Richard Frankel
<RFrankel@TLPJ.ORG
>
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To: '"Rules_Comments@ao.uscourts.gov"'
<Rules_Comments@ao.uscourts.gov>
cc:
Subject: Comments on Proposed Federal Rule of Appellate Procedure 32.1

03-AP-406

Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle, NE
Washington, D.C. 20544

Dear Mr. McCabe,

Attached please find a copy of the comments submitted on behalf of Trial Lawyers for Public Justice ("TLPJ") and the TLPJ Foundation on proposed Federal Rule of Appellate Procedure 32.1. We thank the Committee for consideration of these comments.

Sincerely,

Richard Frankel, Esq.
Trial Lawyers for Public Justice
1717 Massachusetts Ave, N.W.
Suite 800
Washington, D.C. 20036
tel: (202) 797-8600
fax: (202) 232-7203
email: rfrankel@tlpj.org
web: www.tlpj.org

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COMMENTS OF

TRIAL LAWYERS FOR PUBLIC JUSTICE

AND

THE TLPJ FOUNDATION

ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO FEDERAL RULE OF APPELLATE PROCEDURE 32.1

Arthur H. Bryant, Esq.
Executive Director
Trial Lawyers for Public Justice
The TLPJ Foundation
One Kaiser Plaza
Suite 275
Oakland, CA 94612
(510) 622-8150
abryant@tlpj.org
web: www.tlpj.org

Richard Frankel, Esq.
Leslie A. Brueckner, Esq.
Trial Lawyers for Public Justice
The TLPJ Foundation
1717 Massachusetts Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 797-8600
rfrankel@tlpj.org
web: www.tlpj.org

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INTRODUCTION

We submit these comments on behalf of Trial Lawyers for Public Justice ("TLPJ") and the TLPJ Foundation. TLPJ is a national public interest law firm that specializes in precedent-setting and socially significant tort and trial litigation and is dedicated to pursuing justice for the victims of corporate and government abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

The TLPJ Foundation is a non-profit charitable and educational membership organization that supports TLPJ's activities and educates the public, lawyers, and judges about the critical social issues in which TLPJ is involved. It currently has more than 3,000 members, primarily plaintiffs' trial lawyers and law firms, who participate in formulating the organization's policies and work as cooperating counsel on TLPJ's cases. The TLPJ Foundation's members regularly represent plaintiffs in a broad range of personal injury, commercial, civil rights, tort, and other cases in the federal courts (for purposes of brevity, both TLPJ and the TLPJ Foundation will be referred to as TLPJ).

TLPJ supports the adoption of proposed Fed. R. App. P. 32.1 and commends the Committee on Rules of Practice and Procedure for proposing it. The rule, in its proposed form, will prohibit federal Circuit Courts from barring the citation of unpublished opinions in court pleadings. We applaud the Committee for proposing this change, which will go a long way toward restoring the twin pillars of openness and fairness that undergird the judicial decision-

making process. TLPJ also believes, however, that a much stronger rule is necessary – one that forbids the issuance of non-precedential decisions altogether and requires all appellate decisions to be treated equally. By continuing to allow courts to issue non-precedential, "unpublished" decisions that may be cited only for their persuasive value, the proposed rule has four significant drawbacks. The proposed rule (1) increases the risk of arbitrary decision-making, (2) undermines the legitimacy of the judicial system, (3) impedes and distorts the growth of the law, and (4) wastes judicial and legal resources. Because of these problems, TLPJ believes that, at the federal appellate level, there should be no such thing as a non-precedential or "unpublished" decision. Instead of the proposed rule, TLPJ advocates a rule requiring that every appellate decision be treated as published and given binding precedential effect.[1]

I. TLPJ SUPPORTS PROPOSED RULE 32.1 AS A SIGNIFICANT IMPROVEMENT.

TLPJ believes that proposed Fed. R. App. P. 32.1 is a significant step in the right direction. Explaining its rationale for proposing the rule, the Committee amply demonstrates that the current collection of different non-publication/non-citation rules of the federal Circuit Courts places significant hardships on judges, lawyers, and litigants alike. We agree with the Committee's description of the drawbacks of the current system, which include: (1) sowing confusion in the minds of practitioners due to the lack of uniform Circuit publication rules; (2)

