them – and Judge Smith thought the entire court should confront the messy consequences of a system in which not all cases are created equal:

What is the hapless litigant or attorney, or for that matter a federal district judge or magistrate judge, to do? The reader should put himself or herself into the shoes of the attorney for DART. That client is told in May 1999, by a panel of this court in *Anderson*, that it is immune, on the basis of a “comprehensive and well-reasoned opinion.” Competent counsel reasonably would have concluded, and advised his or her client, that it could count on Eleventh Amendment immunity.

Then, in March 2000, in the instant case, a federal district judge, understandably citing and relying on the circuit’s decision in *Anderson*, holds that “it is firmly established that DART is a governmental unit or instrumentality of the state of Texas.” In February 2001, however, a panel, containing one of the judges who was on the *Anderson* panel, reverses and tells DART that, on the basis of well-established Fifth Circuit law from 1986, it has no such immunity. One can only wonder what competent counsel will advise the client now.¹¹⁰

¹⁰⁷ 242 F.3d 315 (5th Cir.), *rehearing denied*, 256 F.3d 260 (5th Cir. 2001).

¹⁰⁸ 180 F.3d 265 (5th Cir. May 6, 1999) (table), *affirming* No. 3:97-CV-1834-BC, 1998 WL 686782 (N.D. Tex. Sept. 29, 1998), *cert. denied*, 528 U.S. 1062 (1999).

¹⁰⁹ Overruling *Anderson* was unnecessary because *Anderson* was nonbinding.

¹¹⁰ *Williams v. Dallas Area Rapid Transit*, 256 F.3d at 261 (Smith, J., dissenting from denial of rehearing en banc).

Actually, Judge Smith does not go far enough; he does not advert to all the interested persons other than DART that would consider an *Anderson* opinion – lawyers advising their DART employee clients, the clients themselves, the insurance brokers and the financial planners, the institutions that rate DART’s bonds and commercial paper, to name just a few.

Perhaps results such as that in *Williams* are the inevitable consequence of the practice of having nonbinding opinions; indeed, similar results can happen even when, infrequently, a binding precedent is overruled en banc. What is *not* an inevitable consequence, however, is a situation in which everyone has to blink history and pretend that the earlier decision never happened. What would have happened if *Anderson* and *Williams* had involved another city’s transit authority – New York’s, Chicago’s, San Francisco’s, Washington’s, Boston’s – in a circuit where nonbinding precedents are quarantined? To the people in the world (as distinguished from the people in the robing room), *Anderson* would have been a powerful precedent: The transit company and its lawyers would have been comforted by *Anderson*; they would have told lawyers for disgruntled employees or ex-employees about *Anderson* when they negotiated with them; those lawyers would have taken *Anderson* into account when evaluating their clients’ cases, and so on. But if a *Williams* case had actually come to court in an anti-citation circuit, it would have been played out as a sort of reverse Hans Christian Andersen tale, in which everyone sees the Emperor’s clothes but has to say he is naked! Everyone would have had to assert that the body of the law was bare of cases addressing the pertinent issues and that *Williams* was what it was not – a case of first impression. In those circuits that impose their anti-citation rules on the lower courts, every piece of writing and oral argument in the case – from the earliest motion practice through the pretrial memoranda, the jury instructions, the post trial motions and the appellate briefing, argument and decision – would have been an imitation of real life, as it studiously ignored the one case that the parties were actually thinking about. That is not a rational way to behave! The well reasoned analysis by which the *Williams* panel demonstrated the incorrectness of *Anderson* would never have seen the light of day. To the clients on both sides – the transit company and, particularly, the two similarly situated plaintiffs who had obtained dissimilar results – the law would simply have seemed capricious and wholly random.

Hypothetical scenarios like these come very close to what actually happens in an anti-citation circuit. In *Sorchini v. City of Covina*,¹¹¹ a lawyer encountered a recent opinion that was remarkably close on its facts and law, mentioned it, and incurred the wrath of the bench.

Less than a year before *Sorchini*, the circuit court had rendered and internet published its nonbinding opinion in *Kish v. City of Santa Monica*,¹¹² a Civil Rights Act case. Anthony James Kish had been bitten by a police dog in the course of his criminal apprehension. He brought a Section 1983 “excessive force” suit, went to trial, lost, and appealed. In the court of appeals, he argued that the district judge had erred in refusing to instruct the jury that the police had a duty to warn him of their intention to set the dog loose (or, perhaps, of the dog’s intention to bite him). The Ninth Circuit affirmed in a succinct opinion that seems perfectly well reasoned. The court noted that “[a]s Kish conceded before the district court, no past

¹¹¹ 250 F.3d 706 (9th Cir. 2001).

¹¹² 216 F.3d 1083 (table), No. 98-56297, 2000 WL 377771 (9th Cir. April 13, 2000).

decision by this court or the Supreme Court can be read for the rather broad proposition that ‘the police should give a warning before force is used against a person.’”¹¹³

Now comes Tino Sorchini, a Covina, California car thief who was bitten by (presumably) another police dog while attempting to elude his pursuers by crawling under a parked truck. Like Mr. Kish, he brought a Civil Rights Act suit, went to trial, requested a “duty to warn” instruction, lost, appealed, and lost again. The “not appropriate for publication” opinion did not mention the earlier *Kish* opinion.¹¹⁴

The City of Covina’s counsel had not been so circumspect. *Kish* was the only Ninth Circuit opinion that addressed a Section 1983 “duty to warn” theory in a context like her case. Perhaps (and this is rank speculation) she was worried about the conflict between *Kish* and the Fourth Circuit’s *Vathekan* opinion. For whatever reason, she cited the *Kish* language quoted *supra*. She won her case, but was ordered to show cause why disciplinary sanctions should not be imposed. In those proceedings, she offered the not so persuasive argument that her conduct had come within an exception to the Ninth Circuit’s anti-citation rule.¹¹⁵ In a separate *published* opinion, Judge Kozinski and District Judge Zapata made short work of that defense,¹¹⁶ and went on to stress that the court really meant it when it said that lawyers cannot discuss the 85% or so of Ninth Circuit cases that are under quarantine, even a case that looks as much like the present case as *Kish* looked like *Sorchini*. The court chose not to impose sanctions in this particular case, stating that (i) it accepted counsel’s representation that she had a good faith misunderstanding of the anti-citation rule, and (ii) the court itself took part of the blame for authoring nonbinding opinions that contained enough information to “tempt lawyers to cite them as precedent.”¹¹⁷ However, “[t]his excuse is valid only in this case.”¹¹⁸ Thus, Ninth Circuit lawyers will eschew the “B” pile cases or be punished.¹¹⁹

