

# “THAT’S MY HOLDING AND I’M NOT STICKING TO IT!” COURT RULES THAT DEPRIVE UNPUBLISHED OPINIONS OF PRECEDENTIAL AUTHORITY DISTORT THE COMMON LAW

## I. INTRODUCTION

One hundred sixty-eight years ago, the venerated Supreme Court Justice Joseph Story made the following statement that still rings true today: “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>1</sup>

Unfortunately, the kind of “alarming doctrine” to which Justice Story referred occurs every day in the federal appellate courts<sup>2</sup> as a result of publication plans<sup>3</sup> that deprive unpublished opinions<sup>4</sup> of precedential authority.<sup>5</sup> Because these publication plans leave to the judges’ discretion<sup>6</sup>

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1. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377 (1833), *quoted in* Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir.), *vacated as moot on other grounds en banc*, 235 F.3d 1054 (8th Cir. 2000).

2. Although the scope of this Note is limited to the federal appellate court rules that deprive unpublished opinions of precedential effect, state courts have similar rules. “In some state courts the proportion of unpublished rulings has climbed to more than 90 percent.” *See, e.g.*, Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 159-65 (1992) (discussing state court rules that deprive unpublished opinions of precedential effect); William Glaberson, *Unprecedented: Legal Shortcuts Run into Some Dead Ends*, N.Y. TIMES, Oct. 8, 2000, § 4, at 4; Peter A. Joy, *Unpublished Opinions Stunt Common Law*, NAT’L L.J., Jan. 29, 1996, at A19 (noting that “an increasing number of state courts have passed rules that forbid citation of unreported opinions”); Jason B. Binimow, Annotation, *Precedential Effect of Unpublished Opinions*, 2000 A.L.R. 5th 17 (2000) (collecting state cases that address state court publication rules).

3. *See infra* Part II.C.

4. The term “unpublished opinions” refers to judicial opinions that are not published in books. As discussed *infra* Part II.B, many unpublished opinions are accessible on-line through commercial computer databases. In addition, most circuit courts of appeals post their unpublished opinions on free Internet sites, but legal researchers are able to search for these opinions only by using the party name or date. *See infra* note 42 and accompanying text.

5. *See infra* Part II.C.

6. *See infra* Part II.C for an explanation of the criteria that judges are supposed to use in making their discretionary decisions whether or not to authorize the publication of an opinion. Each circuit’s publication plan contains rules that state whether the decision to publish an opinion will be made by the judge who writes the opinion or by a majority of the panel. Half the circuit courts leave the decision to the discretion of a single judge; the other circuits will only publish an opinion if a majority of the panel votes to do so. Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. REV. 109, 121, 142 (1995). The circuit court rules that leave the decision to a single judge are the following: FED. CIR. R. 47.6(b);

the decision whether an opinion will be published or unpublished,<sup>7</sup> judges are free to choose to deprive a case of future precedential authority by classifying it as an unpublished opinion.<sup>8</sup> The publication plans thus give an appellate court the “liberty to disregard [its] former rules and decisions”<sup>9</sup> whenever those former rules and decisions are set forth in an unpublished opinion.<sup>10</sup>

Although the publication plans vary from circuit to circuit, all of the plans share a common element: unpublished opinions generally are not treated as precedent.<sup>11</sup> Each of the appellate courts created its publication plan in the

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1ST CIR. R. 36.2(b); 2D CIR. R. 0.23; 5TH CIR. R. 47.5.2; 8TH CIR. R. APP. I, 3; 9TH CIR. R. 36-2(g). The circuit court rules that require a majority vote of the panel before publishing an opinion are the following: 3D CIR. R. APP. I, I.O.P. 5.1.3; 6TH CIR. R. 36; 10TH CIR. R. 36.1; 11TH CIR. R. 36-2. Finally, the following circuit courts allow either a single judge or a majority of the panel to order the publication of an opinion: 4TH CIR. R. 36(a) and 7TH CIR. R. 53(d)(2).

7. Of course, it is the publishing companies, not the judges, who ultimately “publish” the opinions. For the sake of simplicity, however, references in this Note to a judge’s decision to publish or not to publish an opinion will be used in place of references to a judge’s decision to authorize or not authorize an opinion.

8. Today, the word “unpublished” has become synonymous with “nonprecedential.” See, e.g., Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate over Publication and Citation of Appellate Opinions*, 84 JUDICATURE 90, 91 (2000) (“The word ‘unpublished’ has become purely a term of art, actually meaning ‘non-precedential.’”). Judge Richard S. Arnold of the Eighth Circuit Court of Appeals similarly noted that “one of the things that courts are doing . . . is to issue these so-called unpublished, nonprecedential, opinions.” Judge Richard S. Arnold, Address at the Washington University School of Law (Jan. 10, 2001) (videotape on file with Washington University School of Law). In fact, one pair of authors expressed their dissatisfaction with the use of unpublished, nonprecedential opinions by labeling these opinions with the oxymoron “non-precedential precedent”. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) [hereinafter *Non-Precedential Precedent*].

The fact that unpublished opinions lack future precedential authority significantly reduces judges’ incentive to spend as much time and care writing unpublished opinions as they spend writing published opinions. According to Chief Judge of the Seventh Circuit Richard Posner, “It is sort of a formula for irresponsibility . . . . Most judges, myself included, are not nearly as careful in dealing with unpublished decisions.” William Glaberson, *Limited Reviews by Courts Raise Legal Rights Concerns*, PORTLAND OREGONIAN, Jan. 9, 1989, at A05.

Similarly, authors Reynolds and Richman state that “[i]t should come as no surprise that unpublished dispositions are also dreadful in quality.” William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 284 (1996) [hereinafter *Requiem*].

9. STORY, *supra* note 1, quoted in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), vacated as moot on other grounds en banc, 235 F.3d 1054 (8th Cir. 2000).

10. In *Anastasoff*, the seminal three-judge panel decision, Circuit Judge Richard S. Arnold aptly stated that publication plans containing “rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not.” *Anastoff v. United States*, 223 F.3d 898, 904 (8th Cir.), vacated as moot on other grounds en banc, 235 F.3d 1054 (8th Cir. 2000).

11. Braun, *supra* note 8, at 94. “All courts (except, now, the Eighth Circuit) agree that these opinions are not precedent.” *Id.* The word “generally” is used to qualify the statement that “unpublished opinions are not treated as precedent” because there are some extremely limited circumstances in which an unpublished opinion will be given precedential effect. See *infra* Part IIC.

early 1970s<sup>12</sup> in response to increasing concern among members of the legal community that too many judicial opinions were being added to the case books each year.<sup>13</sup> As the number of cases litigated per year grew at a daunting pace,<sup>14</sup> judges and scholars became increasingly fearful that these judicial opinions would inundate legal libraries and bookshelves beyond capacity if measures were not taken to restrict the number of published opinions.<sup>15</sup> Thus, the first publication plans specifically were designed to limit the publication of judicial opinions.<sup>16</sup>

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

12. Each appellate court created its first publication plan in the early 1970s; however, the rules contained in each of the publication plans have always been subject to judicial modification or repeal by judicial vote at any time. In fact, each appellate court has changed and modified the rules contained in its publication plan since the plan's original creation. See, e.g., David Dunn, Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 128 n.4 (1977) (listing the original publication plans of the various circuits).

13. Although these fears actually culminated in the 1970s, they had caused concern “[e]ver since systematic reporting of judicial decisions first began in the 16th century.” Braun, *supra* note 8, at 90-91. In 1671, for example, the English Chief Justice Hale described the collection of reported judicial opinions “as the rolling of a snowball, it increaseth in bulk in every age, until it becomes utterly unmanageable.” *Id.* at 91. Similarly an article written in 1824 laments that “[t]he multiplication of reports . . . is becoming an evil alarming and impossible to be born.” Bliss & White, *The Common Law*, 10 N. AM. REV. (n.s.) 411, 433 (1824), quoted in George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 478 (1986). In 1915, a jurist exclaimed, “The law library of the future staggers the imagination as one thinks of multitudes of shelves which will stretch away into the dim distance, rank upon rank, and tier upon tier . . .” John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 158 (1915), quoted in Shuldberg, *supra* note 11, at 545.