[1] The published/unpublished distinction is a bit of a misnomer. Although many Circuit Courts label certain decisions "unpublished," those decisions are often available through electronic databases, the courts' own websites, or print media. Many Circuits use the term "unpublished" to refer to decisions that are issued without precedential effect. That is how TLPJ will refer to "unpublished" opinions in these comments.

prohibiting practitioners from supporting their clients' positions with language used in previous judicial decisions; and (3) hampering important decisions from coming to public light, as evidenced by the fact that issues addressed in unpublished decisions are not infrequently considered significant enough to warrant review by the Supreme Court. We also agree with the Committee that opponents of the proposed rule overstate the supposed threat to judicial economy and reasoned decision-making posed by a new rule. *See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure,* at 36-37 [hereinafter *Preliminary Draft*].

In addition to the rationale stated by the Committee, we believe that several other reasons exist to eliminate non-citation rules. These include: (1) the inefficacy of the current rules as evidenced by the fact that lawyers, district court judges, and appellate judges regularly read and rely on unpublished decisions despite prohibitions on doing so; (2) the fact that the original justifications for the current rules – combating unfairness to litigants and reducing burdens on law libraries from the proliferation of judicial opinions – are no longer persuasive in light of the fact that most unpublished decisions are printed in West's Federal Appendix and are widely available on the internet; and (3) the realization that unpublished decisions are useful to future decision-makers because they fill gaps in existing precedent and may provide the most on-point reasoning on issues before the court. *See, e.g., Anastasoff v. United States*, 223 F.3d 898 (8th Cir.) (finding that an unpublished Eighth Circuit decision was the only directly controlling case on-point), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000). For these reasons, we commend the Committee for drafting and proposing Fed. R. App. P. 32.1, and, subject to the comments set forth below, we urge its adoption.

II. ALLOWING JUDGES TO CONTINUE TO DESIGNATE DECISIONS AS NON-PRECEDENTIAL INCREASES THE RISK OF ARBITRARY DECISION-MAKING, UNDERMINES THE LEGITIMACY OF THE JUDICIAL SYSTEM, IMPEDES THE DEVELOPMENT OF THE LAW, AND WASTES JUDICIAL AND LEGAL RESOURCES.

While TLPJ applauds the efforts of the Committee to authorize the citation of unpublished appellate decisions, we believe that the rule in its proposed form does not adequately address the most serious problems emanating from unpublished decisions. As the Committee notes, proposed Rule 32.1 is "extremely limited" and takes no position as to whether a Circuit Court should, or must, give binding precedential effect to every decision it issues. *See Preliminary Draft, supra*, at 33. We believe that the rule should not be so limited. By allowing the continued use of unpublished opinions, the proposed rule, as well as the current system: (1) increases the risk of arbitrary decision making, (2) undermines the legitimacy of the judicial system, (3) impedes and distorts the development of the law, and (4) wastes judicial and legal resources. We believe that a broader rule, one requiring that the same set of precedential rules apply to all decisions, will best serve the interests of the judicial system.

TLPJ recognizes that appellate judges can face immense time pressures due to their ever-expanding case loads, and that many judges believe that unpublished decisions are necessary because they simply cannot devote the resources or energy required to turn every disposition into a precedential opinion. We agree that these circumstances are unfortunate. Despite these circumstances, however, TLPJ believes that, notwithstanding such time pressures, the two-tiered system of justice resulting from the issuance of unpublished decisions causes much more harm than good.

