

PUBLICATION PLANS IN THE UNITED STATES  
COURTS OF APPEALS: THE UNATTAINABLE  
PARADIGM

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## I. INTRODUCTION

Looking at the seemingly endless volumes of the Federal Reporter, most people would be shocked to learn that approximately eighty percent of all cases brought before the federal appellate courts are decided in unpublished form.<sup>1</sup> Aside from the obvious implication that the text of the case is not published in the Federal Reporter, to be unpublished also means that the disposition is either relegated to persuasive status or, in those federal appellate circuits with a no-citation rule, the case can never again be brought to the court's attention.<sup>2</sup> Either way, the result is a vast body of case law that plays no active part in the legal system and does little to contribute to legal jurisprudence as a whole.

Local federal appellate circuit rules vary significantly in all aspects of how they manage unpublished opinions—from the guidelines that determine whether a case will be disposed of as an unpublished opinion to the precedential value and citability of opinions designated as unpublished. Though with differing terminology,<sup>3</sup> all federal appellate circuits have rules in place to guide the deciding panel of judges in making the publication determination. In turn, each circuit has rules mandating the resultant precedential value an unpublished opinion will carry. Terminology aside, marked differences in the precedential value and citability of unpublished dispositions exist among the circuits. Eight of the thirteen federal appellate circuits allow citation<sup>4</sup> to an unpublished opinion for persuasive value.<sup>5</sup> The remaining five circuits disallow citation to unpublished dispositions

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1. United States Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. s-3 (2003), at <http://www.uscourts.gov/judbus2002/tables/s03sep02.pdf> (last visited Sept. 26, 2003). As the table indicates, these figures do not account for the United States Court of Appeals for the Federal Circuit. *Id.* However, at the 1999 Federal Circuit Judicial Conference, Chief Judge Mayer reported that sixty-eight percent of the cases decided on the merits in 1998 “were disposed of with a non-precedential opinion, what the other courts may call unpublished.” Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 193 F.R.D. 263, 266 (Apr. 6, 1999).

2. In a recent change, the D.C. Circuit now allows unpublished dispositions entered on or after January 1, 2002 to be “cited as precedent.” D.C. CIR. R. 28(c)(1)(B). This designation as precedent appears to be the equivalent of binding precedent, resulting in the need for an en banc proceeding to overrule an unpublished case. Regardless, “a panel’s decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.” D.C. CIR. R. 36(c)(2). There is no contention in any other circuit that unpublished opinions can be anything other than persuasive, and even then citation to unpublished opinions is frowned upon.

3. For example, the Federal Circuit uses the term “[n]onprecedential [o]pinion” to denote what most other circuits call an unpublished opinion. FED. CIR. R. 47.6(b).

4. All circuits allow for citation of a case under the doctrine of *res judicata*, collateral estoppel, law of the case, or the like. Such unremarkable instances, however, are not the focal point of this debate.

5. See 3D CIR. R. App. I, IOP 5.7; 4TH CIR. R. 36(c); 5TH CIR. R. 47.5.4; 6TH CIR. R. 28(g); 8TH CIR. R. 28A(i); 10TH CIR. R. 36.3(B); 11TH CIR. R. 36-2; D.C. CIR. R. 28(c)(1)(B).

altogether.<sup>6</sup>

In order to gain a general understanding of the publication controversy, this Comment begins with a brief review of the publication debate, along with the most recent congressional and judicial developments in the area. Part III then surveys the various publication plans throughout the circuits, including the various criteria used by the circuits in determining when a disposition will be published and the practical effect of the publication determination on the precedential value of a disposition.<sup>7</sup> The focus of Part III is to introduce a set of paradigmatic publication guidelines which basically represent the goal the circuits are attempting to achieve through the various criteria they use—namely, relegating unpublished status only on those opinions with no precedential value.<sup>8</sup>

Parts IV and V review the various constitutional and policy arguments for and against rules limiting the precedential value of unpublished opinions in light of this set of paradigmatic publication guidelines. The conclusion drawn from Parts IV and V demonstrates that, if paradigmatic publication criteria could be applied without error, no litigant could challenge a circuit's publication plan because there would be no cognizable injury. In other words, if an unpublished opinion truly lacks precedential value, there is a published opinion that will adequately serve the litigant's purpose.

Along with demonstrating that error-free application of publication guidelines cannot be achieved, Part VI argues that the focus of the debate over unpublished opinions must be shifted from the various constitutional and policy arguments to the publication guidelines that produce them. This Comment concludes with a proposed course of action that the federal appellate judiciary must take to develop and implement a publication plan that will produce unpublished opinions that truly have no precedential value.

The aim of this endeavor is to have the judiciary gain a better understanding of exactly what "precedential value" is and, as a consequence, make consistent publication choices. Only when the elusive concept of precedential value is well understood can an answer to the publication dilemma be realized.

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6. 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(b); FED. CIR. R. 47.6(b).

7. Though not addressed in this Comment, all state courts likewise have rules regarding publication and citation of opinions. See Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001).

8. Precedential value is an elusive concept, hence the considerable variation in criteria used by the circuits. See generally *infra* Part III.

## II. THE PUBLICATION DEBATE: PAST AND PRESENT

### A. “Unpublished” as a Misnomer

“Unpublished,” as used in this debate, is a term of art with repercussions not present under a conventional definition. As the term implies, the content of an unpublished opinion is excluded from the Federal Reporter,<sup>9</sup> the official reporter for the federal courts of appeals. However, all but two federal circuits<sup>10</sup> make the full text of unpublished opinions available both on their websites and, as of September 2001, to the West Group’s Federal Appendix (which consists entirely of unpublished opinions—complete with headnotes indexed to West’s Key Number system). With the E-Government Act of 2002, even the two holdout circuits will be forced to post all decisions, including unpublished decisions, on their websites.<sup>11</sup> Most circuits also release unpublished opinions to online databases such as Lexis and Westlaw. Furthermore, hard copies of unpublished opinions may be obtained from each particular circuit’s clerk of the court. That is to say, the term unpublished does not mean that the opinion is unavailable or even difficult to find. The primary implication of an opinion being disposed of as unpublished is the precedential status and citation restriction imposed by the respective local circuit rule.<sup>12</sup> This Comment uses the term “unpublished” in this specialized sense.

### B. *The Origin of Federal Appellate Circuit Publication Guidelines*

The general authority to promulgate rules governing the internal operation of the federal appellate courts derives from the Rules Enabling Act.<sup>13</sup> Publication guidelines and rules governing precedential value originate from the 1964 Judicial Conference of the United States where it was resolved that federal courts of appeals should publish “only those opinions which are of general precedential value.”<sup>14</sup> At first, the circuits were relatively slow to respond, but in 1972 the Conference mandated that each circuit develop a publica-

9. Unpublished opinions are excluded from the official reporter but for a listing in a table of decisions stating only the result of the disposition.

10. The two circuits not currently contributing to the Federal Appendix or making unpublished opinions available on their websites are the Fifth and Eleventh Circuits. Paradoxically, both the Fifth and Eleventh Circuits allow citation to unpublished opinions. See 5TH CIR. R. 47.5.4; 11TH CIR. R. 36-2.

11. See Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913 (2002).

12. Some federal circuits do not use the term “unpublished” in their respective rules dealing with precedential value of opinions. See FED. CIR. R. 47.6; 3D CIR. R. App. I, IOP 5.1-5.7; 2D CIR. R. § 0.23. Regardless, the process by which the court determines the precedential value placed on the opinion can fairly be called the publication process.

13. See 28 U.S.C. §§ 2071-77 (2002).

14. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 11 (1964) [hereinafter 1964 JUDICIAL CONFERENCE PROCEEDINGS].

tion plan.<sup>15</sup> By 1974, all circuits adopted a Conference-approved publication plan.<sup>16</sup> Shortly thereafter, the publication plans took effect and courts began instituting corresponding restrictive citation rules.<sup>17</sup>

Selective publication plans favoring unpublished opinions were promoted in response to the exponentially expanding volume of cases before the courts.<sup>18</sup> The increasing caseload resulted in judges spending a disproportionate amount of time crafting, and lawyers researching, opinions not amenable to the meaningful development of the law.<sup>19</sup> In addition, publication plans addressed the threat to a cohesive body of law that unlimited proliferation of published opinions might create.<sup>20</sup> In other words, publication plans were initially implemented to allay the fear that “judges, unable to digest the burgeoning volumes of case law, would inadvertently make inconsistent rulings.”<sup>21</sup> Another driving force behind the creation of limited publication plans was “the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities.”<sup>22</sup> While many of these concerns are still applicable today, others have become obsolete with the advent of new technologies.<sup>23</sup>

### C. Congressional Inquiry into the Publication Arena

The debate over the propriety of not according unpublished decisions precedential value has gone so far as to prompt congressional inquiry. On June 27, 2002, four legal scholars spoke before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary: Samuel A. Alito, Jr., Third Cir-

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15. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 33 (1972).

16. See 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, 578-79 (1981).

17. *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. 5-6 (2002) [hereinafter *2002 Statements to Congress*] (statement of Samuel A. Alito, Jr., Judge, United States Court of Appeals for the Third Circuit).

18. *Id.*

19. See David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1141-42 (2002) (citing 1964 JUDICIAL CONFERENCE PROCEEDINGS, *supra* note 14, at 11).

20. See Charles W. Joiner, *Limiting Publication of Judicial Opinions*, 56 JUDICATURE 195 (1972).

21. Greenwald & Schwarz, *supra* note 19, at 1143.

22. *Id.* at 1141 (quoting 1964 JUDICIAL CONFERENCE PROCEEDINGS, *supra* note 14, at 11). As discussed *infra* Part V.A, the advent of electronic databases all but eviscerates the viability of this particular concern.

23. Part V, *infra*, addresses these concerns in their present context.

cuit judge and Chair of the Advisory Committee on Appellate Rules; Alex Kozinski, Ninth Circuit judge and long time advocate of non-citation rules; Kenneth J. Schmier, outspoken advocate against non-citation rules; and Arthur D. Hellman, Professor of Law at the University of Pittsburgh School of Law.<sup>24</sup> The hearing was held to gauge whether a problem existed and, if so, what Congress might do to alleviate the problem. Only Judge Kozinski actually commented on the appropriateness (or more accurately inappropriateness) of a congressional foray into the area of appellate judicial rulemaking.<sup>25</sup> The speakers basically used the opportunity as a forum to advocate their respective positions on propriety of unpublished opinions.

#### D. Proposed Judicial Reform

The debate, spurred by federal circuit courts' differing precedential treatment of unpublished dispositions, led the federal Advisory Committee on the Rules of Appellate Procedure to consider, and approve in principle, a new Federal Rule of Appellate Procedure 32.1.<sup>26</sup> As announced at the November 18, 2002 meeting, the new rule would create a uniform procedure allowing citation for persuasive value of unpublished opinions in all federal appellate courts.<sup>27</sup> The next step in the path to final approval and implementation of the rule occurred at the May 15, 2003 meeting in Washington, D.C., where the Advisory Committee considered revised drafts of this and other proposed amendments.<sup>28</sup> The text of the proposed rule was unveiled at the May 15 meeting:

##### Rule 32.1. Citation of Judicial Dispositions

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

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

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24. 2002 Statements to Congress, *supra* note 17 (statements of Judge Samuel A. Alito, Jr., Alex Kozinski, Judge, United States Court of Appeals for the Ninth Circuit, Kenneth J. Schmier, Chairman, Committee for the Rule of Law, and Arthur D. Hellman, Professor of Law and Distinguished Faculty Scholar, University of Pittsburgh School of Law).

25. See *id.* at 15-16 (Alex Kozinski's statement).

26. Proposed rule 32.1 is posted on the United States Courts website, as maintained by the Administrative Office of the United States Courts on behalf of the United States Courts, United States Courts, Federal Rulemaking, at <http://www.uscourts.gov/rules/index.html> (last visited Sept. 26, 2003).

27. *Id.*

28. *Id.*

that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.<sup>29</sup>

What this rule *does not* do is as important to understand as what it *does* do. According to the Committee Note following the text of the proposed rule:

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an “unpublished” opinion as binding precedent is constitutional. It does not require any court to issue an “unpublished” opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as “unpublished” or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its “unpublished” opinions or to the “unpublished” opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions . . . .<sup>30</sup>

Because of the various steps of revision and approval the proposed rule must undergo, including Standing Committee approval, Judicial Conference approval, Supreme Court approval, and a statutory period where Congress may take action, the earliest date such a rule would take effect is likely December of 2005.<sup>31</sup>

#### *E. The Focus of the Debate over Unpublished Opinions*

Substantially all of the argument in this area focuses on the constitutionality and/or propriety of publication and citation rules. However, courts and commentators have based all these arguments on the product that these rules produce (i.e. nonprecedential opinions), as opposed to the publication plans that produce them. In other words, a proponent of affording unpublished opinions precedential value would argue that restrictive publication and citation rules create a body of case law which, while appearing to be useful to a lawyer in the course of litigation, cannot be brought to the attention of the court.<sup>32</sup> The focal point of such an argument is on the nonpreceden-

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29. Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice and Procedure 28 (May 22, 2003), available at <http://www.uscourts.gov/rules/app0803.pdf> [hereinafter Alito Memorandum].

30. *Id.* at 30-31 (citations omitted). The concluding section of this Comment discusses in more detail exactly how this new uniform rule fits into the publication debate.

31. See United States Courts, Federal Rulemaking, *The Rulemaking Process: A Summary for the Bench and Bar* (2002), at <http://www.uscourts.gov/rules/proceduresum.htm> (last visited Sept. 26, 2003).

32. See, e.g., 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 (1998); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757 (1995).

tial opinion, as opposed to the publication plan that created it. Likewise, an advocate of rules affording unpublished opinions no precedential value would point to the untenable burden less restrictive rules would create.<sup>33</sup> This Comment attempts to view the arguments for and against limited precedential value rules in light of the publication guidelines that produce such nonprecedential case law.

In a basic sense, publication guidelines state that an opinion will not be published (i.e. be fully precedential) when such a disposition will not add “significantly to the body of law,”<sup>34</sup> or, in an even more general sense, where the opinion has no precedential value.<sup>35</sup> Some circuits use only general statements to guide the publication determination,<sup>36</sup> while other circuits are explicit in setting forth criteria to achieve this stated goal.<sup>37</sup>

The point at which an opinion is determined to be unpublished is the linchpin of the debate. It is at this point that the opinion becomes full precedential case law or, in the strictest circuits, a case that can never again be brought to the attention of the court. Taking into account the impact of declaring an opinion unpublished, critical analysis from this viewpoint is warranted. As a starting point, a crucial yet often overlooked point about the current state of affairs must be addressed: If publication guidelines were followed as written, the entire publication debate would be moot. No colorable argument based on a deprivation of vital case law could come about since, by definition, an unpublished disposition would only stand for a proposition already firmly embedded in published, precedential case law. In short, with no viable injury, no litigant could have standing to challenge citation rules in the courtroom. This line of reasoning is carried out in more detail and applied to specific arguments for and against citation restrictions in Parts IV and V.

#### F. Publication Guidelines in Practical Context

As with anything subject to human discretion, publication guidelines cannot be applied without (at least occasional) error.<sup>38</sup> One problem presents itself where, in a circuit disallowing citation to an unpublished opinion, such an error, if not corrected immediately,

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33. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1177-79 (9th Cir. 2001).

34. FED. CIR. R. 47.6(b).

35. See 3D CIR. R. App. I, IOP 5.2; 10TH CIR. R. 36.1; 11TH CIR. R. IOP 36-3(5).

36. See 2D CIR. R. § 0.23; 3D CIR. R. App. I, IOP 5.3; 10TH CIR. R. 36.1; 11TH CIR. R. IOP 36-3(5).

37. See 1ST CIR. R. 36(b); 4TH CIR. R. 36(a); 5TH CIR. R. 47.5.1; 6TH CIR. R. 206; 7TH CIR. R. 53(c); 8TH CIR. R. App. I; 9TH CIR. R. 36-2; D.C. CIR. R. 36(a); FED. CIR. R. App. V, IOP 10.

38. Part V, *infra*, isolates how publication guidelines have been misapplied.

cannot be corrected at all.<sup>39</sup> If a litigant believes an opinion should have been designated as published but was not, some circuits allow a short period of time for the present litigants, or in some cases interested parties, to petition the court to have the opinion published.<sup>40</sup> Because an unpublished opinion is not written in a way that makes it suitable for future litigants to rely upon, changing an opinion's label from "unpublished" to "published" does not completely alleviate the problem.<sup>41</sup>

At the very least, if publication guidelines are to persist, citation to opinions for persuasive value must be allowed. Even with a mistake as to publication, a later litigant, while only having a "persuasive"<sup>42</sup> opinion to cite, has a chance of settling the issue in a precedential decision by referencing the court to the earlier unpublished opinion. In a worst-case scenario, a string of unpublished decisions on an unsettled area of law would signal a need to settle the question in a precedential form. If such a state of affairs could not be brought to the attention of the court, it might only be answered by happenstance, if at all.

In order for publication guidelines to be sufficiently effectual, significant reform is called for, though not solely in the form of revising the criteria contained in the guidelines. No matter how specific or detailed the listing of factors, subjectivity and natural human error will not allow for acceptable application of the guidelines. When speaking of acceptability, not only must the selective publication plan be amenable to the proper functioning of the federal appellate process, but

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39. See *infra* text accompanying note 40.

40. In the Federal and Ninth Circuits the time period is 60 days after the unpublished opinion has been issued. FED. CIR. R. 47.6(c); 9TH CIR. R. 36-4. The D.C. Circuit gives a 30-day time limit, though the impact of this allowance is minimized since the D.C. Circuit (and only the D.C. Circuit) affords unpublished opinions issued after January 1, 2002 precedential value. D.C. CIR. R. 28(c)(1)(B), 36(d). The Fourth Circuit, while not giving a time period, states that "[c]ounsel may move for publication . . .," thereby indicating that the window for petition is limited. 4TH CIR. R. 36(b). The Eleventh Circuit is much the same. See 11TH CIR. R. 36-3. Similarly, the Seventh Circuit allows any person to "request by motion" reconsideration of the publication decision, apparently meaning that the request must come from counsel during the litigation process. 7TH CIR. R. 53(d)(3). The First Circuit and Fifth Circuit do not explicitly give a time limit for petitioning the court to publish a previously unpublished opinion. 1ST CIR. R. 36(b)(2)(D); 5TH CIR. R. 47.5.2. As is discussed tangentially, *infra* Part V, a longer time period may do no good to later parties. Since an unpublished disposition will not likely have necessary elements to make a reliable precedent and a significant amount of time has elapsed since the case, the court would basically have to review the case *de novo* and re-issue a new opinion to transform the opinion into reliable precedent (as opposed to simply using the same work product and redesignating it as "published"). Finally, the Second, Third, Sixth, Eighth, and Tenth circuits give no opportunity to petition the court to reconsider the publication decision. See 2D CIR. R. § 0.23; 3D CIR. R. App. I, IOP 5.3; 6TH CIR. R. 206; 8TH CIR. R. App. I; 10TH CIR. R. 36.1.

41. See *infra* Part VI.

42. The persuasiveness (or lack thereof) of opinions designated as unpublished is discussed further *infra* Part VII.

to the general populous as well. That is to say, keeping in mind the impact attendant to the publication decision along with our jurisprudential insistence on safeguarding through various appellate processes, the publication system must be designed to ensure (or least attempt to ensure) the accuracy of the publication decision.<sup>43</sup>

### III. SURVEY OF CURRENT LOCAL RULES REGARDING PUBLICATION AND CITATION IN THE FEDERAL COURTS OF APPEALS

#### A. *Publication Guidelines*

As stated previously, all circuits have a rule encompassing an idea akin to publication. However, guidelines vary from general to fairly detailed. The survey begins with the circuits that give only broad guidance, then moves to those with explicit criteria. The purpose of this review is to glean an understanding of what courts look for in determining whether to publish a decision.

##### 1. *Circuits Elucidating Only General Guidance Concerning Publication*

Only the Second, Third, Tenth, and Eleventh Circuits fail to give an explicit list of criteria for the deciding panel to take into account in making the publication decision.<sup>44</sup> In the Second Circuit, a disposition will remain unpublished<sup>45</sup> where “no jurisprudential purpose would be served by a [precedential] written opinion.”<sup>46</sup> According to the Third Circuit, an opinion will be published “when it has precedential or institutional value.”<sup>47</sup> Conversely, an opinion is designated as not precedential where it “appears to have value only to the trial court or the parties.”<sup>48</sup> Similarly, in the Tenth Circuit, a disposition will not be published where “the case does not require application of new points of law that would make the decision a valuable precedent.”<sup>49</sup> Finally, in the Eleventh Circuit, “[o]pinions that the panel [of

43. This issue is addressed in more detail *infra* Part VII.

44. See 2D CIR. R. § 0.23; 3D CIR. R. App. I, IOP 5.2, 5.3; 10TH CIR. R. 36.1; 11TH CIR. R. 36-3, IOP 5.

45. The Second Circuit does not have a publication plan per se, but instead issues precedential written opinions, nonprecedential open court dispositions, or nonprecedential summary orders. 2D CIR. R. § 0.23. Regardless, an opinion rendered in nonprecedential form is the functional equivalent of an unpublished opinion. *But see* D.C. CIR. R. 28(c)(1)(B) (noting that the D.C. Circuit has the only local circuit rule considering an unpublished opinion precedent).

46. 2D CIR. R. § 0.23.

47. 3D CIR. R. App. I, IOP 5.2.

48. *Id.* at App. I, IOP 5.3.

49. 10TH CIR. R. 36.1.

deciding judges] believes to have no precedential value are not published.”<sup>50</sup>

## 2. *Circuits Expounding Specific Criteria Regarding Publication*

Since many of the criteria listed by the circuits are repetitive, the most exhaustive list is quoted (that of the Federal Circuit), and the criteria of the remaining circuits not addressed in the Federal Circuit’s listing are discussed. In most of the circuits listing publication criteria, the publication rule has language mandating publication where one or more of the criteria listed are met.<sup>51</sup> In the remaining circuits, the language associated with the criteria appears more permissive.<sup>52</sup> Regardless, the goal of publication criteria remains the same—to determine factors indicating when a decision merits publication and, more significantly, has precedential value.

Publication guidelines for the Federal Circuit:

- (a) The case is a test case.
- (b) An issue of first impression is treated.
- (c) A new rule of law is established.
- (d) An existing rule of law is criticized, clarified, altered, or modified.
- (e) An existing rule of law is applied to facts significantly different from those to which that rule has previously been applied.
- (f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued.
- (g) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.
- (h) A significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth.

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50. 11TH CIR. R. 36-3, IOP 5.

51. See 4TH CIR. R. 36(a) (“Opinions . . . will be published only if the opinion satisfies” the criteria. This language might, however, suggest that meeting the criteria is a necessary, but not sufficient, element to achieving publication.); 5TH CIR. R. 47.5.1 (differing in that publication is permissive if the decision contains a concurrence or dissent without meeting the other criteria); 7TH CIR. R. 53(c)(1) (noting a published opinion “will be filed” when the criteria are met); 9TH CIR. R. 36-2 (containing the same “only if” language as the Fourth Circuit rule); D.C. CIR. R. 36(a)(2) (stating that opinions meeting the criteria “will be published”).

52. See 1ST CIR. R. 36(b)(1) (The policy in favor of publication “may be overcome” where certain criteria are absent.); 6TH CIR. R. 206(a) (“The following criteria shall be *considered*” in the publication decision. (emphasis added)); 8TH CIR. R. App. I(4) (“An opinion *should* be published” when one of the criteria are met. (emphasis added)); FED. CIR. R. App. V, IOP 10(4) (Publication is “limit[ed] . . . to dispositions meeting one or more of the[] criteria.”).

- (i) A new interpretation of a Supreme Court decision, or of a statute, is set forth.
- (j) A new constitutional or statutory issue is treated.
- (k) A previously overlooked rule of law is treated.
- (l) Procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instructions or otherwise.
- (m) The case has been returned by the U.S. Supreme Court for disposition by action of this court other than ministerial obedience to directions of the Court.
- (n) A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.<sup>53</sup>

The remaining seven circuits use a mish-mash of these criteria along with some factors not included in the Federal Circuit guidelines. For example, in the Seventh Circuit,<sup>54</sup> an opinion will be published if the decision “constitutes a significant and non-duplicative contribution to legal literature (A) by a historical review of law, (B) by describing legislative history, or (C) by resolving or creating a conflict in the law,”<sup>55</sup> or where the decision “reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order.”<sup>56</sup> The Eighth Circuit mandates publication where the case “does not accept the rationale of a previously published opinion in that case.”<sup>57</sup> Further, some circuits include as a factor for publication whether the decision includes a separate concurring or dissenting opinion.<sup>58</sup>

### B. Citation Limitation and Corresponding Precedential Status

Of the four circuits<sup>59</sup> not enumerating a list of criteria in their publication guidelines, only the Second Circuit does not allow citation to dispositions other than formal opinions.<sup>60</sup> Though allowing citation for persuasive value only, both the Tenth and Eleventh Cir-

53. FED. CIR. R. App. V, IOP 10(4).

54. This factor is not exclusive to the Seventh Circuit. *See, e.g.*, 4TH CIR. R. 36(a)(iv). In fact, none of the additional factors listed are exclusive to the particular circuit. The point of listing them is simply to give an overview of all possible criteria.

55. 7TH CIR. R. 53(c)(1)(iv).

56. *Id.* at 53(c)(1)(v).

57. 8TH CIR. R. App. I(4)(e).

58. *See* 5TH CIR. R. 47.5.1; 6TH CIR. R. 206(a)(4); 9TH CIR. R. 36-2(g).

59. The Second, Third, Tenth, and Eleventh Circuits.

60. 2D CIR. R. § 0.23. Even so, as with all circuit rules, any unpublished or nonprecedential disposition may be cited in an assertion of claim preclusion, issue preclusion, judicial estoppel, law of the case, or the like. *See, e.g., id.* (Unpublished opinions “shall not be cited . . . in unrelated cases.”).

cuits disfavor such citation.<sup>61</sup> The Third Circuit itself does not cite “not precedential opinions,” but apparently allows litigants to call such cases to the attention of the court for persuasive value.<sup>62</sup>

Of the remaining nine circuits,<sup>63</sup> the First, Seventh, Ninth, and Federal Circuits do not allow citation to unpublished opinions.<sup>64</sup> Thus, the total number of circuits disallowing citation of unpublished opinions is five,<sup>65</sup> leaving eight circuits allowing for citation to unpublished opinions.<sup>66</sup> Both the Fourth and Sixth Circuits disfavor citation, but will allow counsel to cite to an unpublished case (apparently for persuasive value) if no published opinion would serve as well.<sup>67</sup> Though not explicitly disfavoring citation, the Fifth Circuit allows citation for persuasive value while making clear that unpublished opinions are not precedent.<sup>68</sup> Finally, the D.C. Circuit, in what is arguably the most progressive stance among the circuits, allows all unpublished dispositions issued on or after January 1, 2002 to be “cited as precedent.”<sup>69</sup>

### C. *The Rules in Perspective*

Regardless of whether assigning general or specific guidance, the aim of all the circuits’ publication plans is to publish any opinion that would yield precedential value. Though statements of policy and criteria differ in expressing what precedential value is and how to evaluate whether it exists, a broad ideology emerges wherein a case

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61. 10TH CIR. R. 36.3; 11TH CIR. R. 36-2, 36-3, IOP 5.

62. 3D CIR. R. App. I, IOP 5.7.

63. The First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, D.C., and Federal Circuits.

64. See 1ST CIR. R. 36(b)(2)(F); 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3(b); FED. CIR. R. 47.6(b).

65. The First, Second, Seventh, Ninth, and Federal Circuits do not allow citation to unpublished opinions. 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(b); FED. CIR. R. 47.6(b).

66. The Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits allow citation to unpublished opinions. See 3D CIR. R. App. I, IOP 5.7; 4TH CIR. R. 36(c); 5TH CIR. R. 47.5.4; 6TH CIR. R. 28(g); 8TH CIR. R. 28A(i); 10TH CIR. R. 36.3(B); 11TH CIR. R. 36-2; D.C. CIR. R. 28(c)(1)(B).

67. See 4TH CIR. R. 36(c); 6TH CIR. R. 28(g).

68. See 5TH CIR. R. 47.5.4. Note, however, the Fifth Circuit distinguishes between unpublished opinions issued before and after January 1, 1996. *Id.* at 47.5.3, 47.5.4. Unpublished opinions issued before January 1, 1996 are precedent, but “should normally be cited only when the doctrine of *res judicata*, . . . [etc.] is applicable.” *Id.* at 47.5.3.

69. D.C. CIR. R. 28(c)(1)(B). However, the court explicitly warns litigants “a panel’s decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.” *Id.* at 36(c)(2). Further, the court warns counsel to “review the criteria governing published and unpublished opinions . . . in connection with reliance upon unpublished dispositions.” *Id.* at 28(c)(1)(B).

is worthy of publication if it will be a guide to future litigants or contribute to legal jurisprudence generally.<sup>70</sup>

Listing and reviewing the criteria associated with publication gives a sense of how the federal appellate circuits as a whole define cases worthy of precedent. Regardless of the form, all publication guidelines strive to achieve publication of only those opinions containing precedential value. From this general understanding, the concept of paradigmatic publication guidelines emerges. Paradigmatic publication guidelines are a fictitious set of guidelines capturing the essence of precedential value as defined by circuit publication criteria generally. When appropriately applied, they can flawlessly delineate between those cases having precedential value and those without. Through the lens of paradigmatic publication guidelines, the true nature of the arguments for and against precedential value in the publication arena is revealed. This revelation will bring into focus the as yet unaddressed problems with publication plans as a whole.

#### IV. CONSTITUTIONAL ARGUMENTS AND PARADIGMATIC PUBLICATION GUIDELINES

##### A. *Anastasoff v. United States and the Article III Argument*

###### 1. *Anastasoff in the Context of the Debate*

Judge Richard Arnold saw the concern raised by him in his 1999 article<sup>71</sup> brought to bear in the form of *Anastasoff v. United States*.<sup>72</sup> In *Anastasoff*, the court was faced with a previously decided unpublished opinion that, if binding on the current panel, would control the outcome of the case.<sup>73</sup> However, the Eighth Circuit Rule regarding citation of unpublished opinions explicitly states that unpublished opinions are not precedent and may only be cited “if the opinion has persuasive value on a material issue and no published opinion . . . would serve as well.”<sup>74</sup> Judge Arnold, writing for the Eighth Circuit, struck down Eighth Circuit Rule 28A(i) as unconstitutional where it

70. For example, though enumerating a list of factors, the D.C. Circuit’s general policy is to publish dispositions “that have general public interest.” D.C. CIR. R. 36(a)(1). Without listing any guidelines, the Second Circuit’s policy is to publish any opinion that serves a “jurisprudential purpose.” 2D CIR. R. § 0.23.

71. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 226 (1999) (“[I]s the assertion that unpublished opinions are not precedent and cannot be cited a violation of Article III?”).

72. 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

73. *Id.* at 899.

74. 8TH CIR. R. 28A(i). The rule also states that “parties generally should not cite [unpublished opinions].” *Id.*

“expand[s] the judicial power beyond the bounds of Article III.”<sup>75</sup> More specifically, Judge Arnold found that, since the Eighth Circuit rule allows the Article III judiciary to shirk its responsibility to follow previous decisions, the rule went beyond the judicial power conferred on federal courts by Article III.<sup>76</sup> In other words, Judge Arnold found that Article III mandates all decisions be strictly binding on future panels.

Basically, through a review of history surrounding Article III and the doctrine of precedent, Judge Arnold found the framers to have impliedly meant in the scant language of Article III<sup>77</sup> that every decided case must necessarily become binding precedent.<sup>78</sup> The court concluded that “[a] more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.”<sup>79</sup>

While some commentators agree with the outcome in *Anastasoff*,<sup>80</sup> most agree that a binding precedential mandate is not contemplated by Article III. In fact, two federal appellate cases, *Hart v. Massanari*<sup>81</sup> and *Symbol Technologies v. Lemelson Medical*,<sup>82</sup> as well as several commentators,<sup>83</sup> have squarely disagreed with Judge Arnold’s recount of history and conclusion as to Article III. In *Hart*, the Ninth Circuit decided the exact same Article III issue as presented in *Anastasoff* and came to the opposite conclusion.<sup>84</sup> The *Hart* court ruled on the Article III issue in the context of an attorney citing an unpub-

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75. *Anastasoff*, 223 F.3d at 900.

76. *See Id.*

77. Article III, Section 1, Clause 1 of the United States Constitution states: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

78. *Anastasoff*, 223 F.3d at 900-05.

79. *Id.* at 904.

80. Steve Sheppard, *The Unpublished Opinion: How Richard Arnold’s Anastasoff Opinion Is Saving America’s Courts from Themselves*, 2002 ARK. L. NOTES 85 (2002).

81. 266 F.3d 1155 (9th Cir. 2001).

82. 277 F.3d 1361 (Fed. Cir. 2002). The court “subscribe[d] to the comprehensive, scholarly treatment of the [Article III] issue in refutation of *Anastasoff* set out in *Hart v. Massanari*.” *Id.* at 1367 (citation omitted). The court also found “[b]ecause Judge Kozinski’s opinion for the *Hart* court is so thorough, we need do little more than signal our agreement with it by synthesizing the main points.” *Id.* at 1367 n.\*.

83. *See* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001); Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to “Unpublish” Opinions*, 77 NOTRE DAME L. REV. 135 (2001); *2002 Statements to Congress, supra* note 17 (statement of Arthur D. Hellman) (“It is most implausible to suppose that the sparse language of Article III encompasses a command (or more accurately a set of commands) governing the precedential effect of intermediate appellate court decisions.”).

84. 266 F.3d at 1160. Unlike the Eighth Circuit, in the Ninth Circuit, litigants may not cite unpublished opinions for persuasive value. 9TH CIR. R. 36-3(b). Be that as it may, both courts framed the issue identically.

lished opinion in violation of the local circuit rule against such citation.<sup>85</sup> Using *Anastasoff's* reasoning as a basis for comparison, Judge Kozinski squarely refuted Judge Arnold's interpretation of history and Article III in ruling on the propriety of the Ninth Circuit's rule affording unpublished opinions no precedential value (and the corresponding no-citation rule).<sup>86</sup> In reviewing the history of precedent in Western jurisprudence, Judge Kozinski found the issuance of non-precedential opinions comports with our notion of precedent and Article III.<sup>87</sup> Going a step further, Judge Kozinski characterized no-citation rules as essential to the proper functioning of the federal appellate judiciary.<sup>88</sup>

Nevertheless, it is important to note the limited application of the issue raised in *Anastasoff* and *Hart*—namely, whether or not all cases must be *binding*<sup>89</sup> precedent under Article III.<sup>90</sup> As stated by Judge Kozinski in *Hart*, binding precedent is “where a single opinion sets the course on a particular point of law and must be followed by courts at the same level and lower within a pyramidal judicial hierarchy.”<sup>91</sup> The current debate focuses principally on the propriety of local rules in the context of whether unpublished opinions should be afforded *any* precedential value.<sup>92</sup> The point being, the actual holdings in *Anastasoff* and *Hart* are somewhat peripheral to the crux of the debate as there is currently no contention that all decisions must *bind* future panels in the same circuit. Put concisely, the current debate is whether all decisions must be *considered* by future panels for their persuasive value if presented in the proper context.

## 2. *Anastasoff* in Light of Paradigmatic Publication Guidelines

In the larger context, *Anastasoff* is a case where the court felt bound by a previous unpublished decision<sup>93</sup> that decided a rule of law previously unaddressed by the Eighth Circuit.<sup>94</sup> Recall also that Judge Arnold's main concern about the local rule was the conse-

85. 266 F.3d at 1158-59.

86. *See id.* at 1159-60.

87. *Id.*

88. *See id.* at 1176-80.

89. Binding precedent as opposed to being afforded merely persuasive value.

90. *Anastasoff v. United States*, 223 F.3d 898, 905 (8th Cir. 2000) (noting that because the issue raised was decided in a previously unpublished decision, the local circuit rule disallowing citation “does not free us from our obligation to follow that decision”).

91. *Hart*, 266 F.3d at 1168.

92. *See* 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, 12 (2002) (“The key issue today is not whether unpublished opinions must be binding precedents; it is whether they may be cited at all.”).

93. *Christie v. United States*, No. 91-2375MN (8th Cir. Mar. 20, 1992). The case, in essence, decided the application of the “mail-box rule” to untimely tax refund claims. *Id.*

94. *Anastasoff*, 223 F.3d at 899.

quence such a rule brings about: A court could decide a case and “disregard all former rules and decisions . . . without reference to the settled course of antecedent principles.”<sup>95</sup> However, if taken as true that such rules operate in this manner, it must follow that publication guidelines operate defectively. In essence, when making the publication decision (and, by extension, the inextricably linked decision as to precedential value), Judge Arnold’s very concern is supposed to be the guidepost steering the publication determination. In other words, if there were a settled course of antecedent principles in the form of fully precedential published opinions (which there would have to be to justify the decision not to publish an opinion),<sup>96</sup> such rules and decisions could not rightfully be ignored.<sup>97</sup> Therefore, the problem faced by Judge Arnold was created well before *Anastasoff* came up on the docket. The problem was created in 1992 when the panel decided the case Judge Arnold purported to be bound by. With the benefit of 20/20 hindsight, it can unremarkably be said that the deciding panel in 1992 erred in the publication decision.<sup>98</sup> As such, in the light most favorable to Judge Arnold, the court was attempting to resolve a current problem created by an improper publication decision that occurred years earlier. To be exact, had the panel deciding the 1992 case properly applied the publication guidelines, the decision would have been published and Judge Arnold would not have had *Anastasoff* as a forum for his Article III dissertation.

As a general proposition, if panels could unerringly follow paradigmatic publication guidelines, the Article III issue would never arise for the simple reason that no litigant would properly have standing to file suit on those grounds.<sup>99</sup> In other words, no court could be charged with violating Article III by not following a previous unpublished decision because any significant proposition being relied on would already be embodied in a precedential published opinion.<sup>100</sup>

Regardless of whether a model of flawless paradigmatic publication application will ever be achieved, the problem is one of applica-

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95. *Id.* at 904.

96. *See supra* Part III.

97. If published precedent was ignored, the panel would clearly be violating the law of the circuit.

98. Or, at least, erred in the sense of paradigmatic publication guidelines.

99. For example, a case in the Ninth Circuit was dismissed where the litigant lacked standing to challenge the no-citation rule for failure to demonstrate injury due to the local circuit rules. *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F. Supp. 2d 1048, 1051 (N.D. Cal. 2001), *aff'd*, 279 F.3d 817 (9th Cir. 2002). Kenneth J. Schmier, also giving a statement to Congress regarding unpublished opinions, was involved in this case and other (unsuccessful) litigation. *See Schmier v. Supreme Court*, 93 Cal. Rptr. 2d 580 (Ct. App. 2000), *cert. denied*, 531 U.S. 958 (2000); *Schmier v. United States Court of Appeals for the Eleventh Circuit*, 34 Fed. Appx. 389 (11th Cir. 2002) (unpublished).

100. To be more precise, any significant proposition being relied upon would either be in a precedential published opinion or one of first impression.

tion of publication guidelines, as opposed to a constitutionally charged Article III argument.<sup>101</sup> Isolating the cause of the problem, as opposed to the difficulties created by the problem, is the essential first step towards solving the precedential dilemma.

### B. *The First Amendment Argument*

#### 1. *The First Amendment in the Context of Unpublished Opinions*

“A court . . . in promulgating its rules is subject to limitations based on reasonableness and conformity to constitutional and statutory provisions . . . .”<sup>102</sup> As such, federal circuit court rules must comply with the First Amendment.<sup>103</sup>

The First Amendment argument against no-citation rules can be stated rather simply: Legal argument is protected speech and no-citation rules abridge this speech by prohibiting access to certain types of arguments.<sup>104</sup> Namely, arguments purporting that a particular unpublished opinion militate a desired outcome are restricted.<sup>105</sup> In a very basic sense, under First Amendment jurisprudence and as applicable to the citation debate, restrictions on speech are classified as either content-neutral or content-based. A content-neutral restriction shows no bias toward a particular idea and “may impose reasonable restrictions on . . . protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”<sup>106</sup> On the other hand, a restriction on expression is classified as content-based when the “government [attempts] to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”<sup>107</sup> A content-based restriction can only withstand constitutional attack if it satisfies strict scru-

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101. See Healy, *supra* note 83, at 51:

Because a court must still follow past decisions even when it issues a non-precedential opinion, problems arise only when the non-precedential opinion differs in a meaningful way from the precedents upon which it is based (or when it is based on no precedents at all, as in cases of first impression). Therefore, as long as courts adopt a narrow rule for determining when non-precedential opinions will be issued, along with mechanisms to ensure compliance with that rule, the underlying values of stare decisis will be preserved.

102. 21 C.J.S. *Courts* § 126 (2002).

103. See Salem M. Katsh & Alex V. Chachkes, *Constitutionality of “No-Citation” Rules*, 3 J. APP. PRAC. & PROCESS 287, 299 (2001).

104. See Greenwald & Schwarz, *supra* note 19, at 1162-63.

105. See 2002 *Statements to Congress*, *supra* note 17 (statement of Kenneth J. Schmier).

106. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

107. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

tiny, meaning that the restriction “must be narrowly tailored to promote a compelling Government interest” and no “less restrictive alternative would serve the . . . purpose.”<sup>108</sup>

Proponents of the First Amendment argument contend that regardless of whether no-citation rules are classified as “content-neutral” or “content-based,” they are unconstitutional restrictions on expression.<sup>109</sup> The argument proposes that where no-citation rules are classified as content-neutral, the government’s interest in limiting citation is slight, since exposure to such cases would not “significantly interfere with the work of the judiciary.”<sup>110</sup> Furthermore, allowing citation merely for persuasive value is a much less restrictive alternative to barring citation altogether.<sup>111</sup> Considering the heightened constitutional standard for a content-based restriction, no-citation rules would similarly fail were they classified as content-based.

On the other hand, Ninth Circuit Judge Alex Kozinski, a long time advocate of no-citation rules, finds a strong judicial interest<sup>112</sup> in excluding unpublished opinions from the attention of the court.<sup>113</sup> Judge Kozinski states, “[t]he prohibition against citation of unpublished dispositions addresses a specific kind of fraud on the deciding court—the illusion that the unpublished disposition has sufficient facts and law to give the deciding court useful guidance.”<sup>114</sup> Furthermore, in *Hart*, Judge Kozinski addressed several other interests of the judiciary in disallowing citation to unpublished opinions.<sup>115</sup>

## 2. *The First Amendment in Relation to Paradigmatic Publication Guidelines*

Regardless of the merits, the First Amendment argument, like the Article III argument, is merely an after-thought when viewed in the context of paradigmatic publication guidelines. If a nontrivial argument prevailed for the first time, paradigmatic publication guidelines dictate the opinion be published and, as such, fully precedential. Thus, the litigant looking to cite an unpublished case for a significant

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108. *United States v. Playboy Entm’t Group*, 529 U.S. 803, 804 (2000).

109. *See Greenwald & Schwarz, supra* note 19, at 1162-63.

110. *Id.* at 1163.

111. *See id.*

112. Though Judge Kozinski’s statements were not made in response to an attack of no-citation rules on First Amendment grounds, they lend themselves to an application in such a context.

113. *2002 Statements to Congress, supra* note 17 (statement of Judge Alex Kozinski).

114. *Id.* at 15.

115. *See Hart v. Massanari*, 266 F.3d 1155, 1176-80 (9th Cir. 2001) (noting judicial interests such as the strain on already taxed judicial resources where time devoted to writing unpublished opinions must increase for fear of misinterpretation, confusion, and unnecessary conflict).

proposition would be robbed of nothing since there would be a fully precedential case embodying the same proposition that can be cited. Once again, a litigant attempting to raise a First Amendment free speech claim would lack standing since the requirement of injury-in-fact is not met—there is no cognizable injury from the rule complained of.<sup>116</sup> In other words, where paradigmatic publication guidelines are properly applied, the original premise—that a litigant is deprived of an argument in an unpublished opinion—is faulty since the very same argument would, if material, also be in a published opinion.

Furthermore, if an argument did not prevail, whether or not for the first time, and appears in an unpublished opinion, a litigant would be ill-advised to rely on such an unpublished case.<sup>117</sup> In other words, the proposition was not only unpersuasive at the time, but not even valuable enough to trigger publication. If publication guidelines are followed precisely, the fact that an argument did not originally warrant publication would basically be determinative of its later success. Be that as it may, a court would likely not find the litigant as having an injury, let alone standing on First Amendment grounds, where the litigant was deprived of the opportunity to cite to a disposition which would, at best, not help prove his or her case.<sup>118</sup>

#### V. POLICY ARGUMENTS FOR AND AGAINST PRECEDENTIAL VALUE IN LIGHT OF THE PUBLICATION PARADIGM

Even with the proliferation of unpublished opinions in recent decades, there have been rather few cases addressing constitutional challenges to local circuit no-citation rules. In fact, in a 1976 case, the Supreme Court rejected without comment the petitioner's First Amendment claim against the circuit's no-citation rule.<sup>119</sup> Of the cases addressed by the court, only *Anastasoff*, which was later vacated on other grounds, found such rules unconstitutional.<sup>120</sup> As such, much of the debate centers around the practical implications of publication guidelines and no-citation rules. In the sections that follow, these practical implications are set forth and viewed with regard to paradigmatic publication guidelines.

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116. For a brief overview of the standing requirement, see *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

117. Published or otherwise, a litigant is always free to replicate the argument.

118. The more likely scenario is that a litigant would be hurt by being able to cite such a case since a previous court considered the argument and rejected it.

119. *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976) (declining writ of mandamus against the Seventh Circuit for having struck a citation to an unpublished opinion in petitioner's brief).

120. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

A. *Unequal Access to Unpublished Case Law in Light of Current Technology*

One of the central rationales behind the implementation of selective publication plans in the 1960s and 1970s was the concern over the feasibility of establishing and maintaining legal libraries equally accessible to all in consideration of the enormous increase in the volume of cases being decided.<sup>121</sup> With the advent of circuit websites, Westlaw, Lexis, and the Federal Appendix, accessibility to unpublished opinions is, to a large extent, no longer a viable concern.<sup>122</sup> However, in the Fifth and Eleventh Circuits, which do not make unpublished opinions available on their websites while allowing citation in briefs,<sup>123</sup> there is some worry that institutional litigants who keep their own files might have an advantage over others without such ready access.<sup>124</sup> Whatever this argument was worth, the E-Government Act of 2002 has laid to rest any concerns over easy access to unpublished dispositions.<sup>125</sup> The effect of the Act is to force all federal appellate courts to post all opinions, including unpublished opinions, on their websites.<sup>126</sup> Be that as it may, under the paradigmatic publication model, an unpublished opinion still has no significant precedential value and is of no use to future litigants. Even assuming some litigants have greater access to the unpublished body of law, no inequity would ensue since any proposition of consequence in an unpublished opinion must be substantially duplicated in a published opinion.<sup>127</sup>

B. *Lack of Judicial Resources as a Justification for Publication Guidelines*

The federal judiciary has expanded in the past several decades, but not nearly at the rate of increased caseloads.<sup>128</sup> As such, the concern over the expanding caseload in the federal appellate judiciary is still, if not more so than previously, a poignant concern where judi-

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121. Greenwald & Schwarz, *supra* note 19, at 1141-42 (citing 1964 JUDICIAL CONFERENCE PROCEEDINGS, *supra* note 14).

122. See Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 556 (1997).

123. 5TH CIR. R. 47.5.4; 11TH CIR. R. 36-2.

124. See generally Barnett, *supra* note 92, at 6 n.28.

125. Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913.

126. *Id.*

127. See Greenwald & Schwarz, *supra* note 19, at 1151; see also Katsh & Chachkes, *supra* note 103, at 310 n.75 (noting that “if summary orders indeed added nothing to the law, then it would not matter if they were not uniformly available to all parties” (quoting 2D CIR. R. § 0.23)).

128. See Greenwald & Schwarz, *supra* note 19, at 1151; *2002 Statements to Congress*, *supra* note 17 (statement of Judge Samuel A. Alito, Jr.).

cial resources have not similarly developed to accommodate the growing caseload.<sup>129</sup>

As a starting point, Judge Kozinski points out in *Hart* that when crafting a published opinion, “the court must be careful to recite all facts that are relevant to its ruling, while omitting facts that it considers irrelevant.”<sup>130</sup> Because an opinion is unpublished “does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented.”<sup>131</sup> It does mean, however, that dispositions can be disposed in a much more timely fashion if unpublished, since there is no need to draft an opinion with due regard for “the countless permutations of facts that might arise in the universe of . . . cases.”<sup>132</sup> Limited publication plans allow judges to decide cases without precedential value using as little resources as possible, conserving those resources for cases that mandate a published, and thus more time consuming, opinion. In conclusion, utilizing unpublished opinions are a necessary judicial tool as “few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them.”<sup>133</sup>

The argument is all but incontestable in light of the current state of affairs in the federal appellate judiciary. However, the judicial resources argument misses the root of the selective publication predicament. No one is arguing against the fact that published opinions take a great deal more time to produce than unpublished opinions. Once again, this issue only comes to fruition once the publication decision has already been made. The judicial resources argument is only persuasive in the context of making the publication decision under two equally unsatisfactory presumptions. First, a lack of judicial resources would impact the publication determination if publication guidelines are interpreted to reflect the idea that judges have the discretion not to publish opinions that should rightfully be published.<sup>134</sup> Such a state of affairs clearly does not comport with the American jurisprudential notion that we are a nation governed by laws, not by men.<sup>135</sup> In other words, such arbitrary discretion in the hands of anyone in a position of power is plainly unacceptable. The other equally disturbing context in which a lack of judicial resources might affect the publication determination is where the judiciary has accepted a watered-down version of precedential value. In other

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129. Greenwald & Schwarz, *supra* note 19, at 1145-46.

130. 266 F.3d 1155, 1176 (9th Cir. 2001).

131. *Id.* at 1177.

132. *Id.* at 1176.

133. *Id.* at 1177.

134. In fact, Judge Kozinski attempts to allay fears that publication decisions are not made in good faith. *Id.* at 1177 n.35.

135. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) (discussing this notion as embodied in the Fifth Amendment).

words, strained resources would force paradigmatic publication guidelines to be redefined such that, in the spectrum of precedential value a decision might contribute, only those somewhat near the high end warrant publication.<sup>136</sup> Be that as it may, a review of the current local circuit publication guidelines discussed in Part II demonstrates an explicit aversion to that kind of compromise. Furthermore, the constitutional arguments so neatly disposed of under paradigmatic publication guidelines would become stronger than ever by increasing the publication threshold—especially if such a position was publicly held by the federal judiciary. Assuming actual publication rates must increase to meet this goal, there is no doubt that an amenable procedure to alleviate already strained judicial resources must be implemented. Nevertheless, strained resources seem to be an unacceptable justification for compromising not only the efficient and complete development of case law, but quite possibly constitutional guarantees.<sup>137</sup>

Therefore, at best, the argument that a lack of judicial resources demand no-citation rules is directed at why publication guidelines should exist, while ignoring that publication guidelines operate to exclude only decisions without precedential value. As such, the state of judicial resources is detached from any analysis under paradigmatic publication guidelines.<sup>138</sup>

### C. *Important Precedential Opinions Being Obscured by Those Without Precedential Value*

As stated by Judge Alito in his 2002 statement to Congress, the judiciary is “concerned that important precedential opinions will be obscured by the thousands of opinions that are issued each year by the courts of appeals to decide cases that do not present any question of significant precedential value.”<sup>139</sup> This argument is faulty on its

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136. Exactly how close to *landmark* a case must be to warrant publication is not relevant. The point is that paradigmatic publication guidelines would have to be redefined to achieve a stricter publication threshold.

137. In recognizing the practical impact the court’s decision would have on the federal judiciary, Judge Arnold in *Anastasoff* proposed that the remedy is not:

to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means the backlogs will grow, the price must still be paid.

223 F.3d 898, 904 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

138. Although paradigmatic publication guidelines eschew judicial resources in theoretical application, practical implications as a driving force behind the operation of the federal appellate judiciary are unquestionably imperative in reaching ultimate resolution. Paradigmatic publication guidelines work as a starting point to isolate exactly what should be the goal in developing our system of precedent. Any solution must necessarily build off these principles.

139. *2002 Statements to Congress*, *supra* note 17 (statement of Judge Samuel A. Alito, Jr.).

face. Judge Richard Posner, who on the whole favors publication plans, states that “[d]espite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are too few on point.”<sup>140</sup> Even with numerous opinions, electronic databases immensely ease the burden of sifting through large amounts of information.<sup>141</sup> Even so, under paradigmatic publication guidelines, the argument would be erroneous by definition. In order to be published, under paradigmatic publication guidelines, any opinion would have to be significant in some respect, regardless if one person or another subjectively finds the opinion *important*. In other words, any published opinion would, in fact, have significant precedential value and not be subject to Judge Alito’s criticism.

#### D. *The Fundamental Fairness Argument*

The fairness argument, as exemplified in *Anastasoff*, basically states that allowing for the creation of non-precedential dispositions undermines the American jurisprudential idea that a “declaration of law is authoritative . . . and must be applied in subsequent cases to similarly situated parties.”<sup>142</sup> Specifically, where a previous decision was decided in particular way, all later decisions must be decided in a like manner. A party is treated unfairly where his or her case is decided differently than a previous, similarly situated party. Fundamental unfairness is implicated where a litigant has a previously decided unpublished opinion involving a similarly situated party in his or her favor, yet the court does not rule favorably. In the context of a no-citation rule, the court will not even consider the previous unpublished opinion, making the rule itself the direct cause of the fundamental unfairness in an unfavorable ruling. No-citation rules arguably cause the court to fail in its duty to consistently decide cases involving similarly situated litigants, thus violating the doctrine of precedent.<sup>143</sup>

The argument is persuasive, but again, is only a product of a misapplication of publication guidelines. Theoretically, if the only case on point is unpublished,<sup>144</sup> and that case is the only evidence that

140. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 166 (1996).

141. See Shuldberg, *supra* note 122, at 556.

142. 223 F.3d 898, 900 (8th Cir. 2000) (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

143. See also *supra* Part IV.A.2.

144. To be able to say an unpublished decision (which, by definition, does not necessarily have a full recount of the facts and judicial reasoning) is on point with any particular situation is a shaky proposition in and of itself. See *infra* Part VII.

would otherwise persuade the court to find in the litigant's favor, the problem arose at the time the panel made the decision not to publish the original case—for if paradigmatic publication guidelines were employed, the case would have been published,<sup>145</sup> and the judgment in both cases must be in sync.<sup>146</sup> Again, with no cognizable injury, the argument would never be presentable before the bench.

## VI. UNATTAINABLE PARADIGMATIC PUBLICATION GUIDELINES

### A. *Local Circuit Publication Guidelines Are Not Applied in the Spirit of Paradigmatic Publication Guidelines*

Donald Songer's insightful, if not painfully apparent, observation sets the tone for this section:

If the case involves, as the criteria suggest, the straightforward application of clear and well settled precedent which is not in need of any published explanation by the courts of appeals, then the correct decision and the correct basis of decision should be obvious to any person who is well trained in the law.<sup>147</sup>

Songer's observation frequently comes to mind when appellate courts affirm district court decisions. Six of the thirteen circuits have rules specifically addressing summary affirmances or abbreviated dispositions apart from publication guidelines.<sup>148</sup> These rules give criteria (such as "the evidence supporting the jury's verdict is sufficient"<sup>149</sup>) indicating where a published opinion need not be issued. However, all six rules, in addition to the stated criteria within the rule itself, have, as a separate requirement, the caveat that publishing such a disposition would serve no precedential purpose.<sup>150</sup> Logic dictates that because the summary affirmance rule speaks of precedential value, the court would look toward the publication criteria for guidance. As long as courts are using the criteria from the summary affirmance rules in conjunction with those stated in their respective publication guidelines, the excess criteria ought to be redundant—simply stating the standard of review the court must employ regard-

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145. The mere fact that no other precedent can be cited in support of the position taken by the court indicates the need for publication.

146. Unless of course the previous case is overruled following the en banc process. Furthermore, the problem of disparate treatment of like legal arguments (as distinct from the precedential value accorded them) within the same circuit at different times is a topic well outside the scope of this Comment.

147. Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 310 (1990).

148. See 3D CIR. R. App. I, IOP 6.2; 5TH CIR. R. 47.6; 8TH CIR. R. 47B; 11TH CIR. R. 36-1; D.C. CIR. R. 36(b); FED. CIR. R. 36.

149. FED. CIR. R. 36.

150. 3D CIR. R. App. I, IOP 6.2; 5TH CIR. R. 47.6; 8TH CIR. R. 47B; 11TH CIR. R. 36-1; D.C. CIR. R. 36(b); FED. CIR. R. 36.

less of those explicitly set forth.<sup>151</sup> The fact that there are two rules arguably indicates a lack of rigor employed by the circuits in reviewing the publication guidelines.

Oddly enough, many circuits allow for the issuance of dissents and concurrences within unpublished opinions.<sup>152</sup> In fact, the Third Circuit explicitly contemplates such occurrences in stating: “A not precedential opinion may be issued without regard to whether the panel’s decision is unanimous and without regard to whether the panel affirms, reverses, or grants other relief.”<sup>153</sup> This is a clear example of how such circuits are not sincerely striving to achieve paradigmatic publication guideline application. At the very least, this indicates that in the Third Circuit, no single judge’s opinion as to the precedential value of an opinion controls.<sup>154</sup> Can a decision be so clear as to warrant non-publication where three federal appellate court judges cannot agree on the outcome?<sup>155</sup> If the answer is yes, then

151. None of the six summary affirmance rules explicitly cross reference to publication guidelines. *See supra* note 150.

152. *See, e.g.*, *Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003), *cert denied*, 123 S. Ct. 2607 (2003). Only the Second Circuit mandates unanimity in the outcome of the case in order not to publish. *See* 2D CIR. R. § 0.23 (“[I]n those cases in which decision is unanimous . . . [and] no jurisprudential purpose would be served by a written opinion, disposition will be made [in unpublished form] . . .”). Note, however, the language does not necessarily imply that where the outcome is not unanimous an opinion must be in published form. Regardless, independent research demonstrates this to be the case.

153. 3D CIR. R. App. I, IOP 5.3; *see also* 1ST CIR. R. 36(b)(2)(C) (“When a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published *unless* all the participating judges decide against publication.”) (emphasis added). According to the Fifth Circuit “[a]n opinion *may* also be published if it: Is accompanied by a concurring or dissenting opinion.” 5TH CIR. R. 47.5.1 (emphasis added). If any of the other enumerated publication criteria are met, publication is not discretionary—it is mandated. *Id.*

154. “A majority of the panel determines whether an opinion is designated as precedential or not precedential . . .” 3D CIR. R. App. I, IOP 5.1; *see also* 11TH CIR. R. 36-2 (“An opinion shall be unpublished unless a majority of the panel decides to publish it.”). Unlike the Third Circuit, several other circuits allow for any single panel member to demand publication. For circuits that explicitly allow a single panel member to force publication, *see* 1ST CIR. R. 36(b)(2)(B) (“[S]hould any judge [be] of the view that the opinion should be published, it must be.”); 2D CIR. R. § 0.23 (Nonpublication where “each judge of the panel believes [publication is not warranted]”); 4TH CIR. R. 36(a) (“A judge may file a published opinion without obtaining all acknowledgements . . .”); 5TH CIR. R. 47.5.2 (“An opinion shall be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication.”); 6TH CIR. R. 206(b) (“An opinion or order shall be designated for publication upon the request of any member of the panel.”); 7TH CIR. R. 53(d)(2) (“[A] single federal judge [has the right] to make an opinion available for publication.”); 8TH CIR. R. App. I (3) (“[A] judge may make any of his opinions available for publication.”); FED. CIR. R. App. V, IOP 10(5) (“The election to employ a nonprecedential opinion or a Rule 36 judgment shall be unanimous among the judges of the panel.”). Interestingly, in context, 7TH CIR. R. 53(d)(2) states: “Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.” This begs the question of whether the other circuits allowing a single judge to publish are similarly salutary in nature.

155. *See Greenwald & Schwarz, supra* note 19, at 1149 (2002):

courts are all but admitting that what should be has given way to what must be. In other words, the strain on judicial resources demands such an outcome, making publication guidelines merely a salutary gesture.

While independent review of the facts of a case can indicate publication errors, empirical data, though not conclusive, is a more reliable source to determine whether publication guidelines have been improperly applied.<sup>156</sup> For example, a 1985 study found that in 1984, twenty-four percent of all unpublished opinions in the federal courts of appeals were reversals.<sup>157</sup> A reversal indicates a disagreement in a legal outcome and arguably demonstrates the heightened significance of the issue presented—potentially heightened to a point warranting publication.<sup>158</sup> Instances of unpublished opinions being reversed by the United States Supreme Court also intimate that publication criteria are improperly applied.<sup>159</sup>

The most visible example of a publication error is displayed by *Anastasoff* itself. The court found itself constitutionally bound to follow an unpublished opinion which apparently decided an issue of first impression under federal tax law.<sup>160</sup> Regardless of the propriety of the court's decision, the original panel clearly made a publication

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If a case is clearly governed by well-established precedent and presents no special facts, what possible need could there be for separate concurrences? If there is, that is itself a strong indication that the case, no matter how trivial it may have seemed on first blush, did not belong on the nonpublication track in the first place.

156. See *Nat'l Classification Comm. v. United States*, 765 F.2d 164, 173 (1985) (Wald, J., concurring) (citing REPORT OF THE SUBCOMMITTEE ON UNPUBLISHED OPINIONS OF THE ADVISORY COMMITTEE ON PROCEDURES TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 45 (May 1984), and noting the Committee's finding that of "the unpublished decisions issued by the court in 1983, . . . 40 percent of the decisions arguably should have been published under the court's governing criteria"); Greenwald & Schwarz, *supra* note 19, at 1153-55; Katsh & Chachkes, *supra* note 103, at 307-12 nn.64-75 (citing many cases the authors believe to be of first impression decided in unpublished form).

157. Greenwald & Schwarz, *supra* note 19, at 1154 (citing a study performed by Donna Stienstra in *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* 42 (Federal Judicial Center 1985)). In addition, Kenneth Schmier, in his statement to Congress, described several instances where, in his opinion, cases warranting publication were resolved as unpublished. See *2002 Statements to Congress*, *supra* note 17 (statement of Kenneth J. Schmier). Mr. Schmier also maintains a website dedicated to the issue of publication and no-citation rules which contains examples of what he believes to be misapplications of stated publication guidelines. The Committee for the Rule of Law, at <http://www.nonpublication.com> (last visited Sept. 26, 2003).

158. Greenwald & Schwarz, *supra* note 19, at 1154.

159. See, e.g., *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) (reversing an unpublished decision from the Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing an unpublished decision from the Second Circuit).

160. See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc) (purporting to be bound by *Christie v. United States*, No. 91-2375MN (8th Cir. Mar. 20, 1992)).

error in issuing an unpublished, nonprecedential opinion in response to an issue of first impression.<sup>161</sup> Another poignant example of a court straying from its publication guidelines occurred in the Fourth Circuit, where the court affirmed the unconstitutionality of a federal statute in an unpublished, *per curium* opinion.<sup>162</sup>

### B. *Why Publication Guidelines Cannot Be Followed Precisely*

Following publication guidelines precisely is important due to the impact of a decision being rendered unpublished. That is to say that an unpublished opinion, whether citable or not, has been deemed worthless as any kind of guide to future courts and litigants.<sup>163</sup>

Though some commentators suggest that judges may have dubious motives and purposely bury unwanted decisions in unpublished form,<sup>164</sup> the more palatable, if not more likely, reason behind errors in the application of publication guidelines is simple human limitation. For example, the subtleties and complexities of an issue might not be revealed in a case inadequately briefed by the litigants or where the actual decision of the case appears fairly obvious. With the volume of cases appellate judges hear, there is no doubt that such situations arise. Instances where the United States Supreme Court has reversed unpublished opinions also tend to implicate either a misapplication of publication guidelines or, at the very least, an error in judgment as to the importance of the issue presented.<sup>165</sup> More importantly, these examples demonstrate the difficulty in distinguishing decisions worthy of publication from those devoid of precedential value.<sup>166</sup>

Considering that case assignment is random, evidence that judges within the same circuit have differing publication rates also displays

161. See 8TH CIR. R. App. I(4)(a) ("An opinion should be published when the case or opinion establishes a new rule of law . . . in this Circuit.").

162. *Edge Broad. Co. v. United States*, 956 F.2d 263 (4th Cir. 1992) (*per curium*) (unpublished table decision). The case was subsequently reversed in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), where the majority noted in footnote three: "We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion."

163. See Greenwald & Schwarz, *supra* note 19, at 1152-53 ("[T]he consequence of not publishing a useful precedent is much greater than the consequence of publishing a redundant, useless one.").

164. See generally Carpenter, Jr., *supra* note 32; Dragich, *supra* note 32.

165. See, e.g., Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 20-21, & n.17 (citing *Johnson v. United States*, 529 U.S. 694 (2000); *Sims v. Apfel*, 530 U.S. 103 (2000); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994); *Houston v. Lack*, 487 U.S. 266 (1988); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984); *Connick v. Myers*, 461 U.S. 138 (1983); *Moore v. Illinois*, 434 U.S. 220 (1977)).

166. See *supra* note 165.

an inconsistent application of publication guidelines.<sup>167</sup> This inconsistency between such highly respected legal scholars speaks volumes as to the implausibility of paradigmatic publication guideline application within the current publication system.

## VII. CONCLUSION

The fact that paradigmatic publication guideline application can never be attained does not necessarily bring the original constitutional and policy arguments back to life in a practical sense. Because unpublished opinions are only written for the parties and contain neither a detailed factual account nor the full reasoning behind the deciding panel's decision,<sup>168</sup> a proper case to actually test these theories will not likely be found.<sup>169</sup> The fact that a current decision appears to match, on its face, a particular unpublished opinion does not make it a prime candidate as a test case. Because unpublished opinions do not contain the full facts and reasoning of the court and publication guidelines, even as exhaustively delineated as possible, are still vague, a panel will rarely be faulted for deciding not to publish a disposition, especially in a close decision. Even if the unpublished opinion seems to fit squarely into a category mandating publication, the panel can simply cite Judge Kozinski in *Hart* for the proposition that, because the decision was unpublished and not crafted with precision, it only *appears* to fit into the publication guidelines.<sup>170</sup> This point plainly cannot be refuted as there is no other record of the case (short of a retrial or attempting to depose the deciding panel) through which to dispute the claim.

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167. 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, 112-13 (2001) ("Judges from different circuits apply relatively similar publication criteria to arrive at widely different publication rates. This lack of uniformity suggests that judges do not make consistent publication decisions."); Songer, *supra* note 147, at 310; Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1376 (1995) (In the "D.C. Circuit, the wide gap between the number of published and unpublished opinions written by different judges gives pause.").

168. See, e.g., 4TH CIR. R. 36(b) ("Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court."); see also *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001) ("An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision.").

169. Evidence of a lack of test cases is clear when one compares the mountainous volume of commentary in this area against the scarcity of actual case law (i.e. only two cases: *Anastasoff*, which is vacated and no longer good law, and *Hart*, which dismissed the Article III argument). See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc); *Hart*, 266 F.3d at 1155.

170. See 266 F.3d at 1176-78. Of course, this argument only speaks to the subjective factors making up the publication, not objective factors such as where the decision "reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order." 7TH CIR. R. 53(c)(1)(v).

As such, the proper forum for an attempt at rules reform is the Rules Advisory Committee (leading up to the eventual adoption of a uniform Federal Rule of Appellate Procedure binding all thirteen federal circuits). A nationally uniform rule may not be a necessity, but considering the wide array of individual circuit rules and the criticism each has received, the time for circuit experimentation is over. And a national uniform rule is exactly what has been approved in principle by the Advisory Committee on Appellate Rules.<sup>171</sup> However, the proposed rule, which would allow for the citation of any unpublished opinion for persuasive value, only deals with *citation* of unpublished opinions.<sup>172</sup> Though a step in the right direction, it fails to address the most critical aspect of the problem—circuits still have no uniform guidance in making the publication determination. Simply lifting the citation ban overlooks the source of the problem—the publication plan. The publication decision carries with it important consequences. In a strict sense, the publication decision determines whether the disposition will be binding circuit precedent subject to the en banc process to overrule or merely used for persuasive value.

An argument for allowing citation of unpublished opinions to the court is rather compelling. Since judges see a variety of sources in briefs, including restatements, treatises, law review articles, legal encyclopedias, and the like, the judiciary is well trained in ascertaining the proper weight to assign a particular authority brought before it. As such, unpublished opinions should be similar to other authority in that judges may assign whatever persuasive value is appropriate.<sup>173</sup>

The argument is sound, but it must be tempered with certain realities. To begin with, by the explicit wording of several rules, unpublished opinions do not likely contain a full factual account of the situation.<sup>174</sup> Even if the disposition has a full factual account, a later panel would have no way to achieve independent verification short of where the disposition itself actually said such. Judge Kozinski further addresses this problem in *Hart*, noting that because an unpublished opinion “is, more or less, a letter from the court to parties fa-

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171. See Alito Memorandum, *supra* note 29, at 28; see also *supra* Part II.D.

172. *Supra* note 171.

173. See Carpenter, Jr., *supra* note 32, at 240-42 (finding that not only should unpublished opinions be citable for persuasive value but further that “[t]he only real question is whether unpublished opinions would obtain a rank equal to binding, published decisions or whether they should occupy a new and unique position beneath binding authority but above primary and secondary persuasive sources”).

174. See, e.g., 4TH CIR. R. 36(b) (stating that “[an unpublished opinion] may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court”); see also FED. CIR. R. App. V, IOP 10(3) (stating that “[n]onprecedential dispositions should not unnecessarily state the facts nor tell the parties what they argued, or what they otherwise already know. It is sufficient to tell the losing party why its arguments were not persuasive.”).

miliar with the facts, announcing the result and the essential rationale of the court's decision"<sup>175</sup> the disposition "is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases."<sup>176</sup>

Thus, even reliance for persuasive value on what appears facially to be a fully accounted unpublished opinion for an uncertain material proposition is problematic at best.<sup>177</sup> Especially considering that, if the unpublished opinion did contain all relevant facts and precise court reasoning, the aims of publication plans—namely, saving judicial resources by not delineating all facts and court reasoning—would be lost, leaving no reason why the opinion was not published in the first instance. Not to mention the fact that if the unpublished opinion really did clear up a material uncertainty, it should have been published at the outset. In fact, Judge Kozinski, in his statement to Congress, considers "[t]he prohibition against citation of unpublished dispositions [as] address[ing] a specific kind of fraud on the deciding court—the illusion that the unpublished disposition has sufficient facts and law to give the deciding court useful guidance."<sup>178</sup>

Furthermore, even if a court allows an unpublished opinion to be cited for its persuasive value, the deference the court will accord is minimal.<sup>179</sup> Not only is the case devoid of the full factual account and reasoning, but the stamp of "not for publication" is itself indicative of the court's assessment of the case; namely, according to the explicit wording of every circuit's rule, the case has been deemed by the court as having no precedential value.<sup>180</sup>

Be that as it may, persuasive reasons still exist for citation to unpublished opinions, even if not as guidance in deciding a particular question of law. Without significantly disturbing the argument against citation, unpublished opinions may be cited to demonstrate the frequency with which an issue arises, signaling the need for the

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175. 266 F.3d at 1178.

176. *Id.*

177. The most important reason to resort to an unpublished opinion in any case is where a material uncertainty about a proposition is not addressed by a published opinion.

178. *2002 Statements to Congress*, *supra* note 17 (statement of Judge Alex Kozinski).

179. The D.C. Circuit (which allows citation to unpublished opinions issued after January 1, 2002) has the most liberal rule regarding unpublished dispositions. *See* D.C. CIR. R. 28(c)(1)(B). Rule 28(c)(1)(B) actually states that an unpublished opinion "may be cited as precedent." *Id.* However, another rule explicitly states that the panel issuing such an opinion "sees no precedential value in that disposition." D.C. CIR. R. 36(c)(2). Simple logic fails to comport with the idea that a panel, when deciding an issue, will be significantly influenced by an opinion dubbed by a previous panel of peers (or the deciding panel itself) as having "no precedential value." *Id.*

180. For example, the Eleventh Circuit, which allows citation of unpublished opinions, states: "Opinions that the panel believes to have no precedential value are not published." 11TH CIR. R. 36-3, IOP 5.

court to take an authoritative stance.<sup>181</sup> Arguably, such a case might be published under paradigmatic publication guidelines,<sup>182</sup> but the reality is that courts are not omniscient and may not realize the issue is one of public importance. Furthermore, a string of unpublished cases can be used to give notice to the court that a relatively old precedential published case has been cited several times and is still good law.<sup>183</sup>

In addition, the ability to cite unpublished opinions might operate as a quasi-oversight function in the application of publication guidelines. The quasi-oversight feature works in two ways. First, where a decision was improperly disposed of in unpublished fashion, citation to the previous decision would help the court recognize and remedy the oversight where the issue presents itself again. Second, where unpublished decisions are regularly brought to the court's attention, judicial accountability, awareness, and recognition of the precedential issues incident to the publication decision will increase. In other words, constantly being exposed to unpublished cases will sharpen judges' perception of what decisions should or should not be disposed of as unpublished.

In any case, the argument against citation seems more aimed at persuading courts that, once citation restrictions are lifted, they should not be applied retroactively. In other words, courts must change their methodology when crafting unpublished decisions since they are no longer for the sole use of the court and parties involved. Both the Fifth and D.C. Circuits have taken this into account in lifting their respective citation bans.<sup>184</sup> Such rules demonstrate that panels must change their understanding of how unpublished opinions should be written given those cases may be cited back to them.

In order to accomplish the stated goal of only publishing those opinions with precedential value, courts must adopt a uniform publication plan, incorporating procedures beyond a mere listing of criteria designed to yield consistent publication decisions. Considering the discretionary nature of the publication determination, a feasible

181. See Greenwald & Schwarz, *supra* note 19, at 1151-53.

182. Specifically, the guideline dealing with an issue of public interest would be implicated. See *supra* Part III.

183. See Greenwald & Schwarz, *supra* note 19, at 1152. *But see*, Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 916 (1986) (finding the argument of using a string cite to prove the continued authority of a case unpersuasive).

184. Both the Fifth and D.C. Circuits have explicit rules addressing citation of unpublished opinions issued both before and after the citation ban was lifted. See 5TH CIR. R. 47.5.3, 47.5.4 (stating "unpublished opinion[s] should normally be cited only when the doctrine of *res judicata* . . . [etc.] is applicable" for unpublished opinions issued before January 1, 1996; allowing free citation to unpublished opinions issued after this date); D.C. CIR. R. 28(c)(1)(A), 28(c)(1)(B) (not allowing citation to unpublished opinions issued before January 1, 2002; citation to unpublished opinions issued after this date is permitted).

mechanism for uniformity must include some sort of oversight procedure. The least intrusive measure begins with unanimity in the non-publication decision.<sup>185</sup> The next step is the institution of publication committees within each circuit. Committees should be composed of circuit judges, rotating in membership, whose function is to critically review a sample of decisions chosen for nonpublication. Such committees would help foster a cohesive and consistent understanding within the circuit of those opinions constituting significant precedential value and thus warranting publication. Such an oversight feature clearly depends on earnest judicial participation for success.

Other key elements to an efficient and uniform publication plan are education and communication. Judges must understand the philosophy behind the text of the publication criteria and be willing to discuss and develop those ideals among peers. Each individual judge must understand and hold similar principles in relation to the selective publication plan. Considering the volume of cases the federal appellate judiciary confronts, implementation will certainly be difficult, but the resultant strengthening of the federal appellate judicial system more than justifies the cost. Although the language of the publication guidelines may not change dramatically, with enough communication, a uniform idea of the elusive concept of “precedential value” can be developed. While there will always be problems, if the judiciary can gain a uniform understanding of just what precedential value means, consistent publication decisions will emerge and the debate over unpublished opinions can finally be settled.

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185. *See supra* Part VI.A.