14. See *infra* note 66 for a sample of statistics documenting the dramatic increase in federal courts of appeals cases.

Throughout the twentieth century, the increase in the number of cases litigated per year was inevitably accompanied by an increase in published opinions. See *infra* Part II.B. One scholar noted that “[t]he Federal Reporter now increases by 30 volumes a year” notwithstanding the fact that a large percentage of opinions are not even published. Braun, *supra* note 8, at 91.

15. The fears of judges and scholars that too many cases were being added to the books each year were ultimately voiced by the Judicial Conference of the United States. See *infra* Part II.B. In 1964, the Conference urged the federal appellate courts to publish solely the opinions “of general precedential value.” JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, in *Reports of the Proceedings of the Judicial Conference of the United States* 11 (1964), quoted in Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS. 219, 219 (1999) [hereinafter 1964 ANNUAL REPORT].

16. See *infra* Part II.B. According to Judge Philip Nichols, Jr., for example, “The true reason behind the selective publication policy is that it is wrong to ask publishers to publish, libraries to collect, and scholars to read opinions that merely labor the obvious . . . rehashing conclusions already reached in authoritative decisions of the same court or the Supreme Court.” Philip Nichols, Jr., *Selective Publication of Opinions: One Judge’s View*, 35 AM. U. L. REV. 909, 916 (1986). As discussed at length *infra* Part III, many other judges and scholars note that unpublished opinions often contain new and important rationale and, therefore, do *not* merely “rehash conclusions already reached” by the court.

American courts have always adhered to a common law system that is dependent upon precedent.<sup>17</sup> Under our common law system, the natural evolution of case law occurs as each new judicial opinion is added to the river of precedent.<sup>18</sup> The publication plans are an artificial impediment to this natural flow of precedent in the same way that a dam is an artificial impediment to the natural flow of a river. Just as a dam prevents a river from overflowing its physical boundaries, the federal appellate courts' publication plans prevent the books that contain the cases from "overflowing" their physical boundaries of bookshelves and law libraries.<sup>19</sup>

Appellate judges have complete control over which cases get past the "dam" and which do not.<sup>20</sup> When judges make these discretionary decisions, they often inadvertently prevent important cases from joining the river of precedent.<sup>21</sup> Such inadvertent obstruction of common law usually results from the fact that judges cannot always foresee which of their decisions will have future importance and which will not.<sup>22</sup> However, some scholars and judges suggest that obstruction of common law is not always inadvertent.<sup>23</sup> For example, courts can use unpublished opinions potentially as a convenient means of "sweeping under the rug" certain cases that might cause controversy if published.<sup>24</sup>

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17. See *infra* Part II.D. As Justice Story long ago stated:

The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges.

STORY, *supra* note 1, quoted in *Anastasoff v. United States*, 223 F.3d 898, 903-04 (8th Cir.), vacated as moot on other grounds en banc, 235 F.3d 1054 (8th Cir. 2000).

18. Black's Law Dictionary defines "common law" as "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." BLACK'S LAW DICTIONARY 270 (7th ed. 1999).

19. See *supra* note 15 and accompanying text.

20. See *supra* note 6 and accompanying text.

21. See *infra* Part III for an analysis of how such publication plans artificially distort our common law system. For a discussion of precedent and stare decisis, see *infra* Part II.D.

22. See *infra* Part III.

23. See *infra* note 24.

24. One judge, for example, posed the following hypothetical scenario: "[I]f, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug." 1964 ANNUAL REPORT, *supra* note 15, at 223.

Similarly, authors Reynolds and Richman warn that "complexity, like inconsistency, will not vanish by sweeping it under the rug." *Non-Precedential Precedent*, *supra* note 8, at 1191. For a detailed discussion of an unpublished opinion in which the Fourth Circuit may have "swept under the rug" a controversial decision, see *infra* text accompanying notes 149-61 (discussing *Johnson v. Knable*, No. 88-7729, 1988 WL 119136 (4th Cir. Oct. 31, 1988), cited in Slavitt, *supra* note 6, at 110,

This Note argues that our federal appellate courts desperately need a uniform rule regarding the precedential value of unpublished opinions.<sup>25</sup> The Rules Enabling Act<sup>26</sup> grants to the United States Supreme Court the authority to “prescribe by general rules . . . the practice and procedure of the . . . courts of appeals.”<sup>27</sup> This Note proposes that the Supreme Court grant precedential authority to all opinions, whether published or unpublished.<sup>28</sup> Courts should grant precedential authority to all judicial opinions because the united doctrines of precedent<sup>29</sup> and stare decisis<sup>30</sup> are fundamental to the legitimate operation of the Judicial Branch.<sup>31</sup> When court rules permit judges to make entirely discretionary decisions regarding which of their judicial opinions they will follow, and which ones they will not,<sup>32</sup> our common law system of precedent is artificially distorted.<sup>33</sup> In addition, whereas the doctrine of precedent has endured successfully in American courts for hundreds of years, the publication plans that violate that doctrine were created only twenty-seven years ago.<sup>34</sup>

Fortunately, we no longer need these publication plans that artificially dam the flow of precedent.<sup>35</sup> The incredible advances in technology that have occurred throughout the past few decades, and that continue to improve every day, now will allow us to transcend the boundaries of physical storage space.<sup>36</sup> Electronic databases such as Westlaw and LEXIS or devices used for data storage, such as CD-ROMs, possess digital storage capacities infinitely more vast than that of bookshelves.<sup>37</sup> Every judicial opinion now can be published electronically.<sup>38</sup> Therefore, we no longer need to limit the publication of judicial opinions according to the amount of available storage

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25. *See infra* Part III.

26. 28 U.S.C. § 2072 (1970), *cited in* Dunn, *supra* note 12, at 147 n.120.

27. 28 U.S.C. § 2072 (1970), *quoted in* Dunn, *supra* note 12, at 147.

28. *See infra* Part IV.

29. *See infra* Part II.D.

30. *See infra* Part II.D.

31. *See infra* Part II.D.

32. *See infra* Part III.

33. *See infra* Part III.

34. *See infra* Part II.D.

35. *See infra* Part III.

36. *See infra* Part IV.

37. *See infra* Part IV. The physical storage space required by a user of an electronic database is the space occupied by one computer and one printer. “One CD-ROM disc, which is wafer thin and a mere five inches in diameter, can store as much information as that contained in 30 to 60 printed volumes. The information contained in thousands of volumes can now be stored in a file cabinet.” Shuldberg, *supra* note 11, at 558.

38. *See infra* Part III.

space of bookshelves and law libraries.<sup>39</sup> This Note proposes that the federal government provide funding for the creation of a single Web site designed solely for the electronic dissemination of judicial opinions.<sup>40</sup> Computer experts could design a search engine similar to the ones used by LEXIS and Westlaw to facilitate a legal researcher's access to relevant judicial opinions when the researcher does not already know the party names or dates of the relevant cases.<sup>41</sup> This search engine would allow researchers to perform sophisticated word searches using Boolean logic.<sup>42</sup> Because this Web site would not attempt to make a profit, unlike commercial research databases, access fees would be substantially less than those of the major providers, LEXIS and Westlaw, and, perhaps, could even be free for the public.<sup>43</sup>

Part II of this Note examines the histories of published opinions, of computer-assisted legal research, of unpublished opinions in the federal appellate courts, and of precedent and stare decisis. Part III of this Note analyzes the ways in which the publication plans violate the doctrines of precedent and stare decisis and artificially distort our common law system. Part IV of this Note proposes a solution to the problems created by the existing publication plans of the federal appellate courts.

## II. HISTORY/OVERVIEW

### A. *History of Published Opinions*

The publication of judicial decisions has been a common thread running through the English legal system for many centuries. From 1292 to 1535, unofficial manuscript law reports called Year Books contained descriptions of judicial acts that "we would recognize as 'court reports.'"<sup>44</sup>

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39. See *infra* Part III.