A. Non-Precedential Decisions Encourage Arbitrary Decision-Making.

TLPJ believes that allowing appellate courts to issue non-precedential dispositions promotes arbitrary, rather than rule-based, decision-making. One of the bedrock principles of the American judicial process is that of stare decisis – the notion that courts will follow prior decisions of the same or higher courts unless sound reasons exist for departure. This principle, by restricting a future judge's ability to disregard the decisions of past courts, ensures that a judge's decision will be based on sound principle rather than personal opinion. A system of binding precedent also creates an impetus for judges (1) to state reasons and principles for distinguishing current decisions from past ones, and (2) to push to get the defects in past opinions corrected. *See, e.g.*, *Anastasoff*, 223 F.3d at 901 ("If judges [could] 'depart from' established legal principles, 'the subject would be in the hands of arbitrary judges whose decisions would be then regulated only by their own opinions.'" (quoting 1 BLACKSTONE, COMMENTARIES at 258-59)). The Framers of the Constitution recognized that binding precedent acts as a necessary check on the scope of the power of the judiciary by preventing judges from exceeding the bounds of decisional law that they themselves establish. *See, e.g.*, *The Federalist* No. 78 (Alexander Hamilton).

If federal appellate decisions are not given the effect of binding precedent, however, then there is nothing to prevent different panels within a Circuit from reaching opposite outcomes in identical cases. If the panel in case A decides not to publish its decision, then the panel in identical case B is not constrained to follow the reasoning in case A. This form of arbitrary decision-making undermines the rule of law by eliminating any guarantee that similarly situated individuals will receive similar treatment.

This risk of reaching arbitrary results is more than merely theoretical. Despite assurances that intra-circuit comity will ensure the consistency of appellate decision-making, examples abound in which one appellate panel disregarded the decision of a previous panel of that same Circuit merely because the prior decision was not published. *See, e.g., Leimer v. Aetna Life Ins. Co.*, 724 F.2d 744, 745-46 (8th Cir. 1984) (noting that its decision created an inconsistency with a previous unpublished Eighth Circuit decision); *United States v. Goldberg*, 67 F.3d 1092, 1102 (3d Cir. 1995) (disregarding a previous Third Circuit decision on the ground that it was unpublished); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (noting that two inconsistent Fifth Circuit decisions were issued against the same defendant); *Kaufman v. Carter*, 952 F. Supp. 520, 529 (W.D. Mich. 1996) (noting intra-circuit split between two unpublished Sixth Circuit decisions). Indeed, in one recent case, the Ninth Circuit, in stating its reason for publishing its decision, observed that the Circuit, over a two-year span, had addressed the same legal issue in twenty different unpublished decisions reaching three different results. *See United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000). Thus, although some defenders of non-publication rules contend that non-publication does not result in inconsistent decisions, the facts prove otherwise.

Finally, allowing courts to issue non-precedential decisions violates basic tenets of fundamental fairness. Every time a litigant walks through the courthouse doors, that person should trust the judicial system to subject his or her case to the same guiding legal principles as the case in the courtroom next door. If appellate courts remain free to issue non-precedential decisions, however, no litigant can have full confidence in the fairness of the system. Without such confidence, the public's faith in the judicial system to act according to principle will be

eroded.[2]

B. Allowing Non-Precedential Decisions Undermines Judicial Legitimacy.

Because the opportunity to issue non-precedential decisions encourages arbitrary decision-making, rules allowing such decisions create the possibility and the perception that courts will take advantage of these rules in order to issue results-oriented decisions that do not follow from broadly applicable legal principles. The public's perception that results-oriented decision-making occurs undermines the integrity of the judicial system in a way that cannot be rectified absent the elimination of non-precedential decisions entirely.

1. Unpublished Decisions Do Not Always Involve Routine Matters Dictated By Past Precedent.

The response offered by proponents of non-publication rules to the risks posed to the legitimacy of the judicial system is that unpublished decisions are issued only in situations where those decisions make no new law because their outcomes are dictated by existing precedent. *See, e.g. Comments on Proposed Rule 32.1 to the Committee on Rules of Practice and Procedure of Judge Robert K. Puglia* (Jan. 20, 2004).[3] In truth, however, many unpublished decisions turn on

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[2] Several judges, both state and federal, have complained that allowing the issuance of unpublished decisions violates principles of fundamental fairness. *See, e.g., Anastasoff*, 223 F.3d at 901 n.7 (Arnold, J.) (noting that one basis for the authority of precedent comes from "fundamental fairness; i.e., that like cases should be treated alike."); *In re Rules of the United States Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 37 (10th Cir. 1992) (Holloway, J.); *In re Amendment of Section (Rule) 809.23(3), Stats*, 456 N.W.2d 783, 788 (Wis. 1990) (Abrahamson, J., dissenting) ("[A]ny litigant who can point to a prior ruling of the court and can demonstrate that he or she is entitled to prevail under it should be able to do so as a matter of justice and fundamental fairness."); *cf. Nat'l Classification Comm. v. United States*, 765 F.2d 164, 172-75 (D.C. Cir. 1985) (Wald, J.) (chastising a previous panel for not publishing a decision containing a novel interpretation of a federal statute).