¹¹³ *Kish*, 2000 WL 377771, at *1. By the time *Kish* came to the appellate court, at least one circuit had upheld a Section 1983 claim with a holding that “failing to give a verbal warning before deploying a police dog to seize someone is objectively unreasonable and a violation of the Fourth Amendment.” *Vathekan v. Prince George’s County*, 154 F.3d 173, 179 (4th Cir. 1998), *citing* *Kopf v. Wing*, 942 F.2d 265 (4th Cir. 1991). The careful language of the *Kish* panel quoted in text suggests that the Fourth Circuit law was brought to the attention of both the district and circuit courts. If so, they would have been aware that the *Kish* ruling would conflict with the law of another circuit. That situation expressly calls for reporter publication under several circuits’ rules (4th Cir. R. 36(a)(v); 5th Cir. R. 47.5.1(d); 6th Cir. R. 206(a)(2); 7th Cir. R. 53(c)(1)(iv)(C); 8th Cir. R., App. I § 4(b); D.C. Cir. R. 36(a)(2)(E); Fed. Cir. IOP 10 § 4(f)), but Ninth Circuit Rule 36-2 does not expressly say that.

¹¹⁴ *Sorchini v. City of Covina*, 2001 WL 474535 (9th Cir. May 4, 2001).

¹¹⁵ Counsel argued that her disclosure of the *Kish* panel’s conclusion came within an exception (9th Cir. R. 36-3(b)(ii)) to the noncitation rule because it was done “for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys’ fees, or the existence of a related case.”

¹¹⁶ Judge Tallman dissented from the per curiam decision without explanation.

¹¹⁷ *Sorchini*, 250 F.3d at 709. It is ironic that an appellate court should be chastising itself for writing intelligible opinions.

¹¹⁸ *Id.* at n.2.

¹¹⁹ Research discloses no case in any of the circuits in which, before *Sorchini*, the citation of nonbinding opinions resulted either in disciplinary sanctions or the threat of them. *Cf.* *Knopf v. Scott Wetzel Serv.*, No. 95-35695, 1997 WL 31542, *1 at n. 1 (9th Cir. Jan. 24, 1997) (“We reject appellees’ suggestion that this court should allow appellees to cite unpublished memorandum dispositions as precedent, as a ‘sanction’ for appellants’ having done so.”); *Seibel v. A.O. Smith Corp.*, No. 97-C-0874-S, 1998 WL 315067, *9 (W.D. Wisc. Apr. 2, 1998) (“The Court has not considered unpublished opinions . . . in reaching its decision in this matter. If any sanction is required, that is sanction enough”). State appellate courts, however, have imposed sanctions. *See Dwyer v. J.I. Kislak Mortg. Corp.*, 13 P.3d 240, 244 (Wash. Ct. App. 2000) (\$500 penalty for citing uncitable opinion on an *Anastasoff* theory); *Hagan v. Gulrud*, 442 N.W. 2d 570, 573 (Wis. Ct. App. 1989) (\$100 penalty); *Yockey v. Yockey*, 750 S.W.2d 420 (Ark. Ct. App. 1988) (en banc) (per curiam) (briefs stricken with leave to file complying substitute briefs).

The court stated that “*Kish* is not precedent, [so] neither *Kish*’s holding, nor *Kish*’s observations about the state of the law, have any bearing Unpublished dispositions are neither persuasive nor controlling authority” *Sorchini*, 250 F.3d at 708-09.

It is impossible to accept this reasoning. Even if one accepts that there can constitutionally be nonbinding opinions – by no means a dead issue after *Anastasoff* and *Hart* – it is simply impossible to buy into the proposition that they cannot ever be persuasive. Persuasiveness is in the eye or ear of the audience; it cannot be legislated nor can it be predicted with certainty. What is persuasive in one context may be totally unpersuasive in another, and what persuades one judge may fail to move another. And the degree of persuasiveness of a particular fact, object, conversation or legal discussion is infinitely elastic and dependent on uncountable situational variables. It is a matter of weight, and its nature is such that its presence or absence cannot be determined on a “batch” basis, but only on a one-situation-at-a-time basis. Even then, it will remain an inherently subjective process.

It is equally impossible to credit Judge Kozinski’s more recent argument, made to Congress, that anti-citation rules are necessary because lawyers are attempting to defraud the circuit courts when they cite unpublished opinions:

Attempting to defraud the court in one’s pleadings is the kind of conduct that may be punished, even if similar out-of-court conduct may not be. The prohibition against citation of unpublished dispositions addresses a *specific kind of fraud on the deciding court* – the illusion that the unpublished disposition has sufficient facts and law to give the deciding court useful guidance.¹²⁰

The argument is unworthy of its distinguished author. Circuit judges – the hypothetical recipients of the hypothetically fraudulent representation – are not about to be gulled; they know better than anyone the limitations of non-circuit binding opinions. Indeed, if there is that imbalance of knowledge that is generally thought to be the badge of fraud, it is in this instance the recipients who have the better knowledge. The court decided the cited case, and members of the court knew all the facts in the record; the citing lawyer knows only what the Westlaw or Lexis opinion tells him. Even in anti-citation circuits, as we have seen, the judges themselves cite the non-reporter published opinions of other circuits when they are thought to have persuasive value;¹²¹ the lawyer is doing no more.

It is doubly troubling that the anti-citation rules, in some if not all anti-citation circuits, reach down to enjoin reference to nonbinding circuit court opinions in trial courts, because the circuit judges are now telling other judges what the latter judges can find persuasive. What is

¹²⁰ Alex Kozinski, Testimony Before the Subcommittee on Courts, The Internet, and Intellectual Property, Oversight Hearing on Unpublished Judicial Opinions, at 11 (June 27, 2002)(*on file with the author and available at <http://www.house.gov/judiciary/kozinski062702.htm>* (emphasis added)).

¹²¹ See *supra* note 106.

persuasive and useful to one judge on the court of appeals may be very different from what is persuasive and useful to a trial judge, bankruptcy judge, or magistrate judge with different life experience. Elsewhere in this Article¹²² we discuss an attorney’s dilemma concerning his ability to cite a then recent nonbinding Federal Circuit opinion, *Berry Sterling Corp. v. Pescor Plastics, Inc.*,¹²³ that explained an equally recent binding decision of that same circuit, *Finnigan v. Int’l Trade Comm’n*.¹²⁴ Counsel knew that his trial judge, unlike the Federal Circuit judges, was not vastly experienced in Patent Act cases. The expert patent judges who joined in *Berry Sterling* may have believed that their conclusion — that two interested witnesses’ testimony was adequate corroboration in a patent validity dispute — was old hat, and did not “add significantly to the body of law.” To the trial judge, however, *Berry Sterling’s* clear articulation of this proposition was not old hat at all; indeed, he had been shown all the earlier circuit binding opinions and, without *Berry Sterling*, he was prepared to rule exactly the other way. That is one of the problems with a rule by which one set of judges imposes blanket citation and “use” restrictions on other judges. One judge’s yawn is another judge’s eureka.

Similarly, the statement that the cases are “not precedent” does not make it so, as the Fourth Circuit acknowledged almost thirty years ago in *Jones v. Superintendent*.¹²⁵ “Any decision is by definition a precedent.”

As a rule, judges are not very tolerant of speakers who fiddle with the meanings of words to suit their purposes. Judges love to quote Lewis Carroll characters, and they are particularly fond of pointing to Humpty Dumpty¹²⁶ when chastising writers and speakers who, rather than bringing an act or thing within the meaning of a word, simply move the word’s definition to suit the act or thing.¹²⁷ But that is exactly what courts are doing when they presume to tell us that an opinion that might be highly persuasive in the real world is not persuasive in court because they have a rule that says so. They are saying that the court “is to be master.” They are legislating the weather.

iii. THE COURTS ARE PUTTING CASES IN THE WRONG PILES FOR THE WRONG REASONS.

Remember that the anti-citation rules, like the non-circuit bindingness rules, rest exclusively on the “redundancy” principle; the “B” pile case does not say anything new. No circuit has a rule that says an opinion addressing an important issue should be put off limits to cita-

¹²² See discussion *supra* note 46-52 and accompanying text.

¹²³ 215 F.3d 1351 (table), No. 98-1381, 1999 WL 674514 (Fed. Cir. Aug. 30, 1999).

¹²⁴ 180 F.3d 1354 (Fed. Cir. 1999).

¹²⁵ 465 F.2d 1091, 1094 (4th Cir. 1972), discussed *supra* at note 80.

¹²⁶ “When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

Lewis Carroll, *Through the Looking-Glass and What Alice Found There*, 123 (The MacMillan Co. 1899).

¹²⁷ See, e.g., *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 905 (9th Cir. 2001); *Lambert v. Ackerley*, 180 F.3d 997, 1013 (9th Cir. 1999); *Sessler v. United States*, 7 F.3d 1449, 1451 (9th Cir. 1993).

tion because the authors have not found the time to think the question through, or to give it the “law review article” treatment that Judges Kozinski and Reinhardt talk about in *Please Don’t Cite This*,¹²⁸ or to ensure that its pronouncements are parsed in a manner worthy of general rather than this-case-only application.

That, however, is the basis upon which the anti-citation rules are defended. Thus, in *Hart*, Judge Kozinski explains that nonbinding opinions are “fully considered,” and “reflect a reasoned analysis,” but that “the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases.”¹²⁹ With all due respect, the decision to cite or not to cite an opinion should not depend on its merit as literature but on its merit as a reasoning tool. Similarly, the attorney who cites a case is probably not overly concerned with the question whether the opinion’s reasoning is always applicable in every case; she is talking about *this* case, and she is entitled to do that, and to argue that she is presenting a useful tool for the tribunal to think about. Authors – even judge-authors – are to be forgiven if they are sensitive about their work, if they want only their best work to be shown, and shown in its best light. No author wants to see his less polished efforts flyspecked by the critics. The process, however, is not about the sensibilities of judges as authors; it is about building the corpus juris and, at bottom, it is about doing justice on the most informed possible basis.

Furthermore, as *Williams v. Dallas Area Rapid Transit*¹³⁰ and other cases make clear, it is fatuous to suppose that a significant opinion on an important subject will not find its way into the consciousness of lawyers and parties just because a circuit court has labeled it uncitable. More harm will be done by sealing the case in a bubble and leaving it on the virtual books, in pristine condition, than by doing what lawyers and judges are paid to do — analyze, criticize, crash test. *Please don’t cite this!* tells us that “we make sure the result is correct,” and *Hart* insists that the non-circuit binding opinions are “fully considered” and a “reasoned analysis.” But *Hart* also acknowledges in the same breath that, “although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning”¹³¹ It is hard to reconcile these messages. If panels really are deciding cases without knowing just why they are deciding them – if they are guess-hitting — then these are exactly the cases that ought to be looked at most closely in the law’s unending search for just that “precise reasoning” that drives the development of judge-made law.

The difference between the theory and the practice of anti-citation rules is harshly lit in the recent *Symbol Technologies, Inc. v. Lemelson Medical Foundation*,¹³² where the Federal Circuit simply refused to discuss two longstanding non-circuit binding opinions that were squarely on

¹²⁸ See *supra* note 7.

¹²⁹ *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001).

¹³⁰ 242 F.3d 315 (5th Cir.), *rehearing denied*, 256 F.3d 260 (5th Cir. 2001). *Williams* and the related *Anderson v. Dallas Area Rapid Transit*, 180 F.3d 265 (5th Cir. May 6, 1999) (table), are discussed at 31-32, *supra*.

¹³¹ *Hart*, 266 F.2d at 1178.

¹³² 277 F.3d 1361 (Fed. Cir. 2002).

point and squarely contrary to the panel majority's decision, and that had probably been looked to by lawyers and business people for guidance over a period of almost fifteen years: In a nutshell, the *Symbol Technologies* question was whether a patent could be invalidated on the basis of an equitable doctrine, "prosecution laches," even though the patent holder had complied with the letter of the law. This equitable defense was rooted in several Supreme Court decisions, but the latest of those decisions dated from 1938,¹³³ long before the passage of the Patent Act in 1952. The Federal Circuit had twice held, in nonbinding opinions, that the equitable defense had been written out of some aspects of patent prosecution law by the enactment of the statute.¹³⁴ Binding or nonbinding, *Bott v. Four Star Corp.* and *Ricoh Co. v. Nashua Corp.* were important windows on the thinking of the Federal Circuit. Patent scholars commented on them,¹³⁵ and it is hard to avoid the conclusion that lower court judges were informed by *Bott* and *Ricoh* while carefully avoiding citing them.¹³⁶ Undoubtedly, too, countless patent lawyers had advised countless clients on the implications of *Bott* over a decade and a half, and those clients had conducted their affairs with view toward *Bott* and later *Ricoh*.

Then, in *Symbol Technologies*, the panel majority held that the 1952 statute had not eliminated the prosecution laches defense after all! Remarkably, the court expressly refused even to talk about *Bott* and *Ricoh*, despite appellee's *Anastasoff* argument. After agreeing with *Hart's* analysis of the "bindingness" issue, the majority simply "decline[d] to consider the nonprecedential cases."¹³⁷ A casual reader would have had no idea just what opinions the court was refusing to consider. We know that *Bott* and *Ricoh* were pointed out to the panel because Circuit Judge Pauline Newman talked about the two cases extensively in her dissent. She embraced their reasoning and urged that *Bott* and *Ricoh* be followed even though they were not circuit binding. She pointed out that "this court has twice rejected the position now taken [by the majority]."¹³⁸

Symbol Technologies shows pernicious problems at two different stages of the circuits' procedures. The *Symbol Technologies* opinion itself emerges as a merely a shadow of judicial reasoning, because the court refused to confront or even talk about its own important earlier

¹³³ The cases were *Crown Cork & Seal Co. v. Ferdinand Gutmann Co.*, 304 U.S. 159, 58 S. Ct. 842 (1938); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 58 S. Ct. 849 (1938); *Webster Elec. Co. v. Splitdorf Elec. Co.*, 264 U.S. 463, 44 S. Ct. 342 (1924); *Woodbridge v. United States*, 263 U.S. 50, 44 S. Ct. 45 (1923).

¹³⁴ *Bott v. Four Star Corp.*, 848 F.2d 1245 (Table), No. 97-04424, 1988 WL 54107, at *1 (Fed. Cir. May 26, 1988) ("equitable considerations" cited by the Supreme Court had no "continued viability" after the passage of the Patent Act); *Ricoh Co. v. Nashua Corp.*, 185 F.3d 884 (Table), No. 97-1344, 1999 WL 88969, at *3 (Fed. Cir. Feb. 18, 1999) (courts should not adopt "equitable safeguards . . . when Congress itself has declined to do so").

¹³⁵ See Raymond P. Niro, *Equitable Defenses in Patent Cases: Equities Count*, 424 PLI/Pat 115, 138-39 (1995) ("[t]he *Bott* decision is correct."); Phil N. Makrogiannis, *Review of the 1999 Patent Law Decisions of the United States Court of Appeals for the Federal Circuit*, 49 Am. U. L. Rev. 1381, 1413-14 (2000); Thomas G. Eschweiler, *Ford v. Lemelson and Continuing Application Laches*, 79 J. Pat. & Trademark Off. Soc'y 401, 420-23 (1997).

¹³⁶ Cf. *Ford Motor Co. v. Lemelson*, 42 U.S.P.Q.2d 1706 (D. Nev. 1997), (reviewing the pre-Federal Circuit authorities cited in *Bott* and tracking *Bott's* logic without ever saying the B word). The trial judge in *Symbol Techs.* had an easier task. He simply adopted the reasoning of *Ford Motor*. See *Symbol Techs. v. Lemelson Med.*, No. 97CV0397, 2000 WL 33709453, at *6 (D. Nev. Mar 21, 2000), *reversed*, 277 F.3d 1361 (Fed. Cir. 2002).

¹³⁷ *Symbol Techs.*, 277 F.3d at 1368.

¹³⁸ *Symbol Techs.*, 277 F.3d at 1370 (Newman, J., dissenting). Lower courts do not doubt that *Symbol Technologies* marked a "significant change in the law." See *Oxaal v. Internet Pictures Corp.*, 2002 WL 486704 (N.D.N.Y. Mar. 27, 2002) at *2. Like the pre-*Symbol Technologies* district judges, the magistrate judge in *Oxaal* carefully avoided mentioning *Bott* or *Ricoh* by name. See *id.*

decisions, decisions that should have informed the exposition of its reasoning. To an even greater extent, the decision in *Bott* itself (and probably in *Ricoh*) shows how far the “A” pile/ “B” pile sorting process has strayed from its announced purposes. *Bott* and *Ricoh* were important decisions. How did they wind up in the “B” pile? The *Bott* judges certainly couldn’t have thought they were disposing of an unremarkable, redundant, and easy case – they were announcing that Supreme Court decisions no longer applied even though they had never been overruled, and that defenses grounded in fairness had been expunged by Congressional silence. A holding like that is closer to heresy than to humdrum, and it is astonishing that it was not either given the dignity of circuit binding status or avoided by an en banc reconsideration. As it happens, the Federal Circuit has a pretty detailed checklist of factors that are supposed to govern the “A” pile/”B” pile decision, and the *Bott* panel ignored a fistful of them in opting for the “B” pile.¹³⁹ This is the bogeyman that lurks out in the shadows of Judge Kozinski’s discussion in *Hart* and Chief Judge Mayer’s discussion in *Symbol Technologies*. Instead of making their “B” pile designations on the basis of a case’s unimportance or lack of factual or legal novelty, the judges are sometimes denying binding precedential status to a case when they aren’t absolutely sure that their logic is unassailable, or that they can persuade another panel member to reach the same result for the same reason if that reasoning is to have circuit binding power. In short, cases are sometimes consigned to the “B” pile not because they are too easy but because they are too *hard*. One might argue that, for busy courts, these are valid reasons for refusing circuit binding stature to such an opinion, but there is *no* principled argument for the proposition that its reasoning cannot be discussed.

Bott and *Ricoh* are not the only examples of cases wrongly sent to the “B” pile: *Christie v. United States*¹⁴⁰ was a small case, but a case of first impression, and the Eighth Circuit’s Rules provide for reporter publication of an opinion that “establishes a new rule of law.”¹⁴¹ The decision in *Kish*¹⁴² was in conflict with at least one other circuit’s ruling on police dogs and duty to warn. *Anderson*¹⁴³ was the Fifth Circuit’s first decision addressing the Eleventh Amendment immunity of the transit authority serving a great metropolitan area. *Berry Sterling*¹⁴⁴ was an overt effort to untangle an obvious intracircuit conflict involving the interpretation of the corroboration requirement under the Patent Act. In each of these cases, an important and probably controversial analysis was wrongly characterized as a non-event and, in theory, a “redundancy.”

¹³⁹ See Fed. Cir. IOP 10 § 4, (calling for publication when “(b) An issue of first impression is treated. (c) A new rule of law is established. (d) an existing rule of law is criticized, clarified, altered or modified. . . . (f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued. (g) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved. . . (i) A new interpretation of a Supreme Court decision, or of a statute, is set forth. (j) A new constitutional or statutory issue is treated”).

¹⁴⁰ No. 91-2375 MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992). *Christie*, the tax case followed by the *Anastasoff* panel, is discussed *supra* at 20-21, 30.

¹⁴¹ 8th Cir., R., App. I§4(a).

¹⁴² 218 F.3d 1083 (table), No. 98-56297, 2000 W.L. 3777771 (9th Cir. April 13, 2000), discussed *supra* at 32-34

¹⁴³ 180 F.3d 265 (5th Cir. May 6, 1999) (unpublished table decision).

¹⁴⁴ 215 F.3d 1351 (table), No. 98-1381, 1999 WL 674514 (Fed. Cir. Aug. 30, 1999), discussed *supra* at 16-17, 35.

iv. THE ANTI-CITATION RULES ARE UNWORKABLE IN PRACTICE AND YIELD ABSURD RESULTS.

On occasion, the discrepancy between the avowed purpose of having nonbinding opinions and their actual selection leads panels – even in anti-citation circuits — to acknowledge that a non-circuit binding precedent is in fact a useful element of the corpus juris:

This Court has recently been presented with an attorney’s fee issue nearly identical to the one currently before this Court. *See LeTourneau v. Pan Am. Fin. Serv., Inc.*, 151 F.3d 1033 (7th Cir.1998) (unpublished disposition). We find the analysis in this unpublished case to be persuasive.¹⁴⁵

Likewise, the Third Circuit has ignored its own protocol on at least one occasion, citing a non-circuit binding opinion and even acknowledging that it was a *benchmark!*

As appellants correctly note, our decision in *Woods* is unpublished, and thus is not regarded as binding authority. However, because of the case’s factual similarity to that before us, we look to the decision as a paradigm of the legal analysis we should here follow.¹⁴⁶

Similarly, district courts will sometimes cite non-circuit binding opinions, even when those courts sit in circuits that expressly or implicitly abjure the practice.¹⁴⁷

Even judges who are straining to adhere to their circuits’ anti-citation rules have difficulty in figuring out just what does and does not come within those rules: Granting that the rules bar reference to an opinion as persuasive authority, do they also preclude distinguishing the case? Criticizing it? Citing it to demonstrate an intercircuit conflict? Citing it as subsequent history of a lower court decision? Citing the lower court decision itself? Assuming that an attorney is obligated to tell the tribunal that his persuasive district court case was reversed on appeal, is he permitted to explain that it was “reversed on other grounds,” or does that cross the anti-citation line?

In *United States v. Lopez-Pastrana*,¹⁴⁸ a dissenting Ninth Circuit judge argued that the majority’s decision would create an intercircuit conflict, and predicted that the contrary cir-

¹⁴⁵ Uphoff v. Elegant Bath, Ltd., 176 F.3d 399, 407 n.2 (7th Cir. 1999).

¹⁴⁶ Drinker v. Colonial School Dist., 78 F.3d 859, 864 n. 12 (3d Cir. 1996) (citations omitted), *following* Woods v. New Jersey Dep’t of Educ., No. 93-5123, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) 439, 440 (3d Cir. Sept. 17, 1993).

¹⁴⁷ *See* Suboh v. City of Revere, 141 F. Supp. 2d 124, (D. Mass. 2001) (First Circuit district court citing First Circuit nonbinding opinion); Amgen, Inc. v. Hoechst Marion Roussel, Inc. 126 F. Supp.2d 69, 135-36 (D. Mass 2001) (First Circuit district court citing Federal Circuit nonbinding opinions); Luciano v. United States, No. 00-CV-1725 (FB), 2000 WL 1597771, at *1 (E.D.N.Y. Oct. 23, 2000) (Second Circuit district court citing Second Circuit nonbinding opinion); Griffy’s Landscape Maint., LLC v. United States, 51 Fed. Cl. 667, 672 (2001); Watson v. Sec’y of Dep’t of Health & Human Serv., 2001 WL 1682537, at *18 n. 33 (Fed. Cl. Dec. 18, 2001) (court whose decisions are reviewed by Federal Circuit citing Federal Circuit nonbinding opinions “as helpful authority, albeit not binding precedent”).

¹⁴⁸ 244 F.3d 1025 (9th Cir. 2001).

cuits were not likely to change their positions. He cited nonbinding decisions from anti-citation circuits and others, but explained that “I do not cite these dispositions for their precedential or persuasive value but, rather, simply to note their existence.”¹⁴⁹ That idea, that one is simply noting the existence of an opinion rather than looking to its persuasive content, sounds suspiciously like what got counsel in trouble in *Sorchini*.¹⁵⁰ Similarly, it is not clear whether the Second Circuit thought of itself as citing (or, to use its own phraseology, “otherwise using”) nonbinding opinions when in *Agee v. Paramount Communications, Inc.*,¹⁵¹ it said that an issue “has arisen with some frequency in the context of sanctions awards and often is addressed in unpublished opinions,” went on to cite (with descriptive squibs) nonbinding opinions from the Ninth Circuit and several other circuits, and then “place[d] the bar on notice” that it was doing exactly what those panels had done. Isn’t that what lawyers call the use of persuasive precedent? Wasn’t the Second Circuit *following* the nonbinding opinions? It also is not clear whether the Seventh Circuit meant to violate its own anti-citation “courtesy” rule when, in *Barrow v. Falck*,¹⁵² it looked to a non-reporter published Ninth Circuit opinion for assistance in interpreting a reporter published opinion from the same circuit. And the Seventh Circuit most assuredly did not think it was breaking its own rule when, in *Beaver v. Grand Prix Karting Ass’n*,¹⁵³ it took an attorney to task for a sanctionable omission because he had cited the reporter published decision of the Idaho District Court as persuasive authority, but had failed to note that the Ninth Circuit had reversed with a nonbinding (and hence noncitable) opinion.

To one degree or another, however, each of these decisions is an affront to the logic of the anti-citation rules, because each cites a nonbinding opinion, each *uses* a nonbinding opinion for some purpose, each acknowledges the existence and content of the nonbinding opinions, and most of them *reason from* the nonbinding opinions. And the essence of the anti-citation rules is that those opinions *do not exist* for anyone other than the parties. Analytically, a nonbinding holding that is in conflict with the court’s present holding cannot present an intercircuit conflict if, as *Sorchini* claims, it is bereft of precedential content, nor can such a holding illuminate the reasoning of an earlier binding opinion if, as Judge Kozinski believes, it has no persuasive heft. Indeed, even a nonbinding opinion *reversing* a district court decision should be entirely irrelevant if the anti-citation rulemakers are to be taken at their word, and attorneys should be free to do exactly what the lawyer did in *Beaver* – cite the published district court decisions, which canonically are “persuasive,” while ignoring the unpublished reversals, which canonically are not.

This is, of course, an absurd result – a reversal is a reversal is a reversal– but it is also a result that is compelled by the reasoning of the anti-citers. It is the rule that is absurd, not its transactional application.

¹⁴⁹ *Lopez-Pastrana*, 244 F.3d at 1036 (Graber, J., dissenting).

¹⁵⁰ See *Sorchini*, 250 F.3d 706 (9th Cir. 2001); *cf.*, *O’Hair v. Board of Educ.*, 805 P.2d 40 (Kan. Ct. App. 1990) (“[W]e . . . consider offensive the remark . . . that, while an unpublished opinion cannot be cited as authority, our rules do not prohibit counsel from ‘calling the court’s attention to its prior decision for whatever use of that prior decision the court might desire to make.’”).

¹⁵¹ 114 F.3d 395, 400 (2d Cir. 1997).

¹⁵² 977 F.2d 1100, 1103 (7th Cir. 1992).

¹⁵³ 246 F.3d 905, 912 n.2 (7th Cir. 2001).

Even the Ninth Circuit recognizes that nonbinding opinions have *some* significance to people other than the particular parties bound by the judgments or orders. Ninth Circuit Rule 36-3 allows counsel to cite nonbinding opinions in order to demonstrate an intracircuit conflict between nonbinding opinions in a petition for rehearing. Why? If the cases are without precedential value of any sort, and if nobody is allowed to think about them or talk about them, who cares whether they are in conflict with one another? The answer of course is that the circuit courts understand that judges and lawyers will read and consider their nonbinding opinions, that they will shape judges' and lawyers' analysis and valuation of claims and defenses, that they will ultimately affect the conduct of real people in the real world, and that there is a positive value to having them not be in conflict with one another.¹⁵⁴ If that is so, then it is once again impossible to shout out that all these opinions are without persuasive content and it is impossible to defend an anti-citation rule that rests on the premise that nonbinding opinions are not *allowed* to be persuasive.

We should not forget that even a case that really belongs on the “B” pile one day may call for “A” pile treatment another day because of the circumstances surrounding its citation; the anti-citers don't seem to grasp this. For example, it was the timing of *Berry Sterling*¹⁵⁵ that would most have made it relevant and helpful to the district court. Regardless of how many pre-*Finnigan* binding opinions of the Federal Circuit supported the *Berry Sterling* view, *Berry Sterling* was different because all of the earlier opinions were rendered before *Finnigan* weighed in. *Berry Sterling* was a post-*Finnigan* case that expressly explained and distinguished *Finnigan*. This is an important point: the novelty, the pertinence of an opinion or holding is no more static than the common law itself. The holding in *Berry Sterling* that two interested witnesses add up to the statutorily requisite corroboration might not have been significant at all the day before the Federal Circuit issued its binding but confusing opinion in *Finnigan*. It might not have been significant a year later, if a new circuit binding opinion either embracing or rejecting the same point of view came along. But it *was* significant on this day, for this lawyer in this particular set of circumstances. This fundamental truth – that a particular opinion, holding or statement may have more persuasive merit or significance on one day than on another day – is the sort of consideration that would almost surely be ignored by circuit judges and their clerks in deciding whether to put their new opinions on the “A” pile or the “B” pile. As it turned out, the uncitable *Berry Sterling* was “good law” on the two-witnesses issue, and the reporter published *Finnigan* was not. *Finnigan* was robustly criticized¹⁵⁶ and the law seems now to have settled back to its pre-*Finnigan* status even though *Finnigan* has never been expressly overruled: testimony can be corroborated by other testimony, without physical evidence.¹⁵⁷ Today, *Berry*

¹⁵⁴ Thus, in *United States v. Rivera-Sanchez*, 222 F.3d 1057 (9th Cir. 2000), the court issued a published opinion that expressly superseded 20 earlier nonbinding opinions that were in conflict with each other.

¹⁵⁵ *Berry Sterling Corp. v. Pescor Plastics, Inc.*, 215 F.3d 1351 (Table) (No. 98-1381), 1999 WL 674514 (Fed. Cir. August 30, 1999). *Berry Sterling* and the two then recent reporter published cases it tried to reconcile, *Thomson S.A. v. Quixote Corp.*, 16 F.3d 1172, 1174-75 (Fed. Cir. 1999), and *Finnigan v. Int'l Trade Comm'n*, 80 F.3d 1354, 1367 (Fed. Cir. 1999), are discussed *supra* at 16-17.

¹⁵⁶ See Charles L. Gholz, *a Critique of Recent Opinions of the Federal Circuit in Patent Interferences*, 82 J. Pat. & Trademark Off. Soc. 296, 300-01 (2000) (*Finnigan* was a “confused and confusing opinion”).

¹⁵⁷ See *Loral Fairchild Corp. v. Matsushita Elec. Indus. Co.*, 266 F.3d 1358, 1364 (Fed. Cir. 2001); *Sandt Tech., Ltd. v. Resco Metal and Plastics Corp.*, 264 F.3d 1344, 1351 (Fed. Cir. 2001); *Eisenberg v. Alimed, Inc.*, 243 F.3d 555 (Table), No. 98-1317, 2000 WL 1119473, *4 (Fed. Cir. Aug. 8, 2000).

Sterling is no longer an important case, but only because later cases stand for the same proposition. Of course, that is probably small comfort to litigants who, in the interim, had to do battle over *Finnigan* without being able to cite *Berry Sterling*.¹⁵⁸ Would the results of such battles have been different if the judges could have been told about *Berry Sterling*? That is impossible to say, but the judges should not have been denied the benefit of all the pertinent law and reasoning.

But what if, like *Anderson v. DART*, the nonbinding *Berry Sterling* reasoning had not accurately predicted the “binding” law! What if the ultimate precedentially binding decision of the Federal Circuit had been to the contrary, and what if *Berry Sterling* (or *Christie* or *Kish*) slipped through a crack because it did not receive the “law review article” treatment that a circuit promises to give to a case before it is placed on the “A” pile! If that were to happen, it would not be very different from what happens with other nonbinding authorities – district court opinions, other circuits’ opinions and the like. It would be one bit of reasoning added to the complex admixture of precedents and analogies that courts consider all the time in mining the corpus juris. If it added nothing useful, that is, if it did not seem to help persuade the tribunals in new cases, it would fall into disuse on that basis alone. If it was wrong, in the sense that it misarticulated the application of law to facts in the *Berry Sterling* situation itself (not to mention future analogous situations), it would be far better for the development of the law if that were pointed out, as the *Williams* court did for *Anderson*, rather than having an entire body of counsel thinking that decisions were raining down haphazardly. Even in that event, the case would have contributed to the maturation and refinement of the point of law. According to Judge Kozinski, “[t]his ability to develop different interpretations of the law among the circuits is considered a strength of our system.”¹⁵⁹ It “allows experimentation with different approaches to the same legal problem, so that when the Supreme Court eventually reviews the issue it has the benefit of ‘percolation’ within the lower courts.”¹⁶⁰ But by putting discussion of its nonbinding cases off limits to themselves and counsel, the circuit courts are pulling the plug on the percolator. More, they are dooming themselves to conduct the same “experiments” over and over again and, each time, to throw their results in the dustbin because the overwhelming majority of their decisions are not only not binding, they actually cease to exist for all practical purposes. The opinion in *Agee v. Paramount Communications, Inc.*,¹⁶¹ makes an informative if inadvertent point. There, the Second Circuit cited three separate nonbinding Ninth Circuit opinions (but no binding ones) standing for a single proposition of law. Can it be that each of those three Ninth Circuit cases was briefed, argued, analyzed, and decided by a panel of judges who labored in blissful ignorance of the other two cases, or who knew about them but closed their eyes tight? Can it be that the exact same question addressed in those three opinions will have to be decided again and again, in perpetuity, always from the ground up and always on a clean slate? That is not good news for the judicial process or the taxpayers.

¹⁵⁸ Cf., e.g., *Process Resources Corp. v. Delta Air Lines, Inc.*, No. 98 Civ. 5648 (JGK), 2000 WL 145114, *5 (S.D.N.Y. Feb 3, 2000); *K & K Jump Start/Chargers, Inc. v. Schumacher Elec. Corp.*, 82 F. Supp. 2d 1012, 1018 (W.D. Mo. 2000).

¹⁵⁹ *Hart v. Massanari*, 266 F.3d 1155, 1173 (9th Cir. 2001).

¹⁶⁰ *Hart*, 266 F.3d at 1173.

¹⁶¹ 114 F.3d 395, 400 (2d Cir. 1997).

The other and more likely alternative, however, is worse: That is the possibility that the judges, clerks and staff attorneys are looking at the earlier non-reporter published opinions and using them to erect occult lines of cases that lawyers are not permitted to discuss, but that govern (or at least inform) the disposition of a present case. In a recent article, Dean Robel employs survey data to show that district and circuit judges regularly read the nonbinding opinions: ¹⁶² “[I]f they are reading the opinions regularly, they must believe that the decisions either predict outcomes or provide direction.”¹⁶³ What this means is that the nonbinding opinions are used as precedents *behind* the bench, even if they cannot be mentioned *before* the bench. It means that the law as argued is different from the law as applied. It means that there is, after all, “a body of secret law,” just as Justice Stevens argues in *Kling*.¹⁶⁴

Electronic publishing and online research have increased the chances that non-reporter published decisions will be real-world precedents for the judges and staff attorneys. The paper and buckram libraries on which many senior lawyers and judges cut their teeth are things of the past. The headnotes and digests we treasured are quaint artifacts, relics of a day when the scope of one’s research was essentially limited by what was in the official reports and the printed digests. In those days, publication really did mean reporter publication.

All is changed. Today’s younger lawyers (many of whom have become older lawyers while our backs were turned) choose the computer as their first line of research. Their search method is word association, Boolean algebra, not digests and headnotes. Cases are read from screens and printouts, not books. This is how law clerks, and even many circuit judges, do their research today. And that means that they do not give their first attention to whether the “book” version is in West’s Federal Reporter or West’s Federal Appendix. It is the most natural thing in the world for a law clerk, reading the briefs in a Civil Rights Act dog bite case like *Sorchini*, to go to Westlaw and tap out a search for “dog /s bit! /p 1983.” And up pops *Kish*! Will she read *Kish*? Of course. Will the panel judges read *Kish* in similar circumstances? Almost certainly. Will they discuss it among themselves? We do not know, but we do know that everybody – law clerks, lawyers, partners, associates – will have *Kish* on their minds if it is pertinent, regardless of whether they cite it or think of it as “precedent.” If they like the *Kish* analysis (or the *Christie* or *Berry Sterling* analysis) that will be reflected in their own analyses, regardless of whether they talk about *Kish* as *Kish*. If they do not like it they will distinguish it, even if they do not mention its name. If that is the fact, and it is, then the nonbinding case should be discussed out in the open; lawyers should not have to play charades.

V. THE FEARS OF AN OPEN FLOODGATE AND A LOSS OF QUALITY ARE UNFOUNDED.

As mentioned earlier, Judge Kozinski’s *Hart* argument for appellate courts’ power to create a class of non-circuit binding opinions is scholarly and exhaustively researched. How-

¹⁶² Robel, *supra* note 87 at 404-08

¹⁶³ *Id.* At 407.

¹⁶⁴ See *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting).

ever, the court’s exposition of the separate question – whether courts can forbid litigants from citing nonbinding opinions, or punish their doing so – suffers badly by comparison. Apart from the court’s failure to address the constitutionality of its anti-citation rule, its exposition of a “need” to preclude the citation of nonbinding opinions rings very hollow:

An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court’s decision. Deciding a large portion of our cases in this fashion frees us to spend the requisite time drafting precedential opinions in the remaining cases. Should courts allow parties to cite to these dispositions, however, much of the time gained would likely vanish. . . . Faced with the prospect of parties citing these dispositions as precedent, conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. . . . This new responsibility would cut severely into the time judges need to fulfill their paramount duties: producing well-reasoned published opinions and keeping the law of the circuit consistent through the en banc process. The quality of published opinions would sink as judges were forced to devote less and less time to each opinion.¹⁶⁵

Unlike the earlier *Anastasoff*-directed analysis, the opinion contains nothing by way of evidence or authority to demonstrate that allowing lawyers to cite a *Kish* or a *Christie* would lead to any of these bad results. This is telling, because empirical information *should* be available. The Fourth, Sixth, Eighth, and Tenth Circuits have all internet published their nonbinding opinions, and allowed counsel to cite them, for quite some time now. The *Hart* court cited not a jot of evidence for either of the two consequences that one would expect if *Hart*’s fears were warranted: (a) that nonbinding opinions in those circuits are more detailed, and their preparation more time consuming, than in the anti-citation circuits that also publish on the internet (the Second, Seventh, Ninth, District of Columbia, and Federal Circuits) and (b) that the quality of reporter published opinions in the former group of circuits is discernibly lower, or that significantly less time is invested in those opinions, than in the anti-citation circuits. It is all speculation, and speech should not be strangled on speculation.

Judge Kozinski’s position is also rooted in the prediction that, once the finger is taken out of the dike, the Ninth Circuit will be flooded with briefs and arguments citing nonbinding opinions. Once again, no evidence of a comparable experience in the other circuits is given, and the thought is hugely counterintuitive. First, if a “B” pile opinion case is truly redundant – that is, if it really deserves “B” pile treatment under the circuit’s rule — it would take a remarkably foolish lawyer to cite the me-too case rather than the circuit binding precedent it echoes. Second, appellate brief writers – ask them – never have enough pages or words in the

¹⁶⁵ *Hart*, 266 F.3d at 1178 (citations omitted).

budget.¹⁶⁶ They are not about to squander their precious treasure on endless string cites to redundant opinions. And, if lawyers know one thing these days, it is that the circuit courts do not like to hear about their nonbinding opinions, and that it is a good idea to steer clear of those opinions unless (in the words of Eighth Circuit Rule 28A(h)) “no published opinion of this or another court would serve as well,” that is, when counsel thinks his nonbinding case is a *Christie*, a *Kish*, a *Berry Sterling*, or a *Bott*. Lawyers like to cite the best available authority, and the nonbinding opinion will rarely be that. And it is not necessary, or in anyone’s interest, for overworked judges to change their approach to nonbinding opinions and begin neglecting the “A” pile opinions just in case, occasionally, a “B” pile opinion happens to be cited. As with any purportedly persuasive authority, the limitations of the particular “B” pile opinion can be addressed if and when it becomes arguably pertinent and is cited in a brief or argument.

IV. CONCLUSION

Lawyers should be mindful of the *Hart* panel’s admonition that “[w]riting a precedential opinion . . . involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants.”¹⁶⁷ By the same token, winning - or, more accurately, trying to win by every honorable means – is a solemn duty of lawyers, and they do this by marshaling their most persuasive words for the court. It is no disrespect to suggest that the circuits’ adoption and enforcement of anti-citation rules places a very high value on the art of opinion-writing while being unduly dismissive of the lawyer’s right and duty, in the service of litigants, to tell a judge what that judge, or another judge has done in the past.

The world of the trial lawyer is a pragmatic one. Trial lawyers are used to working with all manner of judicial pronouncements from circuit courts, district courts, and state appellate and trial courts. They operate in an environment where virtually none of their authorities is “binding precedent” in the sense that it is guaranteed to determine the outcome of the case or even the determination of a particular important aspect of the case. (For obvious reasons, disputes whose resolution is governed by a clear “binding precedent” do not command much of a trial lawyer’s attention or pay the rent.) A trial lawyer is a borrower; he lives in a world of conceptual shreds and patches, borrowing a piece of logic from this case, another from that case, an appealing quotation from yet another case, and cobbling them all together into the structure of his brand new case. His art is in the creation of that new structure from the bits and pieces of the old cases.

Trial lawyers understand that a ruling of a coequal court, a remote appellate court or even the trial judge herself in another case will not bind the court in the present case. They understand, too, that even a circuit binding holding of the governing circuit is binding only to the extent it cannot be distinguished. Thus, trial lawyers are not much troubled if a piece of case law from the governing circuit has only persuasive rather than binding force. What trial

¹⁶⁶ Cf. Fed. R. App. P. 32(a).

¹⁶⁷ *Hart*, 266 F.3d at 1177.

lawyers are looking for is cogent analysis that will, when repackaged in the context of their own case, be as persuasive to the present tribunal as it was to the tribunal that decided the earlier case. To be sure, lawyers need to know what decisions are binding on their tribunal, but they will happily accept and use a persuasive discussion that is not binding. They should not be hampered in doing their job, and they surely should not be punished for it. Most important, their clients should not be denied the best advocacy the attorneys can give them, even when that advocacy entails discussing an opinion that the authors would prefer to ignore. ♦