40. See *infra* Part IV. As discussed *supra* note 2, the scope of this Note is limited to the federal appellate courts' publication plans. However, a strong argument can be made that the Web site urged by this Proposal should include *all* judicial opinions, whether federal appellate court decisions, federal district court decisions, or state court decisions.

41. See *infra* note 42.

42. See *infra* note 75 and accompanying text. Although most circuit courts post their unpublished opinions on electronic bulletin boards that are accessible to the public via the Internet, legal researchers are able to search for these decisions only by party name or date. For example, the Eighth Circuit maintains an electronic bulletin board. United States Court of Appeals for the Eighth Circuit Official Web Site, available at <http://www.ca8.uscourts.gov> (last visited Feb. 21, 2002). This Note urges the implementation of the more user-friendly means of finding relevant cases. See *infra* Part IV.

43. See *infra* Part IV.

44. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 17 (1987) [hereinafter *Form Molds Substance*] (citing F. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH WITH BIBLIOGRAPHICAL MANUAL 94-102 (1923)).

Publishers eventually replaced the Year Books with unofficial nominative case reporters, which individual members of the bar created from their collections of notes discussing judicial decisions.<sup>45</sup> In 1571, Edmund Plowden published the first nominative case reporter, called “Les Comentaires, ou les Reportes.”<sup>46</sup> In the years following the American Revolution, nominative case reporters emerged in America.<sup>47</sup> The desire for an “American” common law—separate and distinct from the laws of England—was a major impetus in the widespread adoption of reporters, beginning with Ephraim Kirby’s 1789 Connecticut Reports.<sup>48</sup> By 1803, a number of jurisdictions had initiated the publication of “official” reports of their judicial decisions.<sup>49</sup> The official reports were more objectively written and regularly published than their nominative predecessors, but they lacked organization and efficiency.<sup>50</sup>

John B. West transformed America’s legal reporting system when he founded and incorporated the West Publishing Company in 1882.<sup>51</sup> West embarked on his journey at the young age of twenty-four, when he convinced his older brother to help him develop a weekly legal news sheet called “The Syllabi.”<sup>52</sup> This publication gained immediate popularity among members of the bar and ultimately led to the National Reporter System.<sup>53</sup> The ingeniousness of the National Reporter System was its goal “to collect, arrange in an orderly manner and put into convenient and inexpensive form

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45. *Form Molds Substance*, *supra* note 44, at 17 (citing HICKS, *supra* note 44, at 96). These collections of notes included those taken by lawyers and judges, in addition to the compiler’s own notes and are therefore called “unofficial nominative case reporters.” Eventually, the books were no longer identified by the individual reporter’s name. Thus, official reports and commercial reports replaced the “nominative” case reporters. *Id.* at 20 n.28 (“This accounts for the ‘nominative’ portion of early United States Supreme Court reports.”).

Neither the unofficial nominative reports nor the official reports were written by the judges themselves. *Id.* at 17. Rather, the reporters wrote both. *Id.* See *infra* note 49.

46. *Form Molds Substance*, *supra* note 44, at n.14 (citing HICKS, *supra* note 44, at 96).

47. *Id.* at 19.

48. *Id.*

49. *Id.* These “official” versions of the reports were more systematic in their coverage and were given official approval by the jurisdiction. *Id.* The major difference between the unofficial nominative reports and the official reports is that the former were written by a court reporter who was a “public-spirited volunteer,” whereas the latter were written by a “state-appointed functionary.” *Id.* at 20 (citing Cal. Gov’t Code § 68900 (West 1976) as “an example of a statute creating the office of court reporter”).

50. *Id.*

51. Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9, 20 n.24 (1994) (citing Thomas A. Woxland, “Forever Associated with the Practice of Law”: The Early Years of the West Publishing Company,” 5 LEGAL REFERENCE SERVICES Q. 115, 116 (1985)) [hereinafter *Legal Research Universe*].

52. Woxland, *supra* note 51, at 115-16.

53. *Id.*

in the shortest possible time, the material which every judge and lawyer must use.”<sup>54</sup> One of the major reasons that the West unofficial reporter system was so successful was that the official state reporters were slow and unreliable.<sup>55</sup> In fact, the office of the state reporter was more often than not delegated to a “political crony rather than an efficient publisher.”<sup>56</sup>

John B. West made a major departure from prevailing practice when he decided to publish *all* judicial decisions, rather than choosing to publish only a selective number of them.<sup>57</sup> Critics chided that such an approach deprived the reports of “any editorial judgment,” and some even called it a “waste-basket” method of reporting.<sup>58</sup> What was perceived as West Publishing Company’s weakness in the beginning, however, ultimately became one of its greatest strengths. According to Professor Robert Berring, lawyers supported the West system of universal publication of judicial decisions because they wanted “all precedent [to] be available.”<sup>59</sup> In fact, West’s system of universal and comprehensive publishing gained such popularity in the legal community that it ultimately became “virtually impossible for another print publisher to ever challenge West’s market.”<sup>60</sup>

In order to facilitate the retrieval of relevant cases from the multitude of cases that were published in the National Reporter System, West developed the American Digest System.<sup>61</sup> The Digest System’s headnotes and keynumber indexing arrangement<sup>62</sup> allows a researcher to find cases quickly and easily. Once a researcher thinks of a word that relates to a given legal issue, the researcher can look up the word in the Digest’s Descriptive-Word Index to find the subject-matter topics that are related to that word and other

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54. *A Symposium of Law Publishers*, 23 AM. L. REV. 396, 406 (1889), cited in Woxland, *supra* note 51, at 118-19.

55. Woxland, *supra* note 51, at 119.

56. *Id.*

57. *Id.* at 123.

58. *Id.*

59. *Id.*

60. Woxland, *supra* note 51, at 120. John West remarked that “it is one of the greatest merits of the National Reporter System that it gives all the cases.” *A Symposium of Law Publishers*, *supra* note 54, at 406, quoted in Woxland, *supra* note 51, at 123. He also responded to an intended insult that his system was like a “blanket system” by replying that a blanket policy is the best kind of insurance policy, “and that is the sort of policy we issue for the lawyer seeking insurance against the loss of his case through ignorance of the law as set forth in the decisions of the highest courts.” *Id.*, quoted in Woxland, *supra* note 51, at 123.

More than a century after West Publishing Company’s inception, no print publisher has been able to compete with West’s success in the field. Woxland, *supra* note 51, at 120. However, LEXIS is a significant competitor in the *electronic* publishing market. *Id.*

61. Woxland, *supra* note 51, at 120.

62. *See infra* note 64.



similar words.<sup>63</sup> Those subject-matter topics then lead the researcher to relevant cases.<sup>64</sup>

At the time that the West Publishing Company designed the American Digest System, fewer than one thousand cases per year were decided.<sup>65</sup> This number rapidly multiplied throughout the twentieth century.<sup>66</sup> When publication increased to tens of thousands of decisions per year, the precedent that emerged contained a confusing mass of often contradictory principles.<sup>67</sup> The American Law Institute (ALI) attempted to remedy this inconsistency by creating the *Restatement*.<sup>68</sup> The major purpose of the *Restatement* was to analyze the case law and extract the “best” principles and ignore the rest.<sup>69</sup> The ALI wanted to replace case law with the *Restatement*, thereby making it unnecessary for lawyers to cite to cases.<sup>70</sup> However, instead of adopting the ALI’s scheme, lawyers continued to cite cases as primary sources. Lawyers generally use the *Restatement* only as a secondary source.<sup>71</sup>

### B. History of Computer-Assisted Legal Research

In April 1973, the American system of legal research was transformed

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63. MORRIS L. COHEN & KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL 44-45 (1992).

64. *Id.* The Digests contain hundreds of alphabetically-arranged topics that are subdivided into numbered sections called “key numbers.” *Id.* at 45. Each of these sections contains a collection of synopses that are taken directly from cases and give citations to those cases. *Id.* at 45-49. When the researcher finds a synopsis that looks relevant to the issue being researched, she can then go directly to the case itself in one of the West National Reporters. *Id.*

65. *Legal Research Universe*, *supra* note 51, at 27-28.