[3] Hereinafter the term "*Comments*" will be used to refer to comments submitted to this Committee on proposed Rule 32.1.

legal issues that are anything but routine. First, the fact that lawyers, district court judges, appellate judges and legal commentators routinely read unpublished appellate decisions indicates that these decisions do contribute something to the legal canon. *See Lauren Robel, The Practice of Precedent:* Anastasoff, *Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 405-09 (2002) (discussing the results of a study revealing that many lawyers and judges regularly read unpublished appellate decisions). Second, the fact that both litigants and judges cite and rely upon unpublished appellate decisions, as well as the fact that unpublished decisions often make new law, also shows that the notion that unpublished decisions are insignificant is a legal fiction. *See id.* at 406-07 (finding that, according to one study, appellate courts cited unpublished dispositions 4,460 times, that district courts cited them 3,161 times, and that district courts relied on them for legal support 1,967 times); *In re Rules of the United States Court of Appeals for the Tenth Circuit*, 955 F.3d 36, 38 (10th Cir. 1992) (hereinafter *In re Tenth Circuit*) (noting that if unpublished decisions always involved routine matters, "considerations of efficiency and economy would lead counsel to rely on published decisions, rather than dig for unpublished rulings"); *Anastasoff*, 223 F.3d at 899 (noting that the only case discussing the relevant legal rule was unpublished). Third, the fact that a substantial number of unpublished decisions reverse decisions of the district court, or contain concurrences or dissents, reveals that significant disagreement exists among the judges deciding unpublished cases. *See, e.g., Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication In the United States Court of Appeals*, 54 VAND. L. REV. 71, 106 (2001) (conducting a study in which the authors found that almost ten percent of unpublished opinions were reversals and/or contained a concurrence or dissent). In short, the attention given to unpublished opinions

by both lawyers and judges demonstrates that those decisions often involve both novel and open legal questions on which a consensus has yet to be reached.

2. Unpublished Decisions Undermine Judicial Legitimacy by Sending a Message to the Public that Certain Cases Do Not Receive Adequate Consideration.

Given that many unpublished decisions do not involve routine matters, it is likely that the public will assume that a panel declined to publish because it failed to devote enough time to the case to ensure that the decision was clearly written and persuasively reasoned. This is a perfectly reasonable assumption for members of the public to make, as a number of judges, including several who submitted comments to this Committee, admit that in their unpublished decisions, their language is imperfect, their logic has not been sufficiently vetted, and their consideration of the facts has been unduly limited. *See, e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1178-79 (9th Cir. 2001); *Comments of Judge Silverman* (Dec. 17, 2003) (noting, that with respect to unpublished decisions, "[w]hat matters is the result, not the precise language of the disposition or its reasoning."); *Comments of Judge Browning* (Dec. 18, 2003) (noting that an unpublished decision "contains minimal factual or legal analysis"); *Comments of Judge Fernandez* (Dec. 4, 2003) (noting that unpublished decisions contain "less writing precision"); *Comments of Judge Thomas G. Nelson* (Dec. 18, 2003) (noting the lower quality of unpublished decisions). The knowledge that a panel spent an abbreviated amount of time and effort on an unpublished decision does little to inspire confidence in the final result. The legitimacy of the judicial system depends on acceptance of judicial authority by the public. *See Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) ("It is confidence in the men and women who administer the judicial system that is the true backbone of the law."). If the public does not trust the decisions that the

court issues, then that legitimacy is irreparably harmed.

Not only does the issuance of unpublished decisions signal to the public and to litigants that those decisions received lesser consideration, but it also signals to the public that those decisions will be given substantially less scrutiny and attention by future panels. Even if the citation of unpublished decisions is allowed, those decisions will not be treated by subsequent panels on a par with opinions that are the product of more thorough analysis and that carry the weight of binding precedent. A litigant's knowledge that the decision in his or her own case need not be followed, or even addressed, in future cases will cause that litigant to think, rightly or wrongly, that the court was simply choosing the outcome it preferred rather than deciding the case according to legal principle. As a result, a litigant will have little confidence in a decision in which the deciding court freely invites future courts to come out the other way.

Moreover, the two-tiered system of justice that flows from non-precedential decisions tells a litigant that his or her case may have received less serious scrutiny than others. Each and every case that reaches an appellate court involves actual individuals who regard their legal claims, and everything that rides on them, very personally and very seriously. Each individual is entitled to have the issues he or she raises on appeal evaluated thoroughly by a judge. Although some cases may carry greater legal importance than others, every case is important to the litigants involved and it is unfair to perpetuate a system of nonpublication that may cause them to feel that they have been treated with less dignity than others.

3. Non-Precedential Decisions Signal to the Public that Courts Engage in Results-Based Decision-Making.

The fact that non-precedential decisions encourage arbitrary decision-making, as well as

the fact that they receive little scrutiny from both present and future courts, creates the perception that courts are issuing results-oriented decisions that do not adhere to broadly applicable legal principles. When a litigant, as well as members of the public see that a court is willing to decide a case a certain way but is unwilling to require, or even suggest, that other cases should be decided in a similar way, that litigant will likely conclude that the court merely wanted to achieve a certain result and thus decided the case without any regard for the legal principles surrounding that decision. The perception that courts are driven by results rather than by principle signals to the public that courts have no regard for the rule of law system that they have been charged with rearing. Even if courts do not actually proceed in such a result-oriented fashion, however, as long as the public believes that they do, confidence in a rule-based system of law is undermined judicial legitimacy is damaged.

Finally, the perception of a results-oriented approach to the law by the judiciary further undermines judicial legitimacy by sending a message that a court does not have full confidence as to whether its decision is correct. When a court consciously decides not to publish a decision involving a novel issue of law, and therefore confines the reach of the decision only to its facts, the public may conclude that the court does not have enough faith in its own reasoning to make its decision precedential. Declining to publish, therefore, reduces the public's confidence in the judicial system, because if the court does not believe in the persuasive force its own decisions, then others are unlikely to believe in it either.

C. Selective Publication Impedes and Distorts the Growth of the Law.

1. Allowing Courts Not To Publish Prevents the Law from Growing and Adapting to New Circumstances.

Allowing judges to publish certain decisions and not publish others hinders the development of the law. The percentage of Circuit opinions that are issued as non-precedential decisions has climbed steadily. In the year 2000, nearly eighty percent of all Circuit opinions were unpublished. The common law system cannot grow without the addition of binding judicial decisions that explain and clarify the law. Therefore, selective publication, by its very nature, inhibits the development of the law by stripping potentially useful decisions of their precedential value. If this rising trend favoring unpublished decisions is permitted to continue, lawyers, judges, and the public alike will suffer as the development of the law stagnates.

Judges have an obligation to further the development of the law by issuing binding precedent that explains, clarifies, and expounds upon legal principles. For more than 200 years, it has been the role of the judiciary "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Anastasoff*, 223 F.3d at 901-03 (asserting that judges are required to decide cases in a way that explains the law). It is impossible, however, for judges to "say what the law is" when their decisions do not make law at all. By issuing non-precedential decisions with no effect on anyone outside the litigants involved, judges act not in their traditional role as guardians of the law whose duty it is to establish broadly applicable legal rules, but instead as simple arbitrators.

This problem is especially serious when judges decide not to publish decisions involving particularly prickly issues. Too often, judges use the escape hatch of non-publication to avoid making law on controversial topics, *see, e.g.*, *William T. Hangley, Opinions Hidden, Citations Forbidden: Report and Recommendation of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 667

(2002), or as a way of hedging their bets in case their decisions later turn out to be wrong. *See id.* If a controversial or politically charged issue presents itself to the court, instead of making the often difficult decisions that are part and parcel of the judicial function, a court can avoid making any sort of real "legal" decision by deciding the case out of one corner of its mouth while cautioning out of the other that the reasoning will not necessarily hold in future cases. In one extreme example, the Fourth Circuit declared an Act of Congress unconstitutional in an unpublished decision, prompting the Supreme Court, when reviewing the decision, to "deem[] it remarkable and unusual [that] . . . the court found it appropriate to announce its judgment in an unpublished per curiam opinion." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 425 n.3 (1993); *see also County of Los Angeles v. Kling*, 474 U.S. 936, 940 (1985) (Stevens, J., dissenting) (criticizing the Ninth Circuit for not publishing a decision that subsequently was reviewed by the Supreme Court). Publishing all decisions as binding precedent, however, both promotes the growth of the law with respect to controversial and complex issues, and tells the public that the courts stand behind their reasoning and believe their logic can withstand rigorous scrutiny.

Furthermore, the decision not to publish decisions that raise novel, difficult, or controversial legal questions reduces the level of debate on the issues that need it most. Judges concede that they are less likely to issue a separate dissent or concurrence in an unpublished case than in a published one. *See, e.g.*, *Hart,* 266 F.3d at 1178 (noting that judges are much more likely to concur or dissent when the panel's decision is going to have precedential effect). Yet controversial issues are the ones most in need of a diversity of views so that all positions on the topic can be aired and considered. An opinion that is precedential, but also balanced by

competing positions from other judges, will play a much stronger role in the development of the law than a rote, unpublished decision that reflects agreement among the panel only as to outcome, but not as to the rationale for that outcome.

2. Giving Judges the Discretion to Choose Which Cases To Publish Does Not Remedy the Problems of Selective Publication

The fact that judges have discretion to publish cases they deem legally significant does not cure the stunting effects of non-precedential dispositions. Judges are limited in their ability to predict fully whether or not their decisions will make new law, or will alter, clarify, modify or explain an existing rule of law. *See, e.g., Remarks of Justice John Paul Stevens to the Illinois State Bar Association's Centennial Dinner, 1977* ("[A] rule which authorizes any court to censor the future of its own opinions rests on a false premise. Such a rule assumes that the author is a reliable judge of the quality and importance of his own work product."). This is because the value of an opinion cannot be determined at the time it is issued, but must be ascertained by future courts that are called on to interpret, explain, criticize, follow, or limit it. *See In re Tenth Circuit*, 955 F.2d at 38 ("Furthermore, when 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 law develops and grows when past decisions are reconciled with future decisions in a way that creates coherent rules and principles. Those rules and principles, however, need both the future decisions, as well as the past decisions, in order to develop properly. Therefore, without being able to predict the future issues that might arise and the future ways that a decision may be interpreted, neither a judge nor anyone else can accurately determine which decisions will have lasting interpretive

power and which will not.

Additionally, there should be no discretion to decide that some cases do not make new law, and therefore do not warrant publication, because every judicial decision adds to the law in some way. As previously mentioned, many proponents of non-publication rules point out that unpublished decisions need not be given precedential weight because they rest on the unique facts of those cases and therefore do not establish or explain any new legal principles. Every case, however, rests on its facts to some degree: no case or controversy exists in a theoretical void. By applying an existing rule to a new set of facts, a court necessarily must define the scope and reach of that rule to determine if the facts at issue warrant application of the rule. *See, e.g.*, *In re Tenth Circuit*, 955 F.2d at 37 (observing that every application of law to facts furthers the growth of the law). These fine factual distinctions often play the biggest role in the development of the law by rigorously testing the logic of different legal principles as they are applied in different contexts. *See, e.g.*, *Danny J. Boggs & Brian P. Brooks, Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 20 (2000). Furthermore, cases that initially appear to wield little explanatory power often become important as future decisions change the legal landscape. *See American College of Trial Lawyers, supra*, at 661-62 (giving examples of how unpublished opinions, if published, can help make sense of later-issued decisions). As a result, selective publication stifles the growth of legal principles by keeping important decisions from entering the corpus of the common law.

Experience demonstrates that the judiciary's attempt to categorize its decisions as precedential and non-precedential has been fraught with difficulty. According to one internal study conducted by the D.C. Circuit, forty percent of the Circuit's unpublished decisions

presented issues significant enough to warrant publication under the Circuit's own publication rules. *See Nat'l Classification Comn. v. United States*, 765 F.2d 164, 173 (D.C. Cir. 1985) (Wald J., concurring). Furthermore, it is not uncommon for the Supreme Court to grant certiorari and reverse an unpublished decision, illustrating that issues deemed unimportant by Circuit Courts often turn out to carry greater significance than initially thought. *See Boggs & Brooks*, *supra,* at 20-21 (identifying instances in which the Supreme Court granted certiorari and reversed unpublished appellate decisions); *County of Los Angeles v. Kling*, 474 U.S. 936 (1985) (reversing an unpublished decision of the Ninth Circuit). Thus, entrusting judges to pick and choose which decisions merit publication does not adequately ensure the continued growth of the law.

3. Selective Publication Distorts the Law by Giving Some Members of the Bench a Disproportionate Role in the Development of the Law.

Equally troubling is the manner in which selective publication distorts the character of the law by giving certain judges and Circuits an inordinate role in shaping the law. Although, on average, almost eighty percent of appellate decisions are not published, the rate of publication between Circuits varies greatly. In 2000, for example, the Seventh Circuit published 43.5% of its decisions while the Fourth Circuit only published 9.5% of its decisions. As a result, since Circuit Courts are more likely to come out one way on a case when following the lead of a sister Circuit than when deciding on a clean slate, the Seventh Circuit is establishing national law to a much greater degree than the Fourth Circuit. Similarly, the discrepancy between publication rates of different judges varies widely. Over a single two-year period, one appellate judge authored 181 published majority opinions, while other judges published as few as 20 opinions over that same

time span. *See Merritt & Brudney, supra,* at 72. Mandatory publication, however, will ensure the proper lawmaking balance because every decision issued by every judge in every Circuit will possess precedential weight.

Additionally, although it is commonly thought that the decision to publish typically is based on the nature, novelty and complexity of the issues being reviewed, publication decisions are often determined by characteristics that are unrelated to the substance of the issues considered by the court. One study has suggested that a judge's decision whether or not to publish often correlates with such arbitrary characteristics as which law school the writing judge attended, the age of the writing judge, and the particular Circuit's rules for publication (i.e. whether all three members of the panel must agree to publish, whether the decision on publication is left exclusively to the writing judge, or whether a majority of panel members must agree to publish). *See id.* at 88, 95-96. Thus, the development of the law does not proceed in a way that incorporates the diverse views of the entire appellate bench. If judges of certain backgrounds are more likely to suppress their views than others, then the law will move in the direction of those who are more inclined to publish. The law grows best, however, when it reflects a broad array of viewpoints and backgrounds. Requiring all opinions to be published, and to be given precedential effect, will expand the range of voices weighing in on legal issues, and therefore alleviate these distortionary results.

Moreover, that same study indicates that judges who have some prior career experience with the particular issues being litigated are *less* likely to publish decisions on those issues than other judges. *See id.* at 95-96. This means that many of the opinions creating Circuit law are being authored by less experienced members of the court. One reason for this discrepancy is that

a judge with background experience might know enough about the issue to believe that the decision being reached is not that important. For judges, and lawyers with less experience, however, publication of that decision can be extremely illuminating, and can help clarify and explain potentially confusing or conflicting aspects of other judicial decisions on that same issue. If all courts are required to publish their decisions and give them precedential weight, then all members of the bench, including those with expertise on the issues up for decision, will be required to contribute equally.

D. Issuing Non-Precedential Decisions Wastes Judicial and Legal Resources.

TLPJ recognizes that the primary argument advanced by proponents of unpublished decisions is that they conserve scarce judicial resources because the number of filed appeals has increased so dramatically in recent years that many judges feel that they have no choice but to decide some cases on an expedited basis through the use of non-precedential decisions. TLPJ also appreciates the concerns expressed by proponents of non-publication rules that if judges are required to publish every decision as binding precedent, the amount of attention devoted to the cases that truly require rigorous scrutiny will decline, and the quality of judicial decision-making as a whole will suffer. *See, e.g.*, *Hart*, 266 F.3d at 1177-79. TLPJ believes, however, that non-precedential decisions in fact waste judicial and legal resources, and that requiring publication of all decisions as binding precedent possibly will reduce the judiciary's overall workload by clarifying the boundaries of the law and by communicating to practitioners which legal claims are cognizable and which are not.

Mandatory publication will increase judicial efficiency in a number of ways. First, it will increase judicial economy by eliminating ambiguities in the law. One of the main values of a

hierarchical system of judicial precedent is that the issuance of precedential decisions fosters certainty, predictability, and guidance for lawyers and lower courts. By issuing binding decisions, courts must define and explain the law as they distinguish and harmonize past decisions with current ones. This process of constant refinement of issues previously addressed by the courts, as well as of exploration of new and novel legal issues, helps to eliminate legal ambiguities by filling in the gaps left by an incomplete body of precedent. Such gaps undoubtedly exist, as many lawyers and district court judges believe that there is too little existing precedent to guide them, rather than too much. *See Robel, supra*, at 405-08. In addition to filling gaps, requiring publication as binding precedent can help eliminate ambiguities because unpublished decisions often reconcile and make sense of conflicting published opinions. *See American College of Trial Lawyers*, *supra*, at 661-62 (providing examples). If potentially clarifying decisions remain unpublished, however, then the benefits of these more recent decisions will be lost, and legal ambiguities will remain to confuse lawyers and lower courts until the appellate courts sort them out sometime in the future.

Second, mandatory publication will substantially reduce repetitive litigation and decision-making. The inevitable result of nonbinding decisions is that lawyers must relitigate, and district judges must readjudicate, the same issues over and over because they have no final word from the Circuit as to the state of the law. *See, e.g.*, *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000) (identifying 20 prior unpublished decisions on the same issue). As a result, nonbinding decisions rob the judiciary of the efficiency-based benefits of a precedential system. A non-binding appellate decision tells lawyers nothing about whether the claims they desire to bring in court are foreclosed or permitted, and leaves lower courts with no additional

guidance as to what the law requires. As a result, the workload of district courts rises dramatically, as district court judges must duplicate their colleagues' efforts instead of being able to rely on a definitive appellate statement of the law. Requiring publication as binding precedent, on the other hand, will provide greater clarity, eliminate repetitive filings by lawyers, and ease the workload burdens faced by both district and appellate tribunals.

Third, requiring publication of all decisions will promote judicial efficiency by providing greater guidance to lawyers and lower courts. The issuance of unpublished, nonbinding decisions fosters confusion in the law because everyone has a different conception of the binding power of unpublished decisions. This is true even though the rules of each Circuit state that unpublished decisions are not given precedential effect. Some courts, by simply ignoring or refusing to consider countervailing unpublished opinions, end up creating splits in the law that engender confusion rather than certainty. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 72-73 & n.3 (D. Me. 1993); *Lane v. Wal-Mart Stores, Inc.*, 69 F. Supp. 2d 749, 756 n.11 (D. Md. 1999); *In re Jones*, 112 B.R. 975, 977 (Bankr. W.D. Mo. 1989). Other courts read unpublished decisions and assume, even though the decisions are nonbinding, that they reflect the reasoning of the Circuit and reflect how that Circuit will decide future cases. *See, e.g., People of the Territory of Guam v. Yang*, 850 F.2d 507, 511 (9th Cir. 1988) (reversing the district court of Guam for erroneously relying on an unpublished Ninth Circuit decision as binding precedent), *overruled on other grounds by United States v. Keys*, 133 F.3d 1282 (9th Cir. 1998); *In re Adams*; 254 B.R. 857, 862 n.3 (Bankr. D. Md. 2000) (interpreting an unpublished Fourth Circuit decision as affirming a rule established by another district court).

The courts' differing approaