

ARTICLES

THE COMMON LAW'S CASE AGAINST NON-PRECEDENTIAL OPINIONS

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I. INTRODUCTION

United States courts of appeals and a number of state appellate courts permit their judicial panels to designate certain decisions as unworthy of publication and as “non-precedential” even though an opinion has been written that justifies them.¹ The designation is based on an assessment by the decisional panel that the resolution of the appealed issues has not added new law to the jurisdiction’s already existing body of law.² Judge Richard

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1. See Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251, 253 tbl.1, 258 tbl.2 (2001) (providing text of court rules). See also *Unpublished Judicial Opinions: Oversight Hearing Before the Subcomm. on Courts, the Internet and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Hearing*] (referencing the table following the statement of Alex Kozinski, Judge, United States Court of Appeals for the Ninth Circuit), available at <http://legal-method.com/hearing.htm>.

2. See, e.g., 1ST CIR. R. 36(b)(1) (“The [publication] policy 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.”); 2D CIR. R. 0.23 (stating that under certain circumstances, “no jurisprudential purpose would be served by a written opinion”); 3D CIR. R. App. I, IOP 5.3 (“An opinion . . . that appears to have value only to the trial court or the parties is designated as not precedential and is not printed as a slip opinion”); 4TH CIR. IOP 36.3 (mandating nonpublication if the “case would have no precedential value”); 5TH CIR. R. 47.5.1 (supporting nonpublication if decisions “merely decide particular cases on the basis of well-settled principles of law”); 7TH CIR. R. 53(c)(1)(i) (publishing an opinion if the decision “establishes a new, or changes an existing rule of law”); *id.* at R. 53(c)(1)(iii) (supporting publication if the decision “criticizes or questions existing law”); *id.* at R. 53(c)(1)(iv) (supporting publication if the decision “constitutes a significant and non-duplicative contribution to legal literature”); 11TH CIR. R. 36–1 (supporting nonpublication if the “opinion would have no precedential value”); D.C. CIR. R. 36(a)(2)(A) (recommending publication if the decision presents a “substantial issue . . . of first impression”); *id.* at R. 36(a)(2)(B) (recommending publication if the decision “alters, modifies, or significantly clarifies a rule”); *id.* at R. 36(a)(2)(C) (supporting publication if the decision “calls attention to an existing rule of law that appears to have been *generally* overlooked”) (emphasis added); *id.* at R. 36(a)(2)(D) (supporting publication if the decision “criticizes or questions existing law”); *id.* at R. 36(a)(2)(E)

Posner has described this criterion as “imprecise and nondirective.”³ An empirical study “casts serious doubt on whether the official criteria for publication of opinions provide a meaningful guide to the judges.”⁴ Once a decision-with-opinion receives the “non-precedential” label, it may not be used as authority in future cases by any of the jurisdiction’s courts, and lawyers are prohibited from citing it in their briefs and oral arguments.⁵ These opinions were once called “unpublished” and were distributed only to the parties to the appeal, but they are now widely available through online databases⁶ and through the Federal Appendix, a new West publication.⁷ This Article uses the noun “non-precedent” and the adjective “non-precedential” to refer to these opinions.

The selective publication policy evolved in the precomputer era when courts and judicial councils worried about their physical ability to publish hard copies of the ever-increasing number of court opinions, the costs to the legal community of acquiring and storing voluminous law reporters, and overwhelming law-finding devices.⁸

(supporting publication if the decision “resolves an apparent conflict in decisions”); FED. CIR. R. 47.6(b) (“An opinion . . . which is designated as not to be cited as precedent is one unanimously determined by the panel issuing it as not adding significantly to the body of law.”).

3. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 165 (1996).

4. Donald R. Songer, Danna Smith & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 984 (1989).

5. See *Hearing*, *supra* note 1 (Judge Kozinski’s testimony). This is the strict version of the policy. 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; FED. CIR. R. 47.6(b). Some circuits allow citation of non-precedent cases as persuasive authority. See 5TH CIR. R. 47.5.4; 8TH CIR. R. 28A(i); 10TH CIR. R. 36-3(B)(1); 11TH CIR. R. 36-2. Three circuits allow unpublished opinions to be cited as binding precedent, but discourage their use. See 4TH CIR. R. 36(c); 6TH CIR. R. 28(g); D.C. CIR. R. 28(c)(1)(B) (stating that unpublished dispositions entered on or after Jan. 1, 2002 may be cited as precedent). Judges in the Third Circuit do not cite unpublished opinions as authority, 3D CIR. App. I, IOP 5.7, but do not forbid lawyers from citing them.

6. See *Hearing*, *supra* note 1 (testimony of Arthur Hellman, Professor of Law, University of Pittsburgh Law School) (stating that eleven of thirteen federal circuits make unpublished opinions available to Westlaw and LexisNexis).

7. See generally Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 THE GREEN BAG: AN ENTERTAINING J. OF L. 259 (2002) (studying the initial volumes of the Federal Appendix and uncovering numerous lengthy and disputed opinions).

8. See A REP. OF THE COMM. ON USE OF APP. CT. ENERGIES OF THE ADVISORY COUNCIL ON APP. JUSTICE, NO. 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 8 (1973) [hereinafter STANDARDS]. See also Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 556 (1997) (“[T]he arguments in favor of the limited publication plans were necessarily premised on legal storage and research as it then existed—on the printed page.”). The non-precedent policy traces back to 1964 when the Judicial Conference recommended that federal courts publish only “those opinions which are of general precedential value.” ADMIN. OFFICE OF THE U.S. CTS., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Mar. 16-17, 1964) [hereinafter JUDICIAL CONFERENCE]. Courts started to implement the policy in 1973 when it was strongly recommended by a

The non-precedent court rules and the practices that evolved under them were a “radical departure from any court practice of the past.”⁹ Designating these decisions as non-precedential and forbidding their citation in later cases were natural companions to their inferior publication status. To permit citation by lawyers would create a market for these opinions and thereby defeat the cost-saving goal; further, only wealthier litigants could enter this market.¹⁰ Both justifications have been eliminated by technology,¹¹ but the policy remains, having gathered new justifications, such as the energy and time saved by large appellate caseloads handled by insufficient numbers of judges¹² and the maintenance of “consistency and clarity” in circuit law.¹³

Whatever the justification, the number of non-precedential opinions currently outnumber by far the ones that count as authority, reaching a four-to-one ratio in the federal circuits as a whole.¹⁴ All United States courts of appeals have controls on citing unpublished opinions: Some ban it

council comprised mostly of appellate judges, some quite prominent. See STANDARDS, *supra*, at 5–21. Historical details of the policy’s growth are provided in several articles. See, e.g., Salem M. Katsh & Alex V. Chachkes, *Constitutionality of “No-Citation” Rules*, 3 J. APP. PRAC. & PROCESS 287, 290–96 (2001); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 575–84 (1981) [hereinafter Reynolds & Richman, *An Evaluation*]; William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168–72 (1978); Kenneth Anthony Laretto, Note, *Precedent, Judicial Power, and the Constitutionality of “No-Citation” Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037, 1039–43 (2002).

9. Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 113 (2000).

10. See STANDARDS, *supra* note 8, at 19; DONNA STIENSTRA, FED. JUD. CTR., UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 47 (1986). A survey of federal government lawyers with ready access to unpublished opinions through internal distribution demonstrated substantial use of these opinions in making litigation or settlement decisions. 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, 958–59 (1989).

11. See generally Shuldberg, *supra* note 8 (arguing that the costs of digitally retrieving and storing cases have decreased considerably, and that cases can be accessed on the Internet at public libraries).

12. See, e.g., 1ST CIR. R. 36(a) (“The volume of filings is such that the court cannot dispose of each case by opinion.”); 2D CIR. R. 0.23 (“The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial time effectively.”). See also Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221–22 (1999) (presenting statistics on judges’ increasing caseloads in contradistinction to the scanty increase in judgeships).

13. See *Hearing*, *supra* note 1 (Judge Kozinski’s testimony).

14. See Laretto, *supra* note 8, at 1039–40 (citing 2000 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 44 tbl.S-3). The rate was about fifty percent in the early 1980s. See STIENSTRA, *supra* note 10, at 40 tbl.2.

outright¹⁵ while others permit citation for persuasive value.¹⁶ A majority of states ban citation of unpublished opinions in their appellate courts.¹⁷

Some movement can be noted away from the practice of using non-precedent, which has dominated in the past three decades. The United States Court of Appeals for the District of Columbia now permits all of its decisions to be cited as precedent.¹⁸ The Ninth Circuit has invited litigants to comment on its no-citation policy, and its advisory committee on rules will make recommendations to the court.¹⁹ The Ohio Supreme Court is now posting all opinions of Ohio appellate courts on its website,²⁰ has abolished the prior distinction between “controlling” and “persuasive” opinions,²¹ and permits citation of “[a]ll courts of appeals opinions . . . as legal authority”²² The Wisconsin Supreme Court is reconsidering its rule prohibiting the citation of unpublished opinions.²³ The Texas Supreme Court has abolished the “do not publish” designation for civil cases, and all civil precedents may be cited for their precedential value.²⁴ The Texas Rules of Appellate Procedure now state that “[a]ll opinions of the courts of appeals are open to the public and must be made available to public reporting services, print or electronic.”²⁵ Finally, the American Bar Association recommends that courts publish all decisions and permit citation to them.²⁶

The current nationwide reexamination of non-precedent practice²⁷ was sparked by a courageous decision of the Eighth Circuit and justified in a

15. See *supra* note 5. See generally The Honorable Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 193–97 (1999) (advocating prohibitions on the citation of unpublished opinions).

16. See *supra* note 5.

17. See *Hearing*, *supra* note 1 (Judge Kozinski’s testimony).

18. See *id.* (Hellman’s testimony).

19. See 9TH CIR. R. 36–3 advisory committee’s notes.

20. See OHIO R. CT. 9(A), available at <http://www.sconet.state.oh.us/Rules/reporting/>.

21. See *id.* at 4(A).

22. See *id.*

23. See Wis. Sup. Ct. Order No. 01-04 (Sept. 4, 2001), available at <http://www.wisbar.org/wislawmag/2001/10/scto3.html> (permitting publication of, and citation to part of an opinion as precedent). Years earlier, the Wisconsin Supreme Court rejected a state bar proposal permitting unpublished opinions to be cited for persuasive and informational purposes. See *In re Amendment of Section 809.23(3)*, 456 N.W.2d 783 (Wis. Sup. Ct. 1990).

24. See Mary Alice Robins, *High Courts Split on “Do Not Publish” Designation*, TEX. LAW., Aug. 9, 2002, at 1.

25. TEX. R. APP. PROC. 47.3 (effective Jan. 1, 2003).

26. See CRIMINAL JUSTICE, TORT & INSURANCE PRACTICE AND SENIOR LAWYERS DIVISION, A.B.A., REPORT TO THE HOUSE OF DELEGATES, Res. 01A115 (Aug. 1, 2001).

27. The Advisory Committee on the Federal Rules of Appellate Procedure of the Judicial Conference of the United States is considering an appellate rule, per the United States Department of

powerful opinion by Judge Richard Arnold, holding that the circuit's no-citation policy was an unconstitutional abdication of the rule of stare decisis.²⁸ The Ninth Circuit quickly disagreed in an equally powerful opinion by Judge Alex Kozinski that found no such mandate in Article III's grant of "judicial power."²⁹ Kenneth Schmier, a California lawyer who was aggrieved by a nonpublication decision of the California Court of Appeal,³⁰ created the Committee for the Rule of Law, erected a website dedicated to the issue,³¹ and has convinced a California congressman to convene an oversight hearing on the matter.³²

This Article looks at the non-precedent policy through the lens of the common law tradition, and reveals strong arguments against it that have not yet been addressed. It demonstrates how the American legal system suffers from the practices of appellate judges in choosing to label the bulk of their actions as non-precedential—choices that defy the wisdom of the common law. The losing parties to these appeals are likely victims because it is dubious that their appeals were given due consideration by an appellate panel. The body of law is also victimized by the loss of valuable precedent. The constitutional issues have been amply discussed elsewhere,³³ as have the stare decisis notions of the Framers,³⁴ and will not

Justice's suggestion, that would permit parties in all circuits to cite an unpublished opinion for persuasive value if a published precedent of the forum court does not already cover the point. See *Hearing*, *supra* note 1 (testimony of Samuel A. Alito, Jr., Judge, United States Court of Appeals for the Third Circuit).

28. See *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000), *vacated by* 235 F.3d 1054 (8th Cir. 2000).

29. See *Hart v. Massanari*, 266 F.3d 1155, 1159–63 (9th Cir. 2001). *Accord* *Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366–68 (Fed. Cir. 2002) (rejecting the stare decisis effect of two contrary unpublished opinions).

30. See *Hearing*, *supra* note 1 (testimony of Kenneth J. Schmier, Chairman, Committee for the Rule of Law).

31. See THE COMMITTEE FOR THE RULE OF LAW, NONPUBLICATION.COM, <http://nonpublication.com>.

32. See *Hearing*, *supra* note 1 (Schmier's testimony).

33. See Daniel N. Hoffman, *Publicity and the Judicial Power*, 3 J. APP. PRAC. & PROCESS 343, 344 (2001) (agreeing with *Anastasoff's* constitutional rationale); Katsh & Chachkes, *supra* note 8, at 290 (arguing that no-citation rules violate the First Amendment and separation of powers); Laretto, *supra* note 8, at 1038–39; Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional* 50 U. KAN. L. REV. 195, 196 (contending that the non-precedent policy violates equal protection and procedural due process).

34. See R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in Anastasoff v. United States*, 3 J. APP. PRAC. & PROCESS 355, 360–83 (2001); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 50 (2001) (contending that the historical record illustrates that binding stare decisis was not accepted at the time of the founding); Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135, 166 (2001) (maintaining that the force

be revisited here. Nor does the Article try to synthesize the multitude of pragmatic considerations raised in the large and ever-growing body of literature,³⁵ which reveals that judges support the non-precedent policy *en masse*³⁶ against the near unanimous opposition of lawyers and academics.³⁷

of precedent was unsettled at the time of the Framers); Price, *supra* note 9, at 84–85 (stating that the Framers' core idea of precedent was that judicial decisionmaking starts with past cases); Recent Cases: *Constitutional Law—Article III Judicial Power—Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect.—Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), 114 HARV. L. REV. 940, 941–46 (2001).

35. For a compendium of the early literature on the policy, see Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 126 n.39 (1994).

36. See POSNER, *supra* note 3, at 171 (“[L]imited publication is good on balance . . .”); Martin, *supra* note 15, at 181 (arguing that the alternatives to nonpublication are “worse” or “unworkable”); The Honorable Philip Nichols, Jr., *Selective Publication of Opinions: One Judge’s View*, 35 AM. U. L. REV. 909, 914 (1986) (“[T]he nonprecedent is really not a precedent, and the rule works as intended.”); Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This! Why We Don’t Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 81 (“[C]itation of [unpublished opinions] is an uncommonly bad idea.”).

37. See Memorandum of Petitioner Christopher G. Wren in Support of Petition for an Order Amending WIS. STAT. § (Rule) 809.23(3), *In re* WIS. STAT. § 809.23(3) at 1 (Wis. Sup. Ct.) (No. 02-02) (recommending citation of unpublished opinions for persuasive value) (on file with the Southern California Law Review); THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 134 (1994) (calling for a rigorous evaluation of the policy and adoption of a uniform national standard); CRIMINAL JUSTICE, TORT & INSURANCE PRACTICE AND SENIOR LAWYERS DIVISION, A.B.A., REPORT ON RECOMMENDATION FOR PUBLICATION AND RELIANCE UPON UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS (Mar. 30, 2001) (recommending electronic and other forms of publication of all opinions and full ability to cite to them); Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 25 (2002) (recommending citation of unpublished opinions for persuasive value); Brooks, *supra* note 7, at 260, 263 (arguing that it is a fiction that unpublished opinions are categorically different from their precedential cousins); Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 259 (1998) (recommending citation of unpublished opinions for persuasive value); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 801 (1995) (recommending a strong presumption favoring publication and nonpublication in only “truly insignificant cases”); James N. Gardner, *Ninth Circuit’s Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224, 1227 (1975) (“All members of the bar of the Ninth Circuit should have the right to order, at any time, that any written disposition by the court be published.”); Robel, *supra* note 10, at 961 (recommending universal publication with an accompanying no-citation legend for particular unpublished opinions); J. Thomas Sullivan, *Concluding Thoughts on the Practical and Collateral Consequences of Anastasoff*, 3 J. APP. PRAC. & PROCESS 425, 450 (2001) (stating that there is “something flawed about these decisions and their supporting opinions”); Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. APP. PROC. & PROCESS 175, 176 (2001) (recommending Supreme Court review of the legality of the policy); Johanna S. Schiavoni, Comment, *Who’s Afraid of Precedent?: The Debate over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859, 1890–93 (2002) (recommending that all appellate opinions be officially published and able to be cited to); Shuldberg, *supra* note 8, at 574 (recommending electronic reporting of unpublished opinions and citation for persuasive value). See generally Joshua R. Mandell, Note, *Trees that Fall in the Forest: The*

II. COMMON LAW FUNDAMENTALS

A. WHAT IS THE FORCE OF A PRECEDENT?

The no-citation, no-precedent rules remove the power to control the resolution of future disputes from selected appellate opinions. To label them non-precedential is to deprive them of stare decisis effects. This necessitates some discussion of what stare decisis normally means in American courts.³⁸ We have to understand precisely what is taken away from this class of appellate decisions. Although these preliminary ideas may seem elementary, they are an essential foundation for later observations.

A decision on a legal issue is made by an appellate court and justified by ideas expressed in a written opinion. Assuming a single-issue appeal, a typical opinion lays out the facts of the case, frames the issue as a question of law, discusses relevant principles and precedents, and decides the matter by applying what we can call a “decisional rule” to the material case facts. In the American legal tradition, the court is obliged to decide under law,³⁹ which means that the court arrives at a principle of general application that it would be willing to apply in future comparable cases.⁴⁰ This decisional rule is called the “rule of the case” or “holding of the case.”

This rule formation involves various levels of creativity. At the highest level, the situation before the court may be unparalleled, meaning that no prior judicial decision in any jurisdiction has considered the legal issue presented by such a combination of case facts. An early, renowned privacy case, *Pavesich v. New England Life Insurance Co.*,⁴¹ is

Precedential Effect of Unpublished Opinions, 34 LOY. L.A. L. REV. 1255 (2001) (critically reviewing the limited publication policy and suggesting careful reexamination).

38. See generally RICHARD B. CAPPALLI, *THE AMERICAN COMMON LAW METHOD* (1997) (assessing a synthesis of methods used to create, understand, and apply American case law).

39. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824) (Marshall, C.J.).

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the . . . law.

Id.

40. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

41. 50 S.E. 68 (Ga. 1905).

representative. The defendant used Paolo Pavesich's photograph in an advertisement published in a newspaper to promote its life insurance without his consent.⁴² Pavesich was neither a model nor a prominent personality.⁴³ The question before the court was whether a cause of action for damages arose from these facts.⁴⁴ The Georgia Supreme Court turned to concepts of natural justice, as well as to privacy values underlying nuisance law and constitutional search requirements, in creating a cause of action for invasion of Pavesich's privacy.⁴⁵ Having little in the way of comparable judicial precedent⁴⁶ and past judicial thinking on the subject, the court had free range to create law.

The Georgia court did not express its holding in verbal form, as was its right. It could have estimated its rule, as might lawyers, academics, judges, law students, and other later users of the precedent. It might have said, for example, "We hold that private individuals have their right of privacy violated and have a right to damages when another uses their photograph for commercial advertising purposes without their consent." Under the doctrine of *stare decisis*, the *Pavesich* precedent controls, which means its decisional rule, whether implicit or express, is to be applied in future cases in Georgia with comparable facts even if a later Georgia court is dissatisfied with the rule.

To envision the rule of *stare decisis* in operation, let us imagine that years later the following case reaches the Georgia Supreme Court.⁴⁷ A photograph of a woman named Roberson is used without her consent to advertise the defendant's flour product. She is not a model, actress, or public figure of any sort. The photograph is reproduced on flyers that are widely posted throughout the city of her residence. To adjudicate this new case, the court must extract the *Pavesich* decisional rule, understand its rationale, and then test the facts of the new case against the rule and its reasons. Law students would likely conclude that Roberson gets damages for violation of her privacy right because the precedent is on point. Differing facts in the two cases—the plaintiff was male in the first case and female in the second, the product was life insurance in the first and flour in

42. *See id.* at 68–69.

43. *See id.* at 69 ("Plaintiff is an artist by profession . . .").

44. *See id.* ("The question . . . is whether an individual has a right of privacy which he can enforce, and which the courts will protect against invasion.").

45. *See id.* at 69–72.

46. Although the New York precedent, *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) was on the books, it flatly denied a right of privacy and provided no help to the Georgia Supreme Court for finding the other way.

47. Case facts are drawn from *Roberson*, 64 N.E. 442, 442 (N.Y. 1902).

the second, and there was dissemination by a newspaper in the former and a multitude of flyers in the latter—are treated as immaterial because they do not impinge on the precedent’s goal of protecting individuals from unconsented commercial exploitation of an aspect of their personality.

This second privacy case is located at the lowest level of judicial creativity. The Georgia Supreme Court has the duty of understanding the scope of the *Pavesich* precedent, that is, the elements and breadth of its rule and the reasons that motivated the creation of that rule. It may then apply syllogistically the rule extracted from *Pavesich* to the current case facts,⁴⁸ rejecting any effort by the defendant to use distinctions in fact to create a nonliability ruling. The second precedent adds little to the jurisdiction’s case law bank. It merely applies an existing, comprehensible, authoritative rule to facts that, in turn, fit comfortably within the rule and its reasons. After stating the case facts, the court may simply announce, “We affirm based on *Pavesich*” This second application of the *Pavesich* holding helps to settle the law on the subject of commercial exploitation of an individual’s photograph. Lawyers would be ill-advised in later cases to challenge it by suggesting it be overruled. Because the *Roberson* case facts fit squarely within the precedent’s holding, this second precedent adds nothing to the precedential force already created by *Pavesich*.

A third case illustrates the development of case law, particularly the expansion of law by the inclusion of a new, differentiated class of claimants within the precedential field. A medicinal product is advertised by means of a widely mailed catalog.⁴⁹ Plaintiff J.P. Chinn, a former state senator and well-known Georgian personality, finds his photograph within a catalog as part of an advertising display to which he has not consented. The question now arises in the Georgia Supreme Court whether this case fits within *Pavesich-Roberson* in light of the potentially distinguishing fact that the plaintiff is a public figure. This new fact compels the court to consider whether public figures retain a zone of privacy that may not be entered by commercial advertisers without consent. Decision is granted for the plaintiff. After extensive discussion of the arguments on both sides,⁵⁰ the opinion concludes that the better rule protects not only private citizens

48. The court would consider itself bound by *Pavesich*, meaning its holding will be followed even if the court would have decided differently in the absence of the precedent. See, e.g., John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 508 (2000) (“Norms of precedent have decisive force precisely when the court would have come out the other way had it not been following precedent.”).

49. Case facts are drawn from *Foster-Milburn Co. v. Chinn*, 120 S.W. 364, 365 (Ky. 1909).

50. Compare *Pavesich*, 50 S.E. at 74–79, with *Roberson*, 64 N.E. at 44–47 (comparing precedents protecting private citizens with precedents protecting public figures).

but also public figures in aspects of their lives that are separate from those that brought them fame.

This third precedent has expanded the *Pavesich-Roberson* holdings by treating as immaterial the fact that plaintiff J.P. Chinn was a public personality. In combination, the three precedents hold that “individuals, whether private or public, have a right to privacy and damages if their photographs are used in commercial advertising without their consent.” Should this third case be selected for nonpublication because the appellate panel carelessly believed it was merely applying *Pavesich-Roberson*, a disservice to the body of law within the jurisdiction would have occurred. Having disappeared from view, *Chinn* would be unable to instruct bench, bar, and the general public about liability for commercial exploitation of public figures. Lacking such instruction, the future would bring disputes and lawsuits among parties positioned similar to the parties in *Chinn*.

What was the precedential force of *Pavesich-Roberson* on *Chinn*? Legal method would not permit the two earlier precedents to control the new case because new reasoning was essential to cope with the distinction between victims Pavesich and Roberson, who were private parties, and victim J.P. Chinn, who was a public personality. Yet the precedents’ privacy reasoning sweeps forward to inspire the *Chinn* court to adopt and expand it to include people like J.P. Chinn. A curiosity about stare decisis is that it does not have degrees of force. A precedent is not somewhat binding or almost binding. It either controls or it does not. Once distinguishing facts move a later court out of a precedent’s force field, the court is free to create the rule it considers most appropriate for the resolution of that new fact configuration.⁵¹

One might rightly suspect that the underworld⁵² of non-precedential decisions-with-opinions contains thousands of holdings that, like *Chinn*, were not controlled by precedent and that would have made law if they were allowed to surface.⁵³ How they dropped into the underworld is, of course, a mystery because appellate panels are not required to justify their non-precedential selections publicly. This Article’s hypothesis, which is

51. Common law judges will nonetheless continue to utilize principles found in off point precedents. Ronald Dworkin calls this the “gravitational force” of precedent. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 112 (1977).

52. The underworld is also known as the “shadow body of law.” See Carpenter, *supra* note 37, at 250.

53. Empirical evidence supports this conclusion. See Shuldberg, *supra* note 8, at 555 n.65 (citing studies that examined unpublished opinions and found “numerous instances of unpublished opinions that in fact did make law”).

discussed throughout, is that judges on these panels, or clerks recommending dispositions, consider the precedential force field to be much wider than permitted by proper legal methodology; that is, they treat words, phrases, ideas, principles, tests, standards, and ratios as binding rather than as persuasive.

A fourth case demonstrates the creation of rule exceptions. Ms. Jones' picture appears on the front page of a Georgia newspaper when it reports her husband's murder.⁵⁴ She was with him when he was stabbed to death on a city street. Is her privacy right impinged? The *Jones* court holds that it is not, grounding its decision on the general public's need to know about public events like murders on the streets.⁵⁵ Ms. Jones is part of a public event, albeit involuntarily. According to the *Jones* court, the faces, figures, and words of the participants in such events are part and parcel of the public event. The public's interest in such information outweighs Ms. Jones' privacy needs and concerns. The no-commercial-exploitation-of-individuals'-photographs branch of the right of privacy has acquired an exception, shooting a spin off from the main privacy doctrinal trunk.

Did the Georgia Supreme Court "enact law" in the hypothetical scenarios described above?⁵⁶ The common law's answer, at least with respect to cases one, three, and four, is undoubtedly "yes." A court's actions must be governed by law. Should law that is on point, as in case two, not exist, the court is obliged to fabricate a decisional rule to determine whether Paolo Pavesich, J.P. Chinn, and Ms. Jones are entitled to relief. This creation of law by a governmental institution, which continues into the future through the doctrine of precedent, can be considered the enactment of law. Is the court obliged to enact law akin to a legislature? The common law's answer, which will be subsequently explained, is undoubtedly "no." We will learn that a court may or may not attempt to articulate its decisional rule in a discrete verbal form. Consider an example from the *Chinn* court:

[W]e concur with those holding that a person is entitled to the right of privacy as to his picture, and that the publication of the picture of a person without his consent, as a part of an advertisement for the purpose

54. Case facts are drawn from *Jones v. Herald Post Co.*, 18 S.W.2d 972, 972-73 (Ky. 1929).

55. See *id.* at 973.

56. This is a theory that treats decisional law as if it were statutory law. See Michael Sinclair, *What Is the "R" in "IRAC"?*, 46 N.Y.L. SCH. L. REV. 457, 458 n.5 (2002-03).

of exploiting the publisher's business, is a violation of the right of privacy, and entitles him to recover without proof of special damages.⁵⁷

This decisional rule is interesting because while it sticks reasonably close to the case's material facts—picture, business advertisement, no consent, and publication—it fails to mention that the plaintiff was a prominent public figure. This could be an oversight or it could be a wonderful example of a court's determination that this fact was immaterial. This *sotto voce* extension of law from private individuals like Pavesich and Roberson to public figures like J.P. Chinn was inadvisable because one naturally wonders whether publishing a public figure's face in an advertisement will lead to the level of embarrassment and suffering claimed by Pavesich and Roberson. Had this case been judged in a nonpublication jurisdiction, it might well have been relegated to the non-precedent bin, putatively relying on the "settled" law of *Pavesich-Roberson*.

Are later courts bound by the words used in *Chinn* to express its holding? The common law says "no,"⁵⁸ but with an important caveat. The opinion might well have expressed the decisional rule of the precedential court accurately, completely, and perfectly in tune with the rationale for the rule. If so, nothing prevents the current court from adopting it *in toto* and then developing it or merely applying it. This is the current court's choice, but only after it has responsibly studied the precedent to ascertain whether its decisional rule is narrower or broader than what the precedential court has written and whether the current case calls for rule development to reach a decision.

Courts have been notoriously sloppy in expressing their decisional rules. Take, for example, the *Pavesich* court: "[A] violation of the right of privacy is a direct invasion of a legal right of the individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover."⁵⁹

57. *Foster-Milburn Co. v. Chinn*, 120 S.W. 364, 366 (Ky. 1909) (citing *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 68 (Ga. 1905)).

58. The common law method insists on equality of treatment of similarly situated litigants, which Ronald Dworkin calls the "doctrine of fairness." DWORKIN, *supra* note 51, at 113. Judges considering precedents look beneath language in opinions to the underlying principles to see if those are present in the current case and require an equal solution under the doctrine of fairness. *Id.* at 110–15. This is why "[j]udges and lawyers do not think that the force of precedents is exhausted, as a statute would be, by the linguistic limits of some particular phrase [in an opinion]." *Id.* at 111.

59. *Pavesich*, 50 S.E. at 73.

Notice how broad this enactment is. The court has departed from the case facts before it and has stated a privacy rule that is so global that it loses its rule-like quality. In other words, it says so much that it says nothing. This judicial conduct is not blameworthy, however, because the court can trust future users to extract a narrower decisional rule, one in keeping with the case's material facts and its reasoning based on those facts. Trusting in the legal method abilities of future lawyers and judges, the court may write the decision without worrying about over- or under-emphasizing its word choices.

The preceding passages have explained how courts create and develop law in the common law tradition. It is not purely the method of analogy, as some have asserted.⁶⁰ The method of analogy is but one lawyer's tool and but a part of the process of case law development.⁶¹ The analogy is futile without an understanding of the relevance of prior case facts and the reasons why past courts have attributed meaning and importance to those facts:

[C]ase specific precedents manifested in written opinions . . . are not merely the "rules" of the cases, the disembodied holdings extracted by collectors and synthesizers. These case law rules, "fiats" in Fuller's analysis, cannot be understood and can easily be misunderstood apart from the reasons which justified their creation. The full meaning of the law of a single case, or a group of cases, or a body of case law can only be known through a meticulous study of the opinions which generated their holdings—in Fuller's terms, the generative reasons, the "under" side of the rules. When case lawyers speak of the reach of a precedent, they mean its authoritative force as known through the hard study of its origins and justification, the cumulative aspirations and concerns of the judges who authored the precedent, and their predecessors whose earlier work was consulted.⁶²

Two important points emerge from this understanding of the common law's functioning. One is that case law development is hard, deliberative work. The very choice of treating an appealed case as non-precedential, if done conscientiously, has to be preceded by thoughtful analysis of the relevant precedents. The other is that burial of large quantities of

60. See, e.g., Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 THE GREEN BAG: AN ENTERTAINING J. OF L. 17, 17 (2000).

61. See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) (explaining the several processes by which judges create law).

62. Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 89–90 (1998) (footnotes omitted) (citing Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 385 (1946)).

decisions-with-opinions deprives the future of the thought processes that engendered the decisional rules in these cases. This presumes that (1) a decisional rule was adopted or developed to decide the appealed case and (2) meaningful consideration was given to the quality of that rule as measured by the reasons supporting it. We learn below that this presumption is suspect.⁶³

B. IS THE CURRENT CASE NON-PRECEDENTIAL?

Stating that the resolution of a legal issue under existing case law is easy⁶⁴ is quite different from saying that the resolution is non-precedential, yet this distinction is not made in the non-precedent debate. An appellate court has little difficulty when the facts of a current controversy line up neatly with a prior decision's facts and rationale. This does not refer to a case with facts exactly identical to those revealed in the precedential opinion—this is such a rare phenomenon that it should not enter the debate. The easy case occurs when the factual variations in the current case plainly do not demand a different outcome given the existing precedent's facts and rationale. The general rule or exception extracted from the existing precedent decides the new case because the deciding judges do not believe that the current case's factual differences justify a different result, considering the rationale of the prior holding. In the language of legal method, the new facts are treated as immaterial.

Even if resolution of the new case is easy, the new decision has precedential value because the rule has been applied to a fact variation. The general rule or exception has expanded, despite its verbal stability, by sweeping in the new complex of facts. In areas of law where factual settings are diverse—due care, bad faith, unconscionability, reasonableness, duress, and proximate cause—which is perhaps the bulk of law, the true content of law is known not by the verbal rule formulations but by the application of those verbal formulations to specific settings. Astute lawyers look for cases analogous to theirs decided under abstract rule formulations; they search for on point precedents. In sum, the actual scope of a doctrinal formulation is learned through its applications and not through the words chosen to express the doctrine.

63. See *infra* Part. V.

64. See *Hearing*, *supra* note 1 (Judge Alito's testimony) ("Opinions dealing with the easy application of established law to specific facts have little use as precedent for other litigants or posterity."); Laretto, *supra* note 8, at 1041 (describing cases where the law is well-settled as "easy").

If the distinction between easy and non-precedential is correct, the former occupies a wide field and the latter a narrow one.⁶⁵ The legal system needs not merely the leading case but also the expansions and contractions of old, verbally stable rules that are found in humdrum applications, or what we might call the “rules in operation” as compared to the “rules in the books.” Eighty percent or more of appellate decisions, not counting routine administrative orders, should be written and published as precedential and twenty percent as summary affirmances, and not vice versa.⁶⁶ What may be reversing this ratio is the application of loose views of precedent by the appellate bench or its staff. After studying non-precedent opinions issued by the Seventh Circuit, a student author surmised that the appellate bench was stretching case facts to fit within precedents or stretching precedents to fit the facts before them.⁶⁷ She may be right.

The current appellate practice of hiding precedents may have an adverse effect on the courts’ workload. The greater the number of precedents, the greater the volume of law, the greater the number of solutions to legal issues, and the easier it would be to determine whether an authoritative answer to a legal issue has been judicially sanctioned.⁶⁸ Assuming that most lawyers would not raise issues on appeal that an appellate court would consider already decided,⁶⁹ an increased volume of law would serve to lower the number of appeals and the number of issues raised in those cases that are appealed far more effectively than sanctions for frivolity. In 2000, 20,791 decisions on litigated legal issues were withheld from bench and bar.⁷⁰ Some 400,000 legal resolutions have been hidden since the no-precedent, no-citation practice gathered force in the

65. See, e.g., *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 263 (5th Cir. 2001) (Smith, J., dissenting from denial of petition for rehearing en banc) (“[O]ne assumption on which the [nonpublication] practice is based—that such opinions create no new law—is dubious.”); Brooks, *supra* note 7, at 260 (arguing that predictions about the precedential value of appeals are “imperfect”).

66. During the era when all federal circuit court opinions were published, about eighty percent were considered important enough to be cited in a later opinion. See POSNER, *supra* note 3, at 164 tbl.6.1.

67. See Pamela Foa, Comment, *A Snake in the Path of the Law: The Seventh Circuit’s Non-Publication Rule*, 39 U. PITT. L. REV. 309, 339 (1977) (“It has been shown how . . . an unrealistic simplification of the facts or of a prior ‘controlling’ case had to be made in order to find some of the orders valueless to the bar.”).

68. See POSNER, *supra* note 3, at 166 (“[T]he aggregate value of unpublished opinions as sources of guidance to the bar and to lower-court judges . . . might well outweigh the costs . . . of publishing . . .”).

69. But see Martin, *supra* note 15, at 183 (“[T]oo high a percentage of litigants are appealing. . . . I see litigants bring arguments that contradict settled points of law.”); Nichols, *supra* note 36, at 919 (“[A] substantial minority of the lawyers . . . [do] not see any appeal as hopeless.”).

70. See Laretto, *supra* note 8, at 1054 n.101.

1980s.⁷¹ It is difficult to doubt that considerable numbers of issues have been unnecessarily and inefficiently relitigated in both appellate and trial courts. The computer has made access to relevant case law simple, swift, and efficient, meaning that if a comparable legal issue has already been litigated, lawyers and judges will know and benefit from it.

It is interesting to compare publication and precedential practices in France, a civil law country. What officially surfaces there are non-precedential opinions scantily reasoned as mere application of civil code provisions to meagerly and abstractly stated case facts.⁷² Hidden from view is a court's full reasoning, including sociopolitical considerations, which is buried in court archives.⁷³ The documents that form the underworld of elaborate judicial reasoning in France are the *conclusions*, which are akin to amicus briefs to the court prepared by a judicial officer who advises the court of the government's views, and the *rappports*, which are briefs submitted to the full court by the judge who is assigned primary responsibility for the particular case.⁷⁴ This is ironic because of the total reversal: The non-precedential, briefly reasoned decisions form our American legal underground whereas only fully reasoned court decisions are officially brought into public view. But this irony runs even deeper. Although French legal theory officially denies that judicial precedents are sources of law,⁷⁵ its underground opinions treat judicial decisions as having normative force.⁷⁶ In contrast, while the doctrine of binding judicial precedent officially reigns in the United States, a large quantity of precedents are stripped of this value by the policies of the courts of appeals discussed in this Article.

To say that non-precedential decisions are infrequent is not to say that federal appellate judges make law on every issue appealed.⁷⁷ The quality of the rules being applied is the variable that determines the extent to which the court will have to make law—the substance of which ranges from

71. For the 1981–2000 period, one researcher counted 340,866 unpublished opinions. See Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 205 (2001). Twenty thousand per year is the average for the latest years, see *id.* at 202 tbl.1, so some 40,000 can be added for 2001 and 2002, totaling approximately 390,000.

72. See Cappalli, *supra* note 62, at 97 n.33.

73. See generally Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1326–27 (1995) (seeking to “correct the skewed common law accounts of how the French judicial system actually functions” and exposing “an entire sphere of French judicial discourse that is kept largely hidden from the general public”).

74. See *id.* at 1355–57.

75. See *id.* at 1330–31.

76. See *id.* at 1377–81.

77. See *Hart v. Massanari*, 266 F.3d 1155, 1160 (9th Cir. 2001).

highly determinate regulatory language to highly indeterminate multifactor analysis ordinarily linked to a balancing process. When rules are in the determinate category, the field of relevant facts narrow, thereby reducing the number of instances arguably within the rules' ambit. Once the disputable ten or so instances are decided, future cases do not make law but merely apply it. But this is an abnormal situation. Contrary to the views of the federal appellate bench, the number of instances in which law is being made—even while general standards, principles, or rules are being applied—are multitudinous, and perhaps constitute the bulk of appealed issues.

One writer has suggested that the quantity of legal reasoning needed to reach a decision is what determines whether judicial decisions qualify as precedential authority. No publication is justified if an opinion contains negligible or no legal reasoning at all.⁷⁸ This is an impossibility because all judicial action is controlled by law.⁷⁹ Every decision on an appealed issue is decided on the basis of a rule of law and requires, at a minimum, selection of the relevant rule and its syllogistic application to the facts before the court—not all the facts, just those that the court identifies as material to the rule. These components of legal reasoning are an absolute floor.

The idea is equally troublesome should it mean that some issues require only a modicum of legal reasoning. By definition, this justifies the location of all non-precedential opinions at an inferior level. The panel that concludes on superficial examination⁸⁰ that an appellate issue is decided by settled law will write a non-precedential memorandum that contains scanty reasoning. After all, one remaining purpose of non-precedent policy is to free appellate judges from the onus of writing lengthy, careful opinions. Under the modicum of reasoning thesis, all the opinions in this case law underworld are rightly non-precedential.

Below, the classes of appellate determinations that deserve only short opinions will be classified.⁸¹ These are pure fact determinations, decisions based solely on the particular case record and reviews for abuse of discretionary decisions made by trial judges on the *sui generis* case incidents before them. Also eligible for short opinions are cases that only

78. See Laretto, *supra* note 8, at 1050–51 (“[J]udicial decisions are precedential authority unless they contain a negligible amount of legal reasoning [W]hat if the court need not engage in legal reasoning to reach its result?”).

79. See *supra* note 39.

80. See *infra* Part V.

81. See *infra* Part VI.

slightly extend or retract doctrine. This leaves a large balance of appealed issues that require considerable thought and are all prime candidates for lean but carefully considered opinions.

What is worrisome about any quantity of reasoning approach is that it is simple to make it appear that an appellate issue can be resolved by a modicum of reasoning. What about the appellate judge who uses the verbal expression of a rule taken from an opinion in the precedent bank without considering its factual context and the differences in the current case facts, which might, if the reasons behind the rule were understood, serve as a ground for a rule variation or exception? What about broad language in higher court opinions or same level opinions being treated with more reverence and decisional power than it intrinsically deserves, or bald dicta being treated as if it were a binding holding? In all these cases of weak methodology, decisional grounds in the non-precedential memorandum are likely to be sparse while carrying a false aura of certainty. The competent lawyer for the losing party knows how the panel has skipped past decent contrary arguments and readings of precedents that merited deeper discussion. The above worries are based on the assumption that each appellate panel has a lead judge for each case assigned to that panel.⁸² The nonlead judges are busy writing comprehensive court opinions on “for publication” appeals assigned to them for writing. The lead judge can write the current case as a simple decision despite its real difficulties and easily swing the other panelists down the non-precedent path.

C. WHO DECIDES THE WORTH OF A PRECEDENT?

The non-precedent regimen starkly reverses centuries of common law tradition. From early on, the premise has been that a court’s duty is to decide a controversy by applying a general rule, carved out of the precedents, to the case facts selected as material to the rule. The court has been free to add justifications for its decisional rule, and modern courts liberally spice their opinions with policy considerations. The judicial opinion justifying the decision has traditionally had four essential elements: selection of material facts, the decisional rule, the bases for the rule, and syllogistic application of the rule to the facts. The duty of determining the

82. See, e.g., Arnold, *supra* note 12, at 221 (“On my court, the decision whether to publish is, as a practical matter, always made by the writing judge.”). In the French legal system, the analogue is the “reporting judge,” who formulates and researches the legal issues and presents reasoning and a recommended solution to the full panel. See Lasser, *supra* note 73, at 1356.

precedential impact of the decision-with-opinion belonged not to the precedent-setting court but to the precedent-applying court.⁸³

Should the decisional court determine precedential force, we have to ask, “With respect to what?” The “what” must be a later case to which lawyers and judges seek to apply the precedent. Only when a case comes along with arguably comparable facts does the precedential relevance of an earlier decision-with-opinion arise. This point naturally leads one to question how an appellate panel can, *ex ante*, determine the precedential significance of its ruling. Lacking omniscience, an appellate panel cannot predict what may come before its court in future days. Judge Kozinski presumes such omniscience in the following passage from *Hart v. Massanari*: “Rules that empower courts of appeals to issue nonprecedential decisions . . . have a . . . limited effect: They allow panels of the courts of appeals to determine whether future panels, as well as judges of the inferior courts of the circuit, will be bound by particular rulings.”⁸⁴

Judge Kozinski is not saying that the ruling has been so scantily considered that it may be wrong and its error should not proliferate. All supporters of the current policy defend the quality of these non-precedential rulings.⁸⁵ He is saying that: (1) We will determine *ex ante* that this case makes no usable law *under whatever circumstances may arise*, (2) having made that determination, we see no need to write a careful opinion, and (3) because of our guess as to the ruling’s future inutility, and because our ruling is rough, we prefer to hide it in a file. It seems insulting to future judges to assume their inability both to assess a decision’s worth and, even though accompanied by an opinion of lesser worth, extract the rule on which the resolution rests. An appellate bench that presumes the power to prejudge a precedent’s future course should not assume that the bench itself, and those below, will misread and misapply non-precedential decisions.

83. See CAPPALLI, *supra* note 38, at 45–50. The word “precedent” derives from the root verb “precede,” which mandates that something come later. The rule-quality of a precedent became relevant only when it sought recognition in a later case. Before the 1970s, in America it was always the later court that determined the precedential effect of an earlier reported case.

84. 266 F.3d 1155, 1160 (9th Cir. 2001).

85. See *id.* at 1177 (“That a case is decided without a precedential opinion does not mean it is not fully considered. . . .”); Martin, *supra* note 15, at 192 (“The publication decision is . . . almost invariably an easy call to make. . . . [W]e as judges . . . seldom . . . make mistakes in dividing up the cases . . .”). Cf. *infra* Part V.B.

D. DO JUDGES WRITE LAW?

One who is trained in legal method must have difficulty accepting Judge Kozinski's views about an appellate judge's duties in creating law. Throughout *Hart*, he talks of appellate courts "announcing" their rules of decision.⁸⁶ Such announcements are of course common, usually taking the form, "We hold . . ." It is sound practice for appellate courts to estimate the rules they craft to decide the case.⁸⁷ This serves to avoid misinterpretations and misapplications of the precedent by future courts. Still, it is only an *estimate* because the power to determine the holding of a judicial precedent resides in future judges applying it.

Further, there is nothing disgraceful about an opinion that discusses general legal principles, selects relevant and discards irrelevant facts, matches the facts against the principles to reach a decision, and explains why the decision is fair. Within all this is an inchoate rule of law, but nothing obliges the decisional court to phrase it in an explicit fashion. Often, it is sensible for the issuing court not to attempt such a formulation because it does not have a handle on the future path its decision may take. Not only must it select the elements of its rule but it must also select the words that express each element in an abstract form, each one generalizing from the precise case facts.⁸⁸ The rule broadens or narrows depending on these choices. The decisional court might rightly consider itself in a poor position to make such choices, declining to anticipate and decide in advance unknown future controversies.

When Judge Kozinski stated in *Hart* that the "rule must be phrased with precision and with due regard to how it will be applied in future cases,"⁸⁹ he confused the judicial with the legislative role. Every word of a statute is law; no word of a judge is law. Judge Kozinski even placed the duty on the precedential court to consider "not only . . . the facts of the immediate case, but . . . also envision the countless permutations of facts that might arise in the universe of future cases."⁹⁰ This statement of duty is its own refutation. The common law method accepts the impossibility of

86. See *Hart*, 266 F.3d at 1170, 1172, 1176.

87. See CAPPALLI, *supra* note 38, § 3.13(a), at 37; Richard Cappalli, *Improving Appellate Opinions*, 83 JUDICATURE 286, 319 (May–June 2000) ("To control future readings of the law created by the decision-with-opinion, the court must . . . state the court's holding explicitly, as carefully as if it had the power to write law.") [hereinafter Cappalli, *Improving*].

88. See CAPPALLI, *supra* note 38, §§ 5.05–5.08, at 53–54, § 6.05, at 71–72.

89. *Hart*, 266 F.3d at 1176.

90. *Id.*

such prevision by judges and wisely leaves the implications of a precedent in the hands of future courts.

Language in a judicial opinion is, of course, the medium judges employ to express their decision and rationale. Critical to precedential force, however, is the idea, not the language expressing the idea. The court writes to tell us which facts were material or immaterial, and why, and which precedents and principles were relevant or irrelevant, and why. It writes to explain why the decisional rule is the best choice. Users construct the precedent's holding from their appreciation of these ideas. This interpretive process is affected by the quality of an opinion's writing.⁹¹ To the extent an opinion is opaque, interpretive error is enhanced, and vice versa. Still, the process of interpreting and applying a precedent is in the hands of the future user, and even the sharply reasoned and written opinion loses control to these users when it is issued.

These are old, traditional ideas. Judge Kozinski and others have posited a new common law in which a precedent controls not through its ideas but through its verbal expression. This reverses the maxim, "[I]t is not what a court says, but what it does." To some, this has been the contribution of legal realism, which pierces theory and bald axioms and exposes how judges actually behave.⁹² Given the new preeminence of an opinion's language, the care with which judges express themselves gains increasing importance and justifies non-precedent policy.

Now that legal method is taught at only a handful of law schools,⁹³ one may rightly suspect considerable slippage in the judicial use of traditional techniques. Yet this can only be a suspicion because it is a highly empirical question whether a new language-oriented American common law has emerged in recent decades. Thousands of judges interpreting millions of precedents would be the field of study. This author's guess based on impressions from decades of reading judicial opinions is that the old common law method continues to hold sway, despite the occasional judge who knows only to obey language from the precedents. What counts is that a hugely important appellate policy now sits on the shaky foundation of guesswork concerning the interpretive practices of trial and appellate judges.

91. See generally CAPPALLI, *supra* note 38, at ch. 3 (describing the techniques available to common law courts to influence the future course of their precedent).

92. See Boggs & Brooks, *supra* note 60, at 17.

93. See generally Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393 (1997) (studying the decline of legal method instruction in American law schools).

III. DO WORDS COUNT? AN EVALUATION OF TWO OPINIONS BY JUDGE KOZINSKI

[T]he reason and spirit of cases make law; not the letter of particular precedents.

Lord Mansfield
*Fisher v. Prince*⁹⁴

A main defense of non-precedent policy is that the judicial time and energy saved by economizing on unimportant appeals can be directed toward careful writing in precedential cases.⁹⁵ This defense assumes the importance of the phraseology of a precedent, which in turn is based on the assumption that those who look to the precedent for law will be led to a more correct interpretation if precedent writers take care in choosing words and phrases.⁹⁶ Should these assumptions be mistaken, an important foundation of non-precedent policy crumbles.

One way to assess the validity of these assumptions is to observe how judges use the actual language of prior opinions. Were a judge to paraphrase an idea found in a precedential opinion, the precedent's exact word formation could be presumptively considered unimportant, as long as the precedential idea was expressed with reasonable clarity. Consequently, this Section focuses mostly on quotations taken from prior opinions. Yet even the premise that quotations are more powerful evidence than paraphrases is problematic. Judges may use quotations not because they consider the particular words and their conjunction to be critical but simply because it is faster to quote than to rephrase. Judges may see no need to formulate their own expression of the idea when the prior statement aptly does so.

This Section examines some recent opinions written by Judge Kozinski,⁹⁷ a chief defender of non-precedent policy,⁹⁸ to examine how he

94. 97 Eng. Rep. 876, 876 (K.B. 1762). It is instructive to observe the misquotation in Judge Kozinski's *Hart* opinion, which perverts Lord Mansfield's meaning: "[A] court considers not merely the 'reason and spirit of cases' but also 'the letter of particular precedents.'" 266 F.3d at 1170.

95. See, e.g., *Hart*, 266 F.3d at 1178-79. Surveyed judges have stated that writing opinions is their most time-consuming task. See STANDARDS, *supra* note 8, at 1. The premise that time is saved and can be redirected to important opinions may be false. See Reynolds & Richman, *An Evaluation*, *supra* note 8, at 595-97 (hypothesizing that the contention that limited publication improves productivity is not supported by the evidence).

96. See Kozinski & Reinhardt, *supra* note 36, at 44 ("[W]hat does *precedent* mean? Surely it suggests that the three judges on a panel subscribe not merely to the result but also to the phrasing of the disposition.").

97. These opinions are examined for suggestive information, not empirical validity.

uses past judicial language in expressing his holdings in general and his practice of quoting from precedents in particular. This Section will assess how critical precision was in past judicial expressions to the judge's thinking process on the cases before him or her.

The first case to be examined is *Mattel, Inc. v. MCA Records, Inc.*,⁹⁹ a "palming off" trademark infringement action. Mattel claimed a song entitled "Barbie Girl" on a record album infringed its "Barbie" doll trademark.¹⁰⁰ Judge Kozinski's opening analysis used three precedential quotations. One stated the general purpose of trademark law: "It is the source-denoting function which trademark laws protect, and nothing more."¹⁰¹ Understanding and effectuating the goals of law, whether constitutional, statutory, or decisional, is a critical element of the judicial process, and it is sound craftsmanship to launch the reasoning process with statements of purpose. But beyond the baseline function of comprehensibility, no particular words or combination of words is necessary; dozens of word choices and combinations would serve equally well in expressing a law's purpose. For example, Judge Kozinski could have written, "Trademark rules serve only to enable consumers to identify the source of a product or service without confusion." But the words he quoted were precise, concise, emphatic, and punchy, relieving the judge from fresh effort.

Two other initial quotations express an important limitation on trademark rights: Freedom of expression enables one to use the mark to communicate an idea or express a viewpoint as long as it is not used as a source identifier. Judge Kozinski used two quotations to express this idea,¹⁰² as well as a paraphrase.¹⁰³ This is no more than a general trademark principle, and again, a multiplicity of words and word combinations can be used to express it without depending on any

98. See *supra* note 29 and accompanying text. See generally Kozinski & Reinhardt, *supra* note 36 (co-authoring an article regarding the validity of disallowing citations to unpublished opinions).

99. 296 F.3d 894 (9th Cir. 2002).

100. See *id.* at 898–99.

101. *Id.* at 900–01 (citing *Anti-Monopoly, Inc. v. Gen. Mills Fun Group*, 611 F.2d 296, 301 (9th Cir. 1979)).

102. See *id.* at 900 (citing *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir. 1987)) (stating that trademark rights "do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view"); see *id.* (citing *Yankee Publ'g, Inc. v. News Am. Publ'g, Inc.*, 809 F. Supp. 267, 276 (S.D.N.Y. 1992)) ("[W]hen unauthorized use of another's mark is part of a communicative message and not a source identifier, the First Amendment is implicated in opposition to the trademark right.").

103. See *id.* ("Were we to ignore the expressive value that some marks assume, trademark rights would grow to encroach upon the zone protected by the First Amendment.").

phraseology in particular. The varying expression of the principle proves the point, and its redundancy reveals the tendency of federal judges to over-write. Note that at the initial stage of judicial reasoning, when the law's purposes and general principles are featured, judges may reach outside their jurisdiction and into affiliated courts and even lower court opinions for quotable expressions of broad ideas. They have no rule-like binding force and may be freely adopted both in essence and in their precise verbal form.

Quotations may also serve as steps in a court's reasoning, and again, no particular words are essential to the concept itself. We find several examples in Judge Jon Newman's superb opinion in *Rogers v. Grimaldi*,¹⁰⁴ the precedent chiefly utilized by Judge Kozinski in *Mattel*. One is the dogma that statutes should be read, if possible, in a way that will avoid clashes with the Constitution. This is a familiar thumb on the scale, and the presumption favoring constitutional readings needs no particular verbiage to express its essence. Judge Newman quotes from a United States Supreme Court case,¹⁰⁵ but only to bolster his own crafted phraseology: "Because overextension of Lanham Act restrictions in the area of titles might intrude on First Amendment values, we must construe the Act narrowly to avoid such a conflict."¹⁰⁶

The next quotation from *Mattel* comes closer to the point where it might be critical for the precedential court to write in the legislative mode, that is, where every word counts as law. Judge Kozinski adopts, on behalf of the Ninth Circuit, language taken from *Rogers*, the Second Circuit trademark case.¹⁰⁷ He described the following language as a "standard" for determining infringement:¹⁰⁸ "[U]nless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or content of the work [unconsented use of a trademark in a work's title is not an infringement]."¹⁰⁹

This looks like a rule, not a standard; indeed, the quotation expresses three different rules.

104. See *Rogers v. Grimaldi*, 875 F.2d 994, 999–1000 (2d Cir. 1989).

105. See *id.* at 998 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Trades Council*, 485 U.S. 568, 575 (1988)) ("[T]he Court will construe [a] statute to avoid [serious constitutional problems] unless such construction is plainly contrary to the intent of Congress.").

106. *Id.* (citations omitted).

107. See *Mattel*, 296 F.3d at 902 ("We . . . adopt the *Rogers* standard as our own.").

108. See *id.*

109. *Id.* (quoting *Rogers*, 875 F.2d at 999).

Rule 1: If (1) a trademark is (2) used (3) in a title (4) of a work of art (5) without authorization and (6) has no artistic relevance to the underlying work, then it is a trademark infringement.

Rule 2: If (1) a trademark is (2) used (3) in a title (4) of a work of art (5) without authorization and (6) has some artistic relevance to the underlying work but (7) explicitly misleads as to the *source* of the work, then it is a trademark infringement.

Rule 3: If (1) a trademark is (2) used (3) in a title (4) of a work of art (5) without authorization and (6) has some artistic relevance to the underlying work but (7) explicitly misleads as to the *content* of the work, then it is a trademark infringement.

How important is the precise verbal formulation of these rules to future courts? Lawyers and judges would certainly say that they are of little importance. As examples, we could readily substitute the word “name” for “title” and “consent” for “authorization” and the words “music, literature, painting, sculpture, and film” for “work of art” and “expressive relevance” for “artistic relevance,” and these substitutions would have no impact on the rules’ content. Indeed, the common law insists that far more important than verbiage to the understanding of a decisional rule is an appreciation of the case facts that generated the rule. The precedent’s factual underpinning helps the lawyer or judge understand whether the precedent’s holding is broader or narrower than its verbal formulation in the precedential opinion.

Judge Kozinski also used a quotation from *Rogers* to express what the precedent held:¹¹⁰ “[I]n general the [Lanham] Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”¹¹¹ Although Judge Kozinski has a general right to express himself freely when writing opinions, he must take greater care in using names and titles in order to avoid confusing his legal consumers. Lawyers typically reserve the words “held,” “hold,” and “holding” to connote the rule of law established by a precedent, although one finds considerable variability on the matter. The quotation from *Rogers* does not express a rule, principle, or standard. It states a balancing process. Dozens of word combinations would express the balance and the factors to be balanced with equal accuracy. Consequently, the quotation by Judge Kozinski is merely another energy saver with no magic attributed to the quoted words.

110. *See id.* at 901.

111. *Id.* (citations omitted).

The second case by Judge Kozinski that was studied, *Ramirez v. Butte-Silver Bow County*,¹¹² demonstrates the judge's enormous reliance on quotations from past precedents. The judge managed to cram twenty-three such quotations into a four page opinion. This stringing together of quotations borders on the obsessive. Let us speculate why this style appeals to the judge. One possibility is that the very problem that non-precedent policy seeks to address, case overloads, has produced this awkward cut-and-paste style. It is easier and faster to express an idea by quoting from a source than by paraphrasing the idea through one's own word combination choices. This also removes any fear of inadvertent plagiarism. One may also say, quite debatably, that this style enhances the sense that the decision reached was inevitable under the precedents.

But recall that we are examining whether word choices in a judicial opinion are of critical importance—critical enough to justify the vast underworld of non-precedential opinions. We are coming at that question indirectly by studying quotations within opinions taken from past judicial authority, the idea being that when writers quote, they believe that the particular combination of words has special force and meaning. Recall that Judge Kozinski defends non-precedent policy on the ground that it conserves time and energy so that judges may write carefully in precedential opinions.¹¹³ Thus, when we observe Judge Kozinski quoting, we may reasonably infer that he sees opinion writers whom he has quoted as having written for his benefit and instruction, picking nouns and verbs with great care for his edification and to ensure that he and other judges and lawyers will not distort their thoughts.

Yet the quotations in *Ramirez* hardly fit this bill. It would be unduly boring and repetitious to describe and evaluate them one by one. There are quotations explaining the purpose of the rules, with nothing resting on the verbiage employed.¹¹⁴ Similarly, quotations are used to describe the means for achieving a rule's purposes, again, with nothing hinging on the particular words quoted.¹¹⁵ A quote is also used to convey the background

112. 298 F.3d 1022 (9th Cir. 2002).

113. See *Hearing*, *supra* note 1 (Judge Kozinski's testimony).

114. See, e.g., *Ramirez*, 298 F.3d at 1026 (quoting *United States v. Lacy*, 119 F.3d 742, 746 n.7 (9th Cir. 1997)); *id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)) ("The [Fourth Amendment's] particularity requirement protects the individual from a 'general, exploratory rummaging in [his] belongings.'"). Surely a paraphrase like "aimlessly searching through one's possessions" would do as well.

115. See, e.g., *id.* at 1026 (quoting *United States v. McGrew*, 122 F.3d 847, 850 (9th Cir. 1997)) (stating that the Fourth Amendment's particularity rule keeps officials from rummaging around by "'limit[ing] the officer's discretion' and by 'inform[ing] the person subject to the search what items the

policy information that police searches require “cooperation and division of labor,”¹¹⁶ something that he could have easily expressed in his own words. It is interesting to note that when Judge Kozinski stated the case’s decisional rule, which makes the officer who led the search liable, he does not quote from the precedents. He cited the most relevant Ninth Circuit precedent, *United States v. McGrew*,¹¹⁷ for his own proposition that “[w]hen officers fail to attach the affidavit to a general warrant [that lacks particularity], the search is rendered illegal because the warrant neither limits their discretion nor gives the homeowner the required information.”¹¹⁸ One would think that his duty as a writer is to ensure perfect rule expression, but a quick glance uncovers nothing more than humdrum. He also used his own words to describe the rule that relieved some of the other defendants from liability: “Law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances, even if the actions result in a constitutional violation.”¹¹⁹ Here, too, there is nothing of importance in the rule’s verbal formulation.

IV. DUBIOUS DEFENSES OF NON-PRECEDENT POLICY

A. CAUTIOUS PRECEDENT SELECTION ENHANCES CASE LAW CONSISTENCY

The body of law created by judicial precedents is notoriously untidy. This law emerges from judicial opinions written to justify the courts’ decisions on legal questions brought for resolution. These opinions are written by judges of disparate abilities, free from all controls but tradition. They might write copiously or stingily, clearly or obscurely, carefully or loosely, decisively or ambivalently. As the corpus of a jurisdiction’s case law builds up, thousands and thousands of legal principles, doctrines, standards, rules, maxims, moralities, presumptions, policy justifications, and other types of ideas come to inhabit the case reporters and electronic databases. It becomes possible for a lawyer to craft out of this mass an argument to support literally any result no matter how far-fetched.

officers executing the warrant can seize”). Surely a paraphrase like “details in a search warrant tell the searchers and the searched what can and cannot be done” could substitute for the quotation without a loss.

116. *Id.* at 1027 (quoting *Guerra v. Sutton*, 783 F.2d 1371, 1375 (9th Cir. 1986)).

117. 122 F.3d 847 (9th Cir. 1997).

118. *Ramirez*, 298 F.3d at 1026 (citation omitted).

119. *Id.* at 1027 (citations omitted).

How does the common law bring order in light of and to this morass? It has developed over the centuries a set of understandings and techniques that gather under the label “legal method.” It is beyond this Article to explore that vast field in any depth, but a few ideas may reacquaint the reader with the common law’s ordering and evaluation techniques.

Categorization of legal principles, doctrines, and rules into different fields begins the ordering process. It is difficult but possible to transport material across these categorical boundaries because each field of law is erected on its own set of foundational goals, assumptions, principles, policies, and practices. Within a field, the concept of dicta plays a critical role in evaluating the weight of ideas expressed in judicial opinions.¹²⁰ Analogical reasoning can be used to expand rules, synthesis of rules into broader doctrine can introduce order, and the process of distinguishing precedents is available to set in motion new lines of authority and to contract the old. All these methods are cabined by what we can call “protocols”: sets of understandings about proper and improper use of these methods.

Symmetry and perfect consistency are not attainable because within a jurisdiction’s case law bank sit clashing principles, doctrines fighting exceptions, multiple and often conflicting policy goals, concurrences, dissents, close calls, and ambiguities. Yet overall, an attorney and judge well trained in legal methodology can usually extract from relevant authority the better decisional rule—one that is reasonably consistent with prior decisions and that responsibly identifies and advances the goals of relevant case law.

Judge Kozinski defends the no-cite, no-precedent practice by focusing on the need to limit publication in order to enable judges to maintain consistency in circuit law when these judges execute the “difficult and delicate” task of writing precedent that can be cited.¹²¹ This claim deserves further examination.

120. See generally Richard B. Cappalli, *What is Authority? Creation and Use of Case Law by Pennsylvania’s Appellate Courts*, 72 TEMP. L. REV. 303 (1999), available at <http://legal-method.com/whatis.htm> (offering varying explanations of the concept of dicta).

121. See *Hearing*, *supra* note 1 (Judge Kozinski’s testimony). See also *Symbol Techs., Inc. v. Lemelson Med., Edu. & Research Found.*, 277 F.3d 1361, 1368 (“Courts contribute to the growing imprecision, uncertainty and unpredictability of the law by issuing repetitive opinions on subjects that have been thoroughly irrigated.”); *STANDARDS*, *supra* note 8, at 6 (“Unlimited proliferation of published opinions constitutes a burden and a threat to a cohesive body of law.”); *Martin*, *supra* note 15, at 192 (“We are creating a body of law. There is value in keeping that body cohesive and understandable . . .”).

The opinion writing task of judges is not that of the treatise writer, who seeks to organize large batches of law. On an appealed issue, the judge faces not a plethora of doctrines and rules but a discrete subset. The job is to create a single decisional rule out of relevant statutory materials and judicial precedents, a rule that is generated by the facts before the court and tested against principles, doctrines, rules, and policies found in the relevant precedents. Should a line of authority be advanced but rejected, the reasons for distinguishing those precedents should be explained. Further efforts at achieving consistency would seem unnecessary and likely counterproductive. It is the focus on case facts that enables a court to think clearly and decisively.¹²² When a court ventures into the realm of abutting doctrines, off point exceptions, parallel situations in other fields, and comparable tangents, its speculative work necessarily degenerates in quality.

Should these sidelines be what Judge Kozinski means by achieving consistency, his vision violates the common law's wisdom in insisting on singular determinations on singular issues reasoned narrowly¹²³ and its insistence that general expressions in court opinions be understood in light of the peculiar case facts that generated them.¹²⁴ He might mean, however, no more than a judge should reconcile today's decision with past case law that may superficially appear to be in conflict. If so, nothing laborious is involved. The panel has already done the mental work of distinguishing these authorities, assuming that full consideration is a reality. The opinion merely writes up the facts and factors that serve to avoid these past precedents: "Appellee has advanced . . . as the controlling authorities, but this court believes them to be distinguishable because"¹²⁵ Judge Kozinski surely does not mean that appellate judges are obliged to comb past cases for potentially conflicting dicta. It is only arguably contrary

122. See PAUL J. MISHKIN & CLARENCE MORRIS, ON LAW IN COURTS: AN INTRODUCTION TO JUDICIAL DEVELOPMENT OF CASE AND STATUTE LAW 146–47 (1965).

123. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989).

124. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821). According to Chief Justice John Marshall,

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Id. at 399.

125. See, e.g., *Campbell v. Kincheloe*, 829 F.2d 1453, 1465 n.7 (9th Cir. 1987) ("Our decision in *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984), is distinguishable. There we struck down the death penalty provision of the federal espionage statute because it provided no statutory guidelines to control the sentencer's discretion").

authority that needs to be distinguished. Arguably contrary *language* in past opinions, even those issued by higher courts, can be safely ignored under accepted concepts of what constitutes binding authority.

B. JUDGES ARE BURDENED TO WRITE CLEAR LAW

The argument framed by Judge Kozinski also advances the judges' need for more time to write clear law.¹²⁶ This implicates competence, not burden: Judges who cannot write clearly likely do not think clearly either. They will have difficulties even in the twenty percent of appellate opinions labeled precedential. Somehow, federal appellate judges believe that time must be spent picking the precise words to insert in their opinions.¹²⁷ This may be the new American common law, within which words chosen by judges for their opinion have some controlling future force, just like a statute. In contrast, the traditional understandings give force only to the ideas expressed in a judicial opinion, ideas that can be expressed using a variety of words and phrases. Good judicial practice requires that such ideas be expressed in an understandable way so that later users can understand a case's material facts, the precedential rules and principles being applied, the court's estimate of the rule it has devised to resolve the issue, and the bases for the rule. But nothing precedential hangs on the choice of a word. It is the later courts that have the power to extract the precedent's holding and to phrase it according to their judgments about its content and breadth.

Judge Samuel Alito has expressed worry about precedent abuse by future lawyers.¹²⁸ The antidote is not the creation of an underworld of careless opinions, but rather lean writing by judges¹²⁹ because "every unnecessary word in a judicial opinion is a candidate for future abusive use by lawyers creating arguments."¹³⁰

Most defenders of no-cite, no-precedent rules speak of the need to free appellate judges from the duty to write carefully.¹³¹ This assumes that

126. See *Hearing*, *supra* note 1 (Judge Kozinski's testimony).

127. See *id.* ("If unpublished dispositions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording"); see *id.* (Judge Alito's testimony) ("The opinion must be crafted with the recognition that some future litigants may seize on any ambiguity in order to achieve an unwarranted benefit or escape the opinion's force.").

128. See *supra* note 1 (Judge Alito's testimony).

129. Cappalli, *Improving*, *supra* note 87, at 318. See also 11TH CIR. R. 36-3, IOP 5 ("Judges . . . will exercise appropriate discipline to reduce the length of opinions by the use of those techniques which result in brevity without sacrifice of quality.").

130. Cappalli, *Improving*, *supra* note 87, at 318.

131. See, e.g., *Hearing*, *supra* note 1 (Judge Kozinski's testimony).

reasoning and writing are not linked, that is, that clarity characterizes the panel's thinking about the proper decisional rule, but writing out that clear thinking is too burdensome. The opposite is likely true, however. Imprecise and inadequately informed thinking leads a panel to an unwise decision, an error that can only be revealed when the panel writer seriously puts pen to paper.¹³² If it "won't write" it is because impressionistic thinking does not translate into logical, sensible handling of precedent and policy. Yet it appears that non-precedential opinions are written not by panel judges but by clerks and staff attorneys.¹³³ This means that appeals selected for second-class processing are never deeply considered by panel judges. These judges may not have read the briefs and certainly did not read the authorities cited in the briefs. The early non-precedent decision¹³⁴ means that the vast majority of these appeals had no oral argument.¹³⁵ Finally, without the writing responsibility, no panel judge has been forced to consider the appealed issues and relevant authorities deeply and thoroughly.

C. THE UNCOMMON LAW: "ZONE OF DISCRETION"

Arthur Hellman suggested at a congressional hearing that a new judicial process has emerged, which he calls the "zone of discretion."¹³⁶ This process is engendered by the judicial or legislative lawmaker's creation of rules that lack definitive elements. Instead, such rules require assessment of a multiplicity of factors or require consideration of the entire factual context within which an action, such as a police search and seizure, occurs. The United States Supreme Court has referred to the latter as the "totality of the circumstances."¹³⁷ The governing legal principle is too

132. See STANDARDS, *supra* note 8, at 2 ("Most people find that their thinking is disciplined by the process of written expression."); BAKER, *supra* note 37, at 120 ("[T]he very writing of an opinion reinforces the decisionmaking and ensures correctness. . . . A decisionmaker who must reason through to a conclusion in print has reasoned in fact."). One federal appellate judge suggests that opinions selected for non-precedent status may be made precedential when writing judges discover they need several pages to justify the panel's decision. See Nichols, *supra* note 36, at 915.

133. See POSNER, *supra* note 3, at 169; Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325, 332-34 (2001).

134. See *infra* note 144 and accompanying text.

135. Most non-precedent cases were not accorded oral argument. See Wasby, *supra* note 133, at 332 (quoting JUDITH A. MCKENNA, LAURAL L. HOOPER & MARY CLARK, CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 19 (2000)) ("Oral argument is strongly associated with opinion publication overall."). One appellate judge has stressed the importance of oral argument in "engag[ing] the attention of judges and mak[ing] them think . . ." Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1386 (1990).

136. See *Hearing*, *supra* note 1 (Hellman's testimony).

137. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

abstract to be called a rule, and instead is traditionally called a standard—the standard of reasonableness being a common one, as in “unreasonable search and seizure.” Whenever an appellate court engages in legal analysis by judging case facts under such standards, it enters Hellman’s zone of discretion. According to Hellman, when decisions are rendered within that zone, precedent is not formed because the likelihood of the same constellation of facts recurring is too small to justify the decisional court writing it up as a precedent. Consequently, that type of decision can pass comfortably into the underworld of unpublished, non-precedential appellate decisions.

This is the precise category of appellate decision where precedent is most needed. When the relevant legal standard provides weak decisional signals, arbitrariness and inconsistency are avoided only by means of a precedential system in which each appellate panel’s decision, conscientiously explained in a published decision, is available for consultation, whether as out-of-jurisdiction persuasive authority or as possibly controlling in-jurisdiction precedent. Not only does precedent instruct as to what was or was not reasonable, unconscionable, bad faith, or reckless disregard, but specific case facts begin to be categorized and rules start to be spun out of the standards.

Let us pretend that in the past twenty-five years the federal circuits have judged the reasonableness of 2500 police searches. The zone of discretion theory would have remitted each of those decisions into the non-precedential underworld. This would have deprived panels of their predecessors’ thoughts about proper police conduct, the instructive function of judicial precedent. Further, it would have blocked the rule generation process by which later courts both examine the reasoning and fact emphases within the most comparable precedents and extract rules of law. Those rules then acquire increasing definitiveness as they attract new cases for inclusion or exclusion. Over time, when case volume is large, a host of quite determinate rules of law are generated from the same starting-point standard being applied in the same genre of cases. These rules then control courts and whatever area of society is governed by them, like the police, in their future judgments and conduct.

Notice the perverse effects of the Hellman zone of discretion thesis. Each scantily written appellate decision within the zone disappears unknown into a case file. Today’s panels have no guidance from

yesterday's.¹³⁸ Each appeal is treated as a case of first impression, regardless of the actuality that it is the 2500th "impression." Today's appellant wins and tomorrow's appellant loses on the same basic facts. Perhaps an even worse consequence is that appellate panels, operating discretionally, do not have to reason deeply or thoroughly. Freed from the constraints of precedents and past judicial thinking, they may let their biases and personal preferences decide not only the appealed issue but also the processes by which that decision was reached by denying oral argument and writing scanty, non-precedential opinions.

A recent United States Supreme Court case that generated Hellman's zone of discretion idea, *United States v. Arzivu*,¹³⁹ is easily turned against it. The case concerned the Fourth Amendment reasonableness of a border patrol stop that uncovered a large quantity of marijuana in two bags, one under the feet of two children in the back seat. Although the Court emphasized the need to look at all the circumstances asserted to justify the reasonableness of a police search and seizure, it emphasized that district court decisions on motions to suppress evidence are subject to de novo appellate review precisely to enable these courts to develop usable law out of the particulars of case decisions. The Court stated that contrary results in trial court decisions may be prevented by allowing appellate courts to "clarify legal principles," "unify precedent," give "tools" to law enforcement officials to assist them in acting lawfully, and look at decisions together so as to "usefully add to the body of law."¹⁴⁰

Utilizing common law methodology, we can extract a rule of law from *Arzivu* itself. The Court discussed the case facts in extreme detail, even appending a map to the opinion. The detailed discussion was mandated by the totality approach. Yet it ultimately selected critical facts and stated them in abstract form.¹⁴¹ Taking its cues, the common law specialist might extract the following rule from the precedent:

When an experienced border patrol officer stops a vehicle commonly used by smugglers on a smugglers' route, its occupants engage in abnormal and suspicious behavior upon seeing the officer, and no lawful reason appears for using a difficult road instead of an easier one, the officer has a particularized and objective basis to suspect wrongdoing and has sufficient cause to make a reasonable stop under the Fourth Amendment.

138. See POSNER, *supra* note 3, at 166 ("[A] surprising fraction of federal appeals . . . are difficult to decide . . . because there are too few [precedents] on point.").

139. 534 U.S. at 266.

140. *Id.* at 273–74 (quoting *Ornelas v. United States*, 517 U.S. 690, 697–98 (1996)).

141. See *id.* at 275–76.

Had a circuit court used Hellman's zone of discretion theory to bury the *Arzivu* holding in the netherworld of non-precedential opinions, law enforcement officers would have lost one comprehensible and reasonably definitive rule to guide their conduct in apprehending suspected criminals.

V. ARE NON-PRECEDENT CASES CAREFULLY SELECTED AND FULLY CONSIDERED?

A. SELECTION AND CONSIDERATION

Defenders of the no-precedent, no-citation practice assert that cases are fully considered even though a panel decides to issue only a non-precedential memorandum opinion to the parties.¹⁴² Great faith is required to believe this.¹⁴³ Full consideration means deep study of the statutes, legislative history, regulations, case law, and relevant secondary materials surrounding the legal issues presented on appeal. Ascertaining legislative desires on an issue not overtly considered by a legislative body is a complex, difficult, and time-consuming process. Analysis of precedents is comparably demanding. Digging rationales out of opaque opinions, reconciling seemingly conflicting lines of authority, and determining whether new facts or missing facts call for a different result are just some of the legal method challenges an appellate panel faces. Teasing the best legal rule out of difficult source materials and competently applying it to current case facts is how one should interpret full consideration of appealed issues.

There is cause to doubt that those 400,000 non-precedential cases decided in the past two decades received that treatment. Justifying my doubt is the practice of appellate panels to make the non-precedent decision as early in the review process as possible.¹⁴⁴ Further, according to

142. *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001) ("That a case is decided without a precedential opinion does not mean it is not fully considered . . ."); Martin, *supra* note 15, at 190 ("[W]e bring the same standards of excellence to unpublished opinions as we do to published opinions . . .").

143. "It is reasonable to assume that every proposition of law relied on in the [published] opinion received some attention from the members of the panel. But when the opinion is unpublished, we have no such confidence." *Hearing*, *supra* note 1 (Hellman's testimony). See also POSNER, *supra* note 3, at 165 ("[T]he unpublished opinion provides a temptation for judges to shove difficult issues under the rug . . ."); Arnold, *supra* note 12, at 223 (arguing that there is a temptation for judges to use the unpublished opinion option for decisions that are hard to justify).

144. See Martineau, *supra* note 35, at 125; Wasby, *supra* note 133, at 333. This follows the suggestion of the Advisory Council on Appellate Justice and aims to "avoid wasted effort[s]." See STANDARDS, *supra* note 8, at 11.

empirical evidence, the distinction between the trivial and the important case is not made with accuracy.¹⁴⁵

Not having access to the workings of an appellate judge's chambers, the decisional process is speculative, and there may be as many processes as there are federal appeals court judges.¹⁴⁶ Some observations are intuitive, however. Without public accountability, an appellate panel is likely to be less conscientious regarding its decision and the accompanying justifications.¹⁴⁷ Further, if a legal issue is fully considered, as described above, writing it up is a simple matter. The future parties need not know of every idea and every source considered by judges and their clerks, nor every argument made by the parties to the appeal. Four or five pages suffice to inform the future parties about the issue, the relevant and irrelevant facts, the guiding principles and precedents, and the core rationale underlying the expressed holding.¹⁴⁸ The American legal system would likely be stronger without two-thirds of the pages in the Federal Reporter, Third Series. Unfortunately, the discursive, endless federal appellate opinion is a common feature of the legal landscape. Rather than offering sound, decisive guidance to courts and lawyers facing comparable issues in future disputes, these discursive opinions offer a grab-bag of arguments to be raised on all sides of an issue. Rather than resolving future disputes, discursive federal appellate opinions generate more controversy. Judges should be writing practical, focused opinions, leaving scholarship to the academics.¹⁴⁹

145. See Foa, *supra* note 67, at 315; Songer, Smith & Sheehan, *supra* note 4, at 984. See also Nichols, *supra* note 36, at 924 (“[E]rrors . . . justify giving more thought to the selections [for nonpublication].”).

146. One circuit's process concerning the decision to publish has been studied by a political scientist. See Wasby, *supra* note 133, at 331 (studying the federal courts of appeals, but drawing primarily from his “extended observation” of the Ninth Circuit).

147. See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 284 (1996) (declaring that “unpublished opinions are . . . dreadful in quality”). The authors of the adjective “dreadful” empirically identified large numbers of unpublished opinions that presented no discernible justification for their decision. See Reynolds & Richman, *An Evaluation*, *supra* note 8, at 600–04. But see Martineau, *supra* note 35, at 132 (“If a court is intent upon acting irresponsibly, it can do so with a published opinion, just as well as without one.”).

148. See Cappalli, *Improving*, *supra* note 87, at 319 (stating that opinions should avoid unnecessary verbiage).

149. Judge Kozinski equates the writing of an opinion to the writing of a law review article. See *Hearing*, *supra* note 1 (Judge Kozinski's testimony).

A point supported by research is that judges rely on their clerks for the bulk of this screening process.¹⁵⁰ Batches of appeals never make it to merits panels based on recommendations of central staff attorneys who conclude that these appeals deserve non-precedent status.¹⁵¹ Of those appeals that reach merits panels, many are disposed of non-precedentially by law clerks' memoranda.¹⁵² Federal appellate judges have insufficient time to consult the authorities cited by the parties in their thirty page briefs. In 1999, the Ninth Circuit judges faced a minimum of 900 briefs.¹⁵³ Should there be a modest twenty citations in each brief, the judges would have to study 18,000 sources—an impossibility.¹⁵⁴

Dependent on clerks fresh out of law school to advise them on whether issues raise new questions or are decided by controlling authority, the appellate judge can guarantee neither careful sorting nor full consideration of those appeals labeled non-precedential. Studies show that these new lawyers know little of legal method, that is, the skills and understanding needed to interpret and apply case law and statutes.¹⁵⁵ They do not extract holdings or deeply study legislative purpose, but instead look for dispositive language in source materials. Having located relevant dicta, the search for the appropriate legal solution ends and the case is found to be controlled by past authority, leading to a non-precedential decision on the briefs without argument.

Instead, full consideration likely means that a panel judge's instinct on an issue coincides with the recommendation in a clerk's memorandum.¹⁵⁶ Not consulting the authorities backing the arguments on the other side of the issue, the appellate judge is not in a position to challenge the clerk's viewpoint. It is not clear if all members of a panel and their staff make an

150. See Richman & Reynolds, *supra* note 147, at 275 ("Clerks and central staff screen the appeals to determine how much judge time should be allocated to each case. These para-judicial personnel also recommend whether oral argument should be granted and whether a full opinion (or, indeed, any opinion) should be written.").

151. See Wasby, *supra* note 133, at 332.

152. See *id.* at 333. See also Richman & Reynolds, *supra* note 147, at 290 ("[S]taff members . . . write opinions in cases decided without oral argument.").

153. See *Hart v. Massanari*, 266 F.3d 1155, 1178 n.37 (9th Cir. 2001).

154. When Judge Kozinski says "we read the applicable authorities," *Hearing*, *supra* note 1 (Judge Kozinski's testimony), "we" must mean someone in his chambers, in addition to or in lieu of himself.

155. See generally Cappalli, *supra* note 93 (studying the revealing lack of legal method instruction in American law schools).

156. One federal circuit judge worried about judges "unreflectively adopting their law clerks' view rather than developing their own view through reflection." Merritt, *supra* note 135, at 1387.

independent and thorough preliminary assessment.¹⁵⁷ Should this be the case, when all panel members and their clerks concur on the same result and reasoning, a valid non-precedential decision may have occurred. But this should be rare indeed, especially if one understands the true meaning of “controlled by authority.”

Regardless of the distinct formulations in the no-precedent rules—“settled” issues do not “establish a new rule of law,” do not “resolve an apparent conflict of authority,” and do not “modify” a rule of law—the normal application of these formulations is when a relevant precedent or line of precedents from the same or a higher court cannot be distinguished. Yet all lawyers know that squarely on point precedents are infrequent. If what is meant, instead, is that precedents easily stretch to cover the new case by analogy, by treating new case facts as immaterial or by expanding the scope of the precedential rule, appellate courts do a disservice to the legal system by not explaining the movement of law in a concise but well-reasoned opinion. The bulk of those 400,000 non-precedential decisions likely fits this bill rather than the controlling authority disguise.

B. THE DARK SIDE: THE VAST UNDERWORLD OF NON-PRECEDENTIAL DECISIONS

Research supports the hypothesis that appeals are often incorrectly assessed as non-precedential. An empirical study of Eleventh Circuit unpublished decisions shines a light into the dark side of this underworld of non-precedents.¹⁵⁸ On legal issues, the circuit does not publish when “an opinion would have no precedential value.”¹⁵⁹ One would expect publication of all reversals on issues of law out of respect for the district judge’s legal viewpoints. Within the non-precedent decisions, the researchers found that twelve percent ended in reversing the lower court, leading the authors to conclude that “many controversial cases are ending up in unpublished opinions.”¹⁶⁰ They also found a correlation between the political ideology of the judges and their underworld decisions, which is

157. It seems unlikely that they do. *See* Wasby, *supra* note 133, at 341 (“[J]udges often defer to each other’s choices . . .”). Empirical evidence demonstrates that circuits that require a panel majority to determine whether or not to publish do not publish more than circuits that place that power in the hands of a single judge. *See* Reynolds & Richman, *An Evaluation*, *supra* note 8, at 592–93.

158. *See* Songer, Smith & Sheehan, *supra* note 4, at 963 (concluding that “the written rule governing publication offers little guidance to the judges and is often applied inconsistently within the circuit”).

159. 11TH CIR. R. 36–1.

160. Songer, Smith & Sheehan, *supra* note 4, at 975–76.

surprising in light of the supposedly trivial nature of non-precedents.¹⁶¹ Further, they discovered that governments and corporations, and the issues related to them, had a significantly greater chance of having their decisions published than “underdogs”—criminals, civil rights appellants, prisoner appellants, and welfare beneficiaries.¹⁶² This last finding was confirmed by studies undertaken by two professors who are experts in appellate practice.¹⁶³

Another empirical study displayed similar results:¹⁶⁴

[W]e found that the unpublished opinions we studied included a surprising number of reversals, dissents, and concurrences. Even more important, we discovered that outcomes among unpublished opinions showed significant associations with political party affiliation, specific professional experiences, and other characteristics of judges adjudicating the cases. Together, these findings suggest that panels authoring unpublished opinions reach some results with which other reasonable judges would disagree. Such divergent views are likely to reflect both differences as to the meaning of legal principles and disagreement over the proper application of seemingly settled law.¹⁶⁵

A third study that searched online databases similarly revealed significant numbers of reversals, dissents, and concurrences in unpublished opinions.¹⁶⁶

What inhabits this underworld of non-precedential decisions? Judge Kozinski would welcome an audit.¹⁶⁷ Our legal system needs to know the extent to which this zone is filled with precedents truly controlled by past authority or otherwise not deserving citation status. It might well be filled with decisions that defied past authority, or were reasoned so poorly so as to call into question the decision, or were too dubious or controversial to see the light of day. Nothing controls a panel’s choice of nonpublication, and given pressing caseloads, it would only be human for panels to utilize the tactic excessively, especially if a court’s judges felt the need to write a

161. *See id.* at 976–79.

162. *See id.* at 980–83.

163. *See* Richman & Reynolds, *supra* note 147, at 277 (“[T]hose without power receive less (and different) justice.”).

164. *See* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 79–82 (2001) (stating that over a seven year period, 1140 decisions reviewing unfair labor practice claims reached the federal circuit courts).

165. *Id.* at 119.

166. *See* Hannon, *supra* note 71, at 215–16, 221–23.

167. *See* *Hearing*, *supra* note 1 (Judge Kozinski’s testimony).

law review-like opinion in every case.¹⁶⁸ Surely the eighty percent statistic¹⁶⁹ by itself strongly suggests overuse. It is doubtful that eight of ten appeals are controlled by past authority in any but the loosest sense of controlled.

VI. A SENSIBLE COMPROMISE: SHORT OPINION CASES

Because most federal appeals cases are now decided without oral argument,¹⁷⁰ which is another development weakening the American legal system, parties to an appeal do not know if the appellate panel has heard their arguments and studied their authorities. Hellman rightly suggests that an “explanatory memorandum . . . provides some evidence that the judges have confronted the issues presented by the appeal.”¹⁷¹ A sensible compromise that recognizes the great workload that besets the appellate bench is the short opinion, which can perform this explanatory function for the parties while simultaneously explaining why the particular opinion is likely not precedential.¹⁷² This Section further suggests that appellate decisions that are actually controlled by settled law—the main criterion in the no-citation, no-precedent rules—must be added to the jurisdiction’s case law bank, and that by utilizing a short opinion, no significant investment of additional judicial resources is necessary.

It is simply untrue that appellate judges must write all opinions copiously if they are to be available for citation. Many appellate issues are questions of fact that are relevant only to the particular case. Summary judgment motions, for example, involve determining whether the nonmoving party’s proof, which is directed to an element of its cause of action, has created a genuine issue for trial. Despite Federal Rule of Civil Procedure 56’s reference to the moving party’s entitlement to a “judgment as a matter of law,” this is often a matter of factual proof requiring a certain level of sufficiency. The trial judge thinks the plaintiff nonmover’s proof is insufficient for a reasonable jury to find for him or her and grants judgment to defendant. The appellate court, looking at the same documentation, agrees or disagrees. In either case, nothing that can be replicated in a

168. See Laretto, *supra* note 8, at 1042 (“The underlying critique of no-citation rules . . . is that they give judges too much discretion in deciding which cases do not merit publication.”).

169. See *supra* note 66 and accompanying text.

170. See *Hearing*, *supra* note 1 (Hellman’s testimony).

171. *Id.*

172. See BAKER, *supra* note 37, at 122 (“Insufficient attention has been given to what might be called the abridged opinion, a written opinion primarily addressed to the parties, which identifies the issue on appeal, announces the court’s disposition, and gives the principled basis for the ruling.”) (citation omitted); JUDICIAL CONFERENCE, *supra* note 8, at 11 (recommending “succinct” opinions).

future case has occurred and no need arises to write a copious opinion. Yet nothing prevents the court from publishing something about its rationale. Current practice is to say nothing more than “affirmed” or “reversed” in a laundry-list table of dispositions. Yet why not reveal the basis of decision, such as “Affirmed. In a racketeering claim, plaintiff’s proof failed to create a genuine issue as to a continuing threat of illegal activity required by *Smith v. Smith*”?¹⁷³

Similarly, short opinions could justify appellate affirmances or reversals concerning denials of new trial motions based on the weight of the evidence or concerning fact-based lower court action granting or denying judgments as a matter of law. Because the trial records in such cases are quite unlikely to be repeated—same witnesses, same testimony, and same documents—no precedential reason exists to delve into the facts publicly. An appellate panel might feel obliged to offer details of its factual conclusions to the parties in a letter memorandum, but its public face need only say, for example, “After reviewing the facts of record, we agree that the new trial motion was correctly denied. Affirmed.”

Another category of cases meriting short opinions is comprised of appellate reviews for prejudicial error in evidentiary matters. Assume the trial judge legally erred in admitting or excluding a piece of evidence. Should this be an evidentiary issue that is likely to arise in future cases, the appellate decision ought to be fully written because the legal world needs to know what evidence is admissible and why. On the other hand, determining whether the admission or exclusion of evidence was prejudicial involves a study of the entire record and thus becomes *sui generis* and need not appear in the public record. For example, “We have carefully reviewed the case record and conclude that the evidentiary error was not prejudicial.”

Many discretionary choices by trial judges revolve around case-specific facts that will never be seen again. Sanction decisions, such as for violations of Federal Rule of Civil Procedure 11 or for violations of discovery rules and orders, are in this category. The pattern of behavior that led to the sanction is unlikely to reappear. These trial court judgments are made in light of the particular claims, defenses, parties, lawyers, case events, and impact on the litigation. Only in the roughest form might a future litigation possess some similarity, and thus, its insistence on the same result would be misguided. Again, no reason exists for a full

173. See, e.g., *Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989) (affirming summary judgment because “[t]he film is manifestly not about [Ginger] Rogers.”).

appellate opinion affirming the sanction, although for common unacceptable attorney conduct the court might wish to instruct the bar by publicly describing the acts considered as sanctionable. Keep in mind that defenders of the no-precedent, no-cite rules assert that even non-precedential cases are fully considered. If so, little extra work would be required to write and publish a brief explanation for the affirmance. In the same vein, both sentencing decisions under rigid guidelines and appeals from administrative records when the court is operating under a deferential review standard need not be written beyond a word or two.

A different category of short opinion would be the appellate resolution of an issue based on controlling authority. Judge Kozinski would have us believe that most non-precedential decisions are controlled by precedents that are materially indistinguishable.¹⁷⁴ He may employ a loose view of precedent under which a prior authority somewhat close in fact, with a stretchable rationale, or with some relevant language is considered on point. Assuming the contrary, that he means “rigid precedent” as he seems to, then the fully considered appellate decision is quite simple to write up. The panel writer can state the issue, write a short statement of material facts, mention any facts found immaterial, and then cite the controlling authority. For example, “We affirm on the basis of *Jones v. Jones*.” Because the case has in theory been fully considered already, writing the opinion should require one hour of a clerk’s time and five minutes for the judge to review the clerk’s draft. The value to the legal system is that future litigants can assess a doctrine’s strength by its constant use.¹⁷⁵

The short opinion task is one executed daily by appellate judges. Rarely are appeals based on a single ground; more typically, appellants and cross-appellants will raise multiple issues. One or two of these might be perceived by the appeals panel, or clerks and staff, as significantly arguable and important, justifying placement of the appeal on the precedential course. Once there, however, the court adjudicates all properly preserved issues, including the frivolous or borderline frivolous ones we may call “tag-along.”

On these tag-along issues, writing judges have two options. First, judges may simply refuse to invest any time and effort in writing up the justification for their decisions on these claims. The court may state, for example, “We have considered appellant’s remaining issues and arguments

174. See *Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001).

175. See *Schuldberg*, *supra* note 8, at 561–62.

and consider them without merit.”¹⁷⁶ Parties to an appeal can hardly complain about not being heard when they are privileged to have oral argument and a writing on their substantial claims, that is, full consideration. Should tag-along issues be insubstantial in the true sense of being either factually unsupported or quickly and decisively answered by on point law, such treatment is justified. It disserves neither the system of legal precedent nor the parties, and it conserves scarce judicial resources. Such resources can be redirected toward the appeals currently being treated cursorily as non-precedential.

More typically, however, writing judges choose the second option of including some discussion of tag-along issues in their opinions. They dispose of them in a paragraph or two, which includes a summary of the case facts relevant to the issues.¹⁷⁷ This is what has been referred to as a short opinion, and these short opinions ought to be utilized for the eighty percent of appeals now being archived as non-precedential. Should a policy reversal occur and appellate judges begin to treat all appeals as precedential, no judicial retraining would be necessary. Nor would retraining be necessary under a system where brief, published explanations are required.

VII. CONCLUSION

Dismantling a system that has spread so widely and deeply will be arduous, especially when appellate judges could be expected to fear encroachment on their valuable time. These judges will surely disagree with two of this Article’s points. The first is that great numbers of appeals taken in the past quarter century have not received due attention from judicial panels, a point that is obvious to most neutral observers. Although preliminary judicial tasks may be delegated to clerks and staff attorneys, all appeals merit, at some point, a significant degree of personal attention from the judges themselves, and non-precedents likely have not.¹⁷⁸ Forced to publish a signed opinion, appellate judges will not escape public scrutiny and will, being human, tend toward a superior work product. Nonskeptical lawyers believe that numerous legal issues have correct answers, and

176. See POSNER, *supra* note 3, at 165 (implicitly stating that one-line treatment may be appropriate for frivolous appeals).

177. See, e.g., *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 899–900, 908 (9th Cir. 2002) (Kozinski, J.) (briefly disposing of the personal jurisdiction and defamation tag-along issues).

178. See Wasby, *supra* note 133, at 334 (citation omitted) (“[W]e spend very little judge time [on non-precedent cases] . . . but rely on recent graduates of law schools for the writing and most of the editing.”) (quoting an anonymous judge).

should they be right, a better process can reasonably be presumed to produce better answers over the long haul.

The second point is that great numbers of appeals have mistakenly been assigned to the fast track. Empirical evidence points in this direction.¹⁷⁹ Scholars have looked into the non-precedent bin and have uncovered numbers of cases with precedential value.¹⁸⁰ This is not surprising. The courts have set up a Catch-22 system that seeks to spot precedentially valueless appeals as early as possible in order to conserve energy while failing to invest the time and effort essential to making that judgment accurately. Only after all relevant precedents and other legal sources have been duly read with suitable legal skills may a court conclude that an issue on appeal is controlled by existing authority. But that necessary due attention is by nature a slow track, meaning that there can be no swift and accurate channeling of appeals. As Euclid once told the satrap of Egypt, “There is no royal road to geometry.”¹⁸¹ Once the due effort is invested, it becomes a small matter to write and publish a lean but convincing decisional justification.

What will ultimately carry the day, however, is not judicial humility and introspection, but rather a recapturing of the common law’s wisdom. The non-precedent system has defied that wisdom by blocking realistic access to tens of thousands of precedents, whether by forbidding their use, according them inferior status, or hiding them entirely. The system has blocked the slow, sure accretion of precedent, with today’s judges failing to benefit from the thoughts of their predecessors. A flawed system that sacrifices significant benefits cannot long endure.

179. See *supra* notes 158–66 and accompanying text.

180. See, e.g., Foa, *supra* note 67, at 338; Merritt & Brudney, *supra* note 164, at 118–21; Songer, Smith & Sheehan, *supra* note 4, at 975–76.

181. OXFORD DICTIONARY OF QUOTATIONS 82 (4th ed. 1992).