66. For example, in 1965, the number of federal circuit cases was 5,771; by 1970, the number had grown to 10,699; and by 1977, it was 17,784 cases. JUDICIAL CONFERENCE OF THE UNITED STATES, *Annual Report of the Director of the Administrative Office of the United States Courts*, in REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 164 (1977) [hereinafter 1977 ANNUAL REPORT] (cited in *Non-Precedential Precedent*, *supra* note 8, at 1167 n.2). In 1980, the circuits disposed of 20,877 cases; by 1990, the number increased to 38,520; and in 1997, the number was 51,194. 1964 ANNUAL REPORT, *supra* note 15, at 221.

When reading these statistics, it is important to recall that beginning in 1974, each federal appellate court began disposing of a portion of its opinions via unpublished opinions. During the year of 1990, for example, the total percentage of unpublished opinions in the federal circuits was 68.4%. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS STATISTICAL TABLE S-3. By the year 2000, this percentage climbed to an alarming 79.5%. *Id.* The fact that nearly 80% of federal appellate cases are going unpublished, and therefore have no precedential power, is strong evidence of how our common law system of precedent is being “artificially” distorted. *See infra* Part III.

67. *Form Molds Substance*, *supra* note 44, at 22.

68. *Id.* at 23.

69. *Id.*

70. *Id.*

71. *Id.* According to Professor Berring, “The history of the Restatement and its evolution into a persuasive secondary authority shows that the comprehensive philosophy of reporting introduced by the West Company had too deeply infected the habits and goals of American legal researchers.” *Id.*

again when LEXIS launched the first-available computer-assisted legal research system.<sup>72</sup> In 1975, Westlaw became LEXIS' first and only commercial competitor when it created its own computer-assisted legal research system.<sup>73</sup> LEXIS and Westlaw provide the full text, in digital format, of every case published in the West Reporters. Furthermore, half of the federal courts of appeals currently authorize LEXIS and Westlaw to provide the full text, in digital format, of their unpublished opinions.<sup>74</sup> These on-line legal databases allow researchers to perform sophisticated word searches using Boolean logic.<sup>75</sup> In effect, these services have freed the researcher from the strict boundaries imposed by the organizational system of the printed Digests.<sup>76</sup>

The development of on-line research databases profoundly transformed the process of legal research.<sup>77</sup> These databases continue to gain popularity, especially among the newest members of the legal community.<sup>78</sup>

### C. History of Unpublished Opinions in the Federal Appellate Courts

Throughout the first half of the Twentieth Century, litigation increased in America and, correspondingly, the number of judicial opinions multiplied at a fast pace.<sup>79</sup> In the 1960s and early 1970s, the federal appellate courts authorized the publication of all judicial opinions, even single-word memorandum decisions.<sup>80</sup> Because the West Publishing Company continued

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72. Shuldberg, *supra* note 11, at 556. See William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 LAW LIBR. J. 543, 552-53 (1985); Scott F. Burson, *Report From the Electronic Trenches: An Update on Computer-Assisted Legal Research*, 4 LEGAL REFERENCE SERVICES Q. 3 (1984).

73. Shuldberg, *supra* note 11, at 556.

74. Hinderks & Leben, *supra* note 2, at 158.

75. *Legal Research Universe*, *supra* note 51, at 30. "Boolean logic allows the researcher to look for specific words or combinations of words in a document, specifying proximity if desired." *Id.*

76. *Id.*

The nature of electronic information is that it is stored in a manner dictated by the machine environment, and can be recalled in as many ways as one designs into the system. This means that one can pull up parts of the database, or the entire thing, in a variety of arrangements limited only by the system's design and the searcher's creativity.

*Id.* at 28.

77. See notes 59-63 and accompanying text.

78. *Legal Research Universe*, *supra* note 51, at 31. For example, Law Librarian Charles Ten Brink of the University of Chicago humorously noted that "librarians urging the law students to use the old paper-based systems for legal research were like people urging folks to eat vegetables at a buffet, while the LEXIS and Westlaw representatives were offering them a table of Big Macs and Twinkies." *Id.*

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

80. Shuldberg, *supra* note 11, at 546 (citing, e.g., Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307,

its practice of universal publication, tens of thousands of cases were added to the books each year.<sup>81</sup> In 1964, the Judicial Conference of the United States<sup>82</sup> responded to the unlimited production of published opinions by recommending that the federal courts of appeals authorize for publication solely the opinions “which were of general precedential value.”<sup>83</sup> This recommendation was too broad, however, to effectively curtail the number of opinions that were published each year.<sup>84</sup>

In 1972, the Judicial Conference of the United States acknowledged the inconsistency and inefficiency with which the various circuit courts had attempted to implement its 1964 recommendation.<sup>85</sup> According to a report from the Board of the Federal Judicial Center,<sup>86</sup> all of the circuits agreed that too many opinions were being published, but they lacked a unanimous approach to limit publication.<sup>87</sup> The Judicial Conference responded to the Federal Judicial Center’s recommendation that the circuit courts change their publication rules by requesting:

[E]ach circuit council to review its publication policy and to implement the following modifications:

- a. Opinions will not be published unless ordered by a majority of the panel rendering the decision;
- b. Non-published opinions should not be cited, either in briefs or in

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308 (1990)).

81. *Form Molds Substance*, *supra* note 44, at 22.

82. The Judicial Conference of the United States is “the governing body of the lower federal courts for administrative purposes.” Arnold, *supra* note 15, at 219. For more information on the Judicial Conference, see *1964 Annual Report*, *supra* note 15, at i, ii (reprinting 28 U.S.C. § 331 (n.d.)), which gives a lengthy description of the Judicial Conference of the United States).

83. Shuldberg, *supra* note 11, at 546 (quoting 1964 ANNUAL REPORT, *supra* note 15, at 11.

84. Kerri L. Klover, Comment, “Order Opinions”—*the Public’s Perception of Injustice*, 21 WM. MITCHELL L. REV. 1225, 1238 (1996). For an in-depth discussion of the formation of the nonpublication rules, see Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals*, MANAGING APPEALS IN FEDERAL COURTS 497, 501-08 (1998), *cited by* Klover, *supra* note 84, at 1238 n.59.

85. Klover, *supra* note 84, at 1238.

86. “The Federal Judicial Center was established in 1967 by the Federal Judicial Center Act, Pub. L. No. 90-219, 81 Stat. 664 (codified at 28 U.S.C. §§ 620-29 (1976)).” *Non-Precedential Precedent*, *supra* note 8, at 1170 n.18. “The Act specifies four functions of the Center: (1) to research and study the operation of the federal court system; (2) to develop improved techniques of judicial administration; (3) to stimulate, create, and conduct programs of continuing education and training for all personnel of the federal judiciary; and (4) to provide staff, research, and planning assistance to the Judicial Conference of the United States. 28 U.S.C. § 620(b) (1976).” *Id.* For more information about the Center, see Tom C. Clark, *The Federal Judicial Center*, ARIZ. ST. L.J. 537 (1974), *cited in Non-Precedential Precedent*, *supra* note 8, at 1170 n.18 (“The author, Justice Tom C. Clark, served as the first Director of the Center.”).

87. Klover, *supra* note 84, at 1238-39 (citing Stienstra, *supra* note 84, at 501).

court opinions;

c. When an opinion is not published the public record shall be completed by publishing the judgment of the Court.<sup>88</sup>

In response to these optional guidelines, each circuit court developed its own unique publication plan by 1974.<sup>89</sup> Essentially, the limited publication and no-citation rules of the circuit courts' publication plans were designed to promote efficiency by preventing the publication of routine, "easy," cases that were decided merely upon factual issues or by the application of previously established legal principles.<sup>90</sup> As one scholar articulated, publication plans limiting the publication of opinions "[are] intended to serve as a sorting device, separating the wheat from the chaff. Opinions that have general precedential value or other public significance are separated from those that do not."<sup>91</sup>

Judges attempt to "separate the wheat from the chaff"<sup>92</sup> by following the guidelines contained in their circuit's publication plan.<sup>93</sup> Each publication plan's guidelines are intended to assist judges in deciding whether to publish or not to publish an opinion.<sup>94</sup> The guidelines vary in detail from circuit to circuit; however, the common theme of all of the guidelines is that when a judge decides, *in the judge's discretion*, that a case is unlikely to have future precedential value, the judge should dispose of that case in an unpublished opinion.<sup>95</sup>

The guidelines have different ways of helping judges decide which cases are likely to have future precedential value. For example, "half of the circuits use an amorphous test, exemplified by the Second Circuit's standard of whether any 'jurisprudential purpose would be served by a written opinion.'"<sup>96</sup> The rest of the circuits "have developed specific criteria, such as whether the opinion establishes a new rule of law, involves an issue of continuing public interest, criticizes existing law, or resolves an apparent conflict of authority."<sup>97</sup>

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88. *Id.* at 1238 (quoting *Non-Precedential Precedent*, *supra* note 8, at 1170).

89. *Id.* at 1239.

90. Shuldberg, *supra* note 11, at 548.

91. *Id.* at 551.

92. *See supra* note 91.

93. Slavitt, *supra* note 6, at 120.

94. *Id.*

95. Shuldberg, *supra* note 11, at 551.

96. Slavitt, *supra* note 6 at 120, 142 n.67 (citing 2D CIR. R. 0.23; 3D CIR. R. APP. I, I.O.P. 5.5.1; 10TH CIR. R. 36.1; 11TH CIR. R. 36-2; FED. CIR. R. 47.6(b)).

97. Slavitt, *supra* note 6 at 120, 142 n.68 (citing 1ST. CIR. R. 36.2(a); 4TH CIR. R. 36(a); 5TH CIR. R. 47.5.1; 6TH CIR. R. 36; 7TH CIR. R. 53(c)(1); 8TH CIR. R. APP. I, at 4; 9TH CIR. R. 36-2; D.C. CIR. R.

By leaving the decision of whether to publish a judicial opinion entirely to the discretion of judges, the publication plans allow judges to decide which cases become “law” and which ones do not. Published opinions become “law” because they are given precedential effect, whereas unpublished opinions are deprived of precedential effect.

The appellate courts have modified their respective publication plans since the plans’ inception.<sup>98</sup> In their current format, the publication plans of the various circuits diverge in two important ways. First, the publication plan may specify whether or not litigants have permission to cite unpublished opinions. Second, the publication plan may specify the level of authority the circuit grants to cited unpublished opinions. As to the first point of divergence, the plans’ permission to cite unpublished opinions fall into one of the following three categories: (1) six circuits absolutely *prohibit* citation to unpublished opinions in unrelated cases;<sup>99</sup> (2) four circuits *disfavor* citation to unpublished opinions in unrelated cases; and (3) two circuits openly *permit* citation to unpublished opinions.<sup>100</sup>

The six federal appellate courts in the first category impose an absolute prohibition on citation to unpublished opinions in unrelated cases. These courts are the United States Courts of Appeals for the District of Columbia, Federal, First, Second, Seventh, and Ninth Circuits.<sup>101</sup>

The four circuits in the second category *permit* citation to unpublished

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14(b)).

98. *See supra* note 12.

99. The term “related cases” is used in this discussion to refer to cases involving “res judicata, estoppel, or law of the case.” *See, e.g.*, 4TH CIR. R. 36(c). The term “unrelated cases” is used in this discussion to refer to cases that do not involve “res judicata, estoppel, or law of the case.” *Id.*

100. Shuldberg, *supra* note 11, at 569. The fact that a circuit allows citation to unpublished opinions does not necessarily mean that the circuit grants precedential authority to that unpublished opinion. The circuit might grant only persuasive authority to its unpublished opinions. For a fuller discussion, see *infra* note 105 and accompanying text.

101. *See* D.C. CIR. R. 28(c) (citation of unpublished opinions permitted only “when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant”); 1ST CIR. R. 36.2(b)(6) (“Unpublished opinions may be cited only in related cases. Only published opinions may be cited otherwise.”); 2D CIR. R. 0.23 (Unpublished opinions “shall not be cited or otherwise used in unrelated cases.”); 7TH CIR. R. 53(b)(2)(iv) (“Except to support a claim of res judicata, collateral estoppel or law of the case, [unpublished opinions] shall not be cited or used as precedent.”); 9TH CIR. R. 36-3 (Unpublished opinions “shall not be regarded as precedent and shall not be cited to or by this Court . . . except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.”).

Court rules contained in each circuit’s publication plan are subject to judicial modification at any time. *See supra* note 12. For this reason, a researcher or practitioner should use the most current version of the rules. 7 FEDERAL LOCAL COURTS RULES: COURTS OF APPEALS RULES (3d ed. 2001) is a loose leaf service updated every two months as needed. Several courts of appeals publish their local rules on the Internet, which may be more current. Links to the circuit courts’ official Internet sites are available at <http://www.uscourts.gov/courts> of appeals.

opinions, but they *disfavor* such citation in unrelated cases and in cases where a published opinion would serve as well. In other words, these circuits strongly prefer that litigants cite to unpublished opinions only in related cases or in cases where no published opinion would serve as well. These four circuits are the United States Courts of Appeals for the Fourth, Sixth, Eighth, and Tenth Circuits.<sup>102</sup>

The only circuit in the third category, the United States Court of Appeals for the Eleventh Circuit, openly *permits* citation to unpublished opinions.<sup>103</sup> The United States Court of Appeals for the Fifth Circuit falls into either the second or the third category, depending on the year in which the unpublished opinion was issued.<sup>104</sup> Finally, the United States Court of Appeals for the Third Circuit lacks a rule that addresses the question whether citation to unpublished opinions is prohibited or permitted.<sup>105</sup>

The second point of divergence among the circuit publication plans is the level of authority each circuit grants to cited unpublished opinions. In circuits that permit citation to unpublished opinions, the court may grant cited unpublished opinions either *persuasive* authority or *precedential* authority. This distinction is extremely important. The grant of only *persuasive* authority means that the court is not bound to follow the holdings contained in its unpublished opinions in future cases with similar facts. Conversely, the grant of *precedential* authority requires the court to follow the holdings of its

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102. See 4TH CIR. R. 36(c) (“Citation of this Court’s unpublished dispositions . . . is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.”); 6TH CIR. R. 28(g) (allowing citation of unpublished decisions only where no published opinion would serve as well, and for res judicata, collateral estoppel, and law of the case); 8TH CIR. R. 28A(i) (“Unpublished opinions are not precedent and parties generally should not cite them . . . [unless relevant to] res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion . . . [or] if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.”); 10TH CIR. R. 36.3(B)(1-2) (“Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if: (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (2) it would assist the court in its disposition.”).

103. 11th Cir. R. 36-2 (“Unpublished opinions . . . may be cited as persuasive authority . . .”).

104. The Fifth Circuit actually has two different rules: one applies to unpublished opinions issued before January 1, 1996, and the other applies to unpublished opinions issued after January 1, 1996. The former rule falls into the second category listed above in note 102, and the latter rule falls into the third category listed above in note 103. See 5TH CIR. R. 47.5.3 (“Unpublished opinions issued before January 1, 1996, . . . should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable . . .”); 5TH CIR. R. 47.5.4 (“Unpublished opinions issued on or after January 1, 1996 . . . may be cited . . .”).

105. A rule in the Third Circuit’s Internal Operating Procedures comes closest to addressing this question. 3D CIR. I.O.P. 5.8 states: “Because the court historically has not regarded unpublished opinions as precedents that bind the court . . . the court by tradition does not cite to its unpublished opinions as authority.” This rule clarifies that the court itself does not cite to its unpublished opinions, but does not mention whether or not litigants may cite to its unpublished opinions.

unpublished opinions in future cases with similar facts.

In the six circuits that prohibit citation to unpublished opinions in unrelated cases, obviously, unpublished opinions are granted neither precedential nor persuasive authority.<sup>106</sup> Of the remaining circuits, the Eighth, Tenth, and Eleventh Circuits grant unpublished opinions only persuasive authority.<sup>107</sup> Two circuits, the Fourth and Sixth, grant unpublished opinions precedential authority, albeit only in related cases or in cases where no published opinion would serve as well.<sup>108</sup> The Fifth Circuit grants unpublished opinions issued after January 1, 1996, persuasive authority only, but it grants unpublished opinions issued after January 1, 1996, precedential authority.<sup>109</sup> The Third Circuit lacks a rule that addresses the question of whether unpublished opinions are granted even persuasive authority.<sup>110</sup>

#### *D. Precedent and Stare Decisis*

Our common law system is founded upon the united doctrines of precedent and stare decisis.<sup>111</sup> The earliest of the American courts implemented the doctrine of precedent.<sup>112</sup> Chief Justice John Marshall, one of the founding fathers of our current legal system, explained that “[i]nherent in every judicial decision is a declaration and interpretation of a general principal or rule of law.”<sup>113</sup> Throughout the centuries following the Marshall Court, the United States Supreme Court has continued to honor the notion that such “declarations and interpretations” of the law “must be applied in subsequent cases to similarly situated parties.”<sup>114</sup>

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106. See *supra* note 101 and accompanying text.

107. See 8TH CIR. R. 28A(i); 10TH CIR. R. 36.3; 11TH CIR. R. 36-2.

108. The rules of these two circuits disfavor citation to unpublished opinions. However, each court permits their citation “[i]f a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well.” 6TH CIR. R. 28(g). See also 4TH CIR. R. 36(c).

109. See 5TH CIR. R. 47.5.3 to 4 (“Unpublished opinions issued before January 1, 1996, are precedent . . . . Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel, or law of the case.”).

110. See *supra* note 105. 3D CIR. I.O.P. 5.8 states that the court does not grant precedential authority to unpublished opinions, but does not clarify whether or not it grants persuasive authority to such opinions.

111. See 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, 766-85 (1995).

112. See *supra* note 17 and accompanying text.

113. *Marbury v. Madison*, 5 U.S. 137 (1803), quoted in *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir.), vacated as moot on other grounds en banc, 235 F.3d 1054 (8th Cir. 2000).

114. 223 F.3d at 900 (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991); *Cohens v. Virginia*, 6 Wheat, 264, 399 (1821)).

The doctrine of “stare decisis”<sup>115</sup> is linked to the doctrine of precedent. Whereas “[t]he general theory of precedent encouraged citing precedents *en masse* to illustrate for the court the nature of the law on the question involved,”<sup>116</sup> the doctrine of stare decisis “reaches its apogee when a single precedent is considered to be a ‘binding’ authority.”<sup>117</sup> Thus, the doctrine of stare decisis is “utterly dependent” upon published opinions.<sup>118</sup> Because a reliable and comprehensive system of publishing judicial opinions was not instituted in the United States until the late nineteenth century,<sup>119</sup> stare decisis is a relatively new doctrine.<sup>120</sup>

Together, the doctrine of precedent and the doctrine of stare decisis promote what one law professor describes as the “core values that lend legitimacy to the judicial process.”<sup>121</sup> According to Professor Dragich, these “core values” are stability, certainty, predictability, consistency, and fidelity to authority.<sup>122</sup>

### III. ANALYSIS

The various publication plans of the Federal Appellate Courts that deprive unpublished opinions of precedential authority are inherently flawed. The plans violate the doctrines of precedent and stare decisis<sup>123</sup> and artificially distort our common law system.<sup>124</sup>

As discussed in Part II.D of this Note, the doctrines of precedent and stare

115. *Black’s Law Dictionary* defines “stare decisis” as follows: “[Latin ‘to stand by things decided’] The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” BLACK’S LAW DICTIONARY 1414 (7th ed. 1999).

In other words,

[w]hen a point or principle of law has been . . . settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open . . . to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.

WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 321 (3d ed. 1914), quoted in BLACK’S LAW DICTIONARY 1414 (7th ed. 1999).

116. Dragich, *supra* note 111, at 773.

117. Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800-1850*, 3 AM. J. LEGAL HIST. 28, 29 (1959), quoted in Dragich, *supra* note 111, at 773.

118. Dragich, *supra* note 111, at 773.

119. See *supra* Part II.A.

120. Dragich, *supra* note 111, at 773.

121. *Id.* at 777.

122. *Id.* For an in-depth analysis of each of these enumerated “core values,” see Dragich, *supra* note 111, at 777-81.

123. See *supra* Part II.D.

124. Slavitt, *supra* note 6, at 125.



decisis depend entirely on published opinions.<sup>125</sup> The doctrine of precedent involves citing to as many helpful cases as a litigant can find.<sup>126</sup> The doctrine of stare decisis involves using a single precedent as “binding” authority.<sup>127</sup> When a litigant finds a case that is directly on point, the rules of precedent and stare decisis normally require the court to grant “binding” authority to that case.<sup>128</sup> However, if the case is contained in an unpublished opinion, the court’s publication plan allows the court to ignore both doctrines.<sup>129</sup> Rather than grant “binding” authority to the case, the court need not grant *any* authority to the case.<sup>130</sup>

The fundamental policies underlying the doctrines of precedent and stare decisis apply to unpublished opinions just as they do to published opinions.<sup>131</sup> According to Chief Judge William J. Holloway, Jr. of the Tenth Circuit, for example, “[t]he most important reasons for permitting citation of published precedents are just as cogent to me in the case of unpublished rulings.”<sup>132</sup> He reasoned that “[e]ach ruling, published or unpublished, involves the facts of a particular case and the application of law to the case. Therefore, all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation.”<sup>133</sup>

Judge Richard S. Arnold of the Eighth Circuit similarly proclaims that the policies underlying the doctrines of precedent and stare decisis are equally applicable to unpublished and to published opinions.<sup>134</sup> Judge Arnold asserts that under a proper application of the doctrine of precedent, “judges must respect what they have done in the past, whether or not it is printed in a book.”<sup>135</sup> The publication plans that deprive unpublished opinions of

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125. See *supra* note 118 and accompanying text.

126. See *supra* note 116 and accompanying text.

127. See *supra* note 117 and accompanying text.

128. See *supra* note 115 and accompanying text.

129. See *supra* Part II.C.

130. As one scholar noted, “[with nonpublication] [s]tare decisis is twice diminished. First, the decision itself is freed from the responsibility to reason within full view. Second, an increment of precedent is rendered unusable.” THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEAL* 130 (1994), *quoted in* Shuldberg, *supra* note 11, at 555.

131. See *supra* text accompanying note 122.

132. *Re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted November 18, 1986, 955 F.2d 36, 37 (10th Cir. 1992) (Holloway, C.J., concurring and dissenting).

133. *Id.*

134. See Arnold, *supra* note 15, at 225. Like Chief Judge Holloway, Judge Arnold believes that every judicial decision, whether published or unpublished, should be given precedential effect. *Id.*

135. *Id.* Judge Arnold stated that the Eighth Circuit’s publication plan “says, quite plainly, that [the doctrine of precedent] applies only when the court wants it to apply.” *Id.* at 221. Furthermore, “if we decided a case directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged. We are perfectly free to depart from past opinions if they are unpublished, and whether to publish them is entirely our own choice.” *Id.*

precedential authority thus violate the doctrines of precedent and stare decisis, which apply equally to unpublished and published opinions.

Not only do such publication plans violate the doctrines of precedent and stare decisis, but they also artificially distort our common law system.<sup>136</sup> By leaving the decision of whether to publish a judicial opinion entirely to the discretion of judges, the publication plans allow judges to decide which cases become “law” and which do not.<sup>137</sup> Published opinions become “law” because courts grant them future precedential authority.<sup>138</sup> In contrast, unpublished opinions do not become “law” because they are deprived of future precedential authority.<sup>139</sup>

As a result of this process, the body of American common law no longer flows naturally as each new judicial opinion is added to the river of precedent.<sup>140</sup> Instead, publication plans allow judges to decide which opinions join the river and which ones do not.<sup>141</sup> When judges exercise their discretion and withhold thousands of judicial opinions from publication, they actually distort our common law system.<sup>142</sup>

Judges decide which opinions become “law” based solely on their guesses as to whether a particular opinion is likely to have future “precedential value.”<sup>143</sup> In other words, the publication plans are “intended to serve as a sorting device, separating the wheat from the chaff.”<sup>144</sup> However, “separating the wheat from the chaff” is not as easy as it sounds. Judges cannot always accurately predict which decisions have future importance.<sup>145</sup>

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136. Slavitt, *supra* note 6, at 125.

137. *See supra* Part II.C.

138. *See supra* Part II.C.

139. *See supra* Part II.C.

140. *See supra* Part II.D.

141. *See supra* Part II.C.

142. Slavitt drew an analogy between the judges and a sculptor: “Our system of precedent has become subtractive as well as additive. Like a sculpture, it is shaped as much by what is removed as by what is added.” Slavitt, *supra* note 6, at 109.

143. Shuldberg, *supra* note 11, at 551.

144. *Id.* *See also* text accompanying note 91.

145. According to Chief Judge Holloway of the Tenth Circuit, for example:

[W]hen we make our *ad hoc* determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe. Future developments may well reveal that the ruling is significant indeed. . . . The classifications are too fine in many instances and we cannot confidently say, in deciding whether to publish, that we are not working an injustice on parties in later cases.

*Re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted November 18, 1986, 955 F.2d 36, 38 (10th Cir. 1992) (Holloway, C.J., concurring and dissenting).

Similarly, United States Supreme Court Justice Stevens stated that this process “rests on a false premise” because it “assumes that an author [of a judicial opinion] is a reliable judge of the quality and importance of his own work product . . . . Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.” Remarks of Justice Stevens, Illinois

Thus, they might make an incorrect guess by deciding not to publish an opinion that subsequently turns out to be quite important.<sup>146</sup> In fact, scholars and judges alike have observed that a disturbingly large number of important cases are unpublished, and therefore nonprecedential, opinions.<sup>147</sup> Authors Reynolds and Richman poignantly refer to unpublished opinions that arguably should have been published as cases of “suppressed precedent.”<sup>148</sup>

One example of “suppressed precedent” is the unpublished opinion *Johnson v. Knable*.<sup>149</sup> In *Johnson*, a prison inmate applied for a job in the prison’s education department and was turned down.<sup>150</sup> The prisoner filed suit against the prison, alleging that he was denied the position because he was gay and that this was a violation of the Equal Protection Clause.<sup>151</sup> The Fourth Circuit held that the prison officials might, in fact, have violated the prisoner’s equal protection rights if they discriminated against the prisoner on

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State Bar Association’s Centennial Dinner, Springfield, Illinois (Jan. 22, 1977), *quoted in Non-Precedential Precedent*, *supra* note 8, at 1192.

Professor Dragich likewise states, “Often, the determination whether or not a particular opinion is law-making cannot be made until years later, when further developments in the law demonstrate what the authoring judge could not forecast.” Dragich, *supra* note 111, at 784.

As another scholar aptly noted, “experience shows that there are gems among the unpublished decisions.” Braun, *supra* note 8, at 94.

146. *See infra* note 147.

147. According to one commentator, “Numerous studies have demonstrated that a significant number of these unpublished decisions involve cases that are non-routine, law-making, or politically significant.” Shuldberg, *supra* note 11, at 568. Among the sources Shuldberg cites are: Pamela Foa, *A Snake in the Path of Law: The Seventh Circuit’s Non-Publication Rule*, 39 U. PITT. L. REV. 309, 315-38 (1977) (“evaluating all unpublished orders issued by the Seventh Circuit over a six month period and concluding that ‘cases are being decided which (if given precedential effect would) create new law’”); James N. Gardner, *Ninth Circuit’s Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224, 1226 (1975) (“noting Ninth Circuit unpublished cases that, ‘if published, would set precedent’”); 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, 584-86, 606-11 (1981) (“noting that the results of a sample of the published and unpublished opinions of the federal courts of appeals during the 1978-78 Reporting Year revealed a number of instances of cases that ought to have been published but were not, including cases which resolved novel issues of state and federal law, as well as ‘decisions suggesting that statutes, agencies, or the courts themselves are not performing up to par’”); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 946 n.33 (1989) (citing an unpublished report to the United States Court of Appeals for the Ninth Circuit that “stud[ied] all Ninth Circuit opinions issued during a one year period, classifying the unpublished opinions by subject matter, and analyzing their information value”); Donald R. Songer, *Criteria For Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 313 (1990) (“noting that a ‘significant number of the unpublished decisions of the courts of appeals appear to involve cases which are non-routine [and] sometimes politically significant’”). Shuldberg, *supra* note 11, at 555.

148. Reynolds & Richman, *supra* note 147, at 606.

149. No. 88-7729, 1988 WL 119136 (4th Cir. 1988).

150. 1988 WL 119136, at \*\*1.

151. *Id.*

the basis of his sexual orientation.<sup>152</sup>

*Johnson* would have attracted a lot of attention had it been published because it “arguably would have made homosexuality subject to strict scrutiny review under the Equal Protection Clause.”<sup>153</sup> Whether homosexuality should be considered a “suspect classification that triggers increased judicial scrutiny under the Equal Protection Clause is hotly debated.”<sup>154</sup> The issue was one of first impression in the Fourth Circuit; nevertheless, that circuit chose to issue its decision in an unpublished opinion.<sup>155</sup>

Although the Fourth Circuit disfavors citation to unpublished opinions, it permits a litigant to cite an unpublished opinion if the lawyer believes that the unpublished opinion “has precedential value . . . and there is no published opinion that would serve as well.”<sup>156</sup> Thus, in *Johnson* the Fourth Circuit created a new legal rule with potential precedential authority, but then “hid it from public scrutiny.”<sup>157</sup> Moreover, by issuing an unpublished opinion, the Fourth Circuit effectively “shielded its decision from Supreme Court review”<sup>158</sup> because the Supreme Court is far less likely to grant certiorari to an appeal from an unpublished opinion than it is to an appeal from a published opinion.<sup>159</sup>

One scholar asserts that the strategy used by the Fourth Circuit “accentuates the judiciary’s power to act without the restraint contemplated by our governmental structure. Although a counter-majoritarian judiciary exercises a valuable constitutional ‘check’ over the political branches, its decisions should at least be subject to public scrutiny and review by a higher court.”<sup>160</sup> According to that scholar, the Fourth Circuit’s disposition of *Johnson* as an unpublished opinion “illustrates how nonpublication may be used to hide controversial decisions.”<sup>161</sup>

The decision not to publish an opinion that otherwise would have

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152. *Id.* “If *Johnson* was denied a prison work assignment simply because of his sexual orientation, his equal protection rights may have been violated.” *Id.*

153. Slavitt, *supra* note 6, at 128.

154. *Id.*

155. *Id.*

156. 4TH CIR. R. 36(c). *See supra* note 108 and accompanying text.

157. Slavitt, *supra* note 6, at 128. Unpublished opinions often go unnoticed because the public assumes that had those cases contained important principles, the opinions would have been published. *See supra* text accompanying note 144.

158. Slavitt, *supra* note 6, at 128.

159. *Id.* “The Court already grants less than ten percent of all certiorari requests.” *Id.* at 127.

160. *Id.* at 129.

161. *Id.* at 128. A number of scholars and at least one judge fear that publication plans create the potential for judges to use unpublished opinions as a convenient means of “sweeping under the rug” certain controversial decisions. *See supra* notes 23-24 and accompanying text.

significant value to future litigants artificially distorts our common law system.<sup>162</sup> Distortion occurs whether the judge inadvertently predicts that the case has no future precedential value<sup>163</sup> or intentionally sweeps a controversial issue under the rug.<sup>164</sup> Either way, publication plans that deprive unpublished opinions of precedential authority create substantial disadvantages for future litigants. Every litigant who finds an unpublished opinion on-point cannot ask the court to honor the doctrines of precedent and stare decisis that would otherwise compel the court to follow the decision.<sup>165</sup>

Fortunately, the incredible technological advances that have occurred during the past few decades offer a source of relief for the problems created by the publication plans of the federal circuit courts.<sup>166</sup> As discussed in Part II.C of this Note, the federal courts previously authorized the publication of *all* judicial opinions.<sup>167</sup> When litigation increased such that tens of thousands of cases were added to the books every year, however, the Judicial Conference found it no longer practical to store such massive amounts of printed material.<sup>168</sup> The Conference subsequently recommended that the circuit courts drastically reduce the number of opinions authorized for publication.<sup>169</sup> Significantly, the Conference made this recommendation *prior* to the advent of computer-assisted legal research.<sup>170</sup> Today, on-line legal databases save enormous amounts of physical storage space.<sup>171</sup> As a result, publication plans that artificially distort our common law system are no longer necessary.<sup>172</sup>

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162. *See supra* text accompanying notes 136-48.

163. *See supra* text accompanying notes 136-48.

164. *See supra* note 148 and accompanying text.

165. *See supra* text accompanying notes 125-35.

166. *See supra* Part II.C.

167. *See supra* Part II.C.

168. *See supra* Part II.C.

169. *See supra* Part II.C.

170. *See supra* Part II.B.

171. *See supra* Part II.B.

172. In 1990, the Federal Courts Study Committee declined to recommend universal publication of judicial opinions at that time but stated that “inexpensive database access and computerized search technologies may justify revisiting the issue, because these developments may now or soon will provide wide and inexpensive access to all opinions.” JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE APRIL 2, 1990 130-31 (1990), *cited in* Frank M. Coffin, *Research for Efficiency and Quality: Review of Managing Appeals in Federal Courts*, 138 U. PA. L. REV. 1857, 1864 (1990). Technological advances do, indeed, “justify revisiting the issue” now because we no longer must be constrained by limitations on the amount of available physical storage space.

## IV. PROPOSAL

This Note proposes that the United States Supreme Court use the Rules Enabling Act<sup>173</sup> to create a uniform rule regarding the precedential authority of unpublished opinions in the federal appellate courts.<sup>174</sup> This uniform rule should grant precedential authority to *all* opinions, whether published or unpublished. To facilitate public access to unpublished judicial opinions, this Note proposes that the federal government fund a single Web site designed solely for the electronic dissemination of federal court opinions.<sup>175</sup>

This Note proposes that, instead of calling these electronically disseminated opinions “unpublished opinions,” they be named “digital opinions.”<sup>176</sup> Appellate judges and publishing companies would still decide which judicial opinions to publish in books; the remaining opinions would be disseminated to the public as digital opinions.<sup>177</sup> This proposal would grant precedential authority to all judicial opinions, whether published or digital. All opinions, both published and digital, are, at their core, “a declaration and interpretation of a general principle or rule of law.”<sup>178</sup> This proposal asserts that the only meaningful difference between the two is the medium by which

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173. 28 U.S.C. § 2072 (1970). *See supra* note 26 and accompanying text.

174. A uniform rule would provide clarification and unity among the circuit courts of appeals. Dunn, *supra* note 12, at 146. A uniform rule would also limit “circuit shopping.” *Id.* at 147.

A uniform rule was not enacted when the publication plans initially were implemented because the Judicial Conference wanted the courts to experiment with a variety of different plans. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (1974), *quoted in* Shuldberg, *supra* note 11, at 546-47. The Judicial Conference stated that the resulting variety of plans was analogous to “11 legal laboratories accumulating experience and amending their publication plans on the basis of that experience.” *Id.*

Only a few years after the publication plans initially were enacted, scholars began calling for the enactment of a uniform plan. *See, e.g.,* Dunn, *supra* note 12, at 146-47. In 1977, for example, one scholar noted that “[a]lthough courts have recognized the value of experimentation, in this instance long-term experimentation is not warranted. The various circuits have had between *three and seven* years’ experience in developing standards and procedures related to unreported decisions.” *Id.* (emphasis added).

Today, more than twenty-three years after the implementation of each circuit’s amended publication plan, the federal circuit courts still lack a cohesive approach to publishing their judicial opinions. *See supra* note 12 and accompanying text. The time is ripe for the Supreme Court to enact a uniform plan.

175. *See supra* note 40.

176. This change in terminology is proposed because the term “unpublished opinion” has become synonymous with “unimportant” or “junk” opinion. According to authors Reynolds and Richman, for example, “unpublished dispositions are also dreadful in quality . . . . It is no wonder, therefore, that former Chief Judge Markey of the Federal Circuit once told his Circuit Conference that unpublished decisions were ‘junk’ opinions.” *Requiem, supra* note 8, at 284. *See supra* note 8.

177. Legal researchers without Internet access can seek the assistance of law librarians and public libraries. *See infra* text accompanying note 181.

178. *Marbury v. Madison*, 5 U.S. 137 (1803), *quoted in* *Anastasoff v. United States*, 223 F.3d 898, 899-900 (8th Cir.), *vacated as moot on other grounds en banc*, 235 F.3d 1054 (8th Cir. 2000).

they are disseminated to the public.

The design of the universal Web site that would disseminate digital opinions should include a powerful search engine to facilitate legal researchers' accessibility to relevant cases.<sup>179</sup> Because this Web site would not attempt to make a profit, the cost of accessing it would be substantially less than commercial providers.<sup>180</sup> Even those who cannot afford expensive Internet products or who do not own computers would be able to access this Web site from computers in public libraries.<sup>181</sup>

Finally, this proposal will not increase the burden on judges. Judges will continue to write the same number of opinions irrespective of their publication status. The implementation of this proposal would simply honor the doctrines of precedent and stare decisis by granting precedential authority to *all* judicial opinions.<sup>182</sup>

## V. CONCLUSION

In conclusion, the publication plans that deprive unpublished opinions of precedential authority are inherently flawed because they violate the doctrines of precedent and stare decisis, and they artificially distort our common law system.<sup>183</sup> Courts implemented these publication plans in response to increased concern that law libraries would not have enough space

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179. A search engine similar to the ones used by the most comprehensive commercial databases would allow researchers to perform sophisticated word searches using Boolean logic. *See supra* note 42 and accompanying text.

180. Of course, this Web site would merely provide the judicial opinions from the federal courts and, therefore, commercial databases would still be able to profit from the other sophisticated commercial on-line services that they offer.

181. *See supra* note 177.

182. The reader need not automatically assume that granting precedential effect to every judicial opinion will create massive confusion for judges. According to one scholar, "[a] string of decisions might ultimately reach the same result, thus solidifying, rather than weakening the understanding of that topic of law." Shuldberg, *supra* note 11, at 561. In fact, this scholar quotes the following statement made by Judge Posner: "Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals are difficult to decide, not because there are too many precedents but because there are too few on point." *Id.*, quoting RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 123 (1985).

Similarly, Professor Peter A. Joy explained,

The larger the number of precedents, however, the more predictable the outcome in a particular case is likely to be, and the less likely, therefore, that it will go to trial or be appealed. Conversely, increasing the number of unpublished opinions will stunt the law's development and ultimately lead to more, rather than less, litigation. Without the reliance on prior decisions to create precedent, litigants and courts must continue to revisit issues. This leads to a wasting of court resources, unnecessary legal fees and a confusion of conflicting results.

Joy, *supra* note 2, at A19-20.

183. *See supra* Part III.

to store the thousands of opinions added to books each year.<sup>184</sup> Courts enacted these plans *prior* to the advent of computer-assisted legal research.<sup>185</sup> Today, we have the technological capability to store massive amounts of information digitally.<sup>186</sup> Thus, the major reason for the original enactment of the publication plans no longer justifies their use.<sup>187</sup> The time has come for the United States Supreme Court to enact a uniform rule granting precedential authority to all federal judicial opinions.<sup>188</sup>

As one commentator aptly remarked, “[I]f we succeed in using every resource, including technology, to continue the delivery of justice and the preservation of liberty in a free society, [Judge Learned] Hand may one day say to us, ‘well done.’”<sup>189</sup>

*Suzanne O. Snowden* \*

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184. *See supra* Part II.B.

185. *See supra* Part II.B.

186. *See supra* Part II.B.

187. *See supra* Part III.

188. *See supra* Part IV.

189. HOWARD T. MARKEY, *THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY* 198 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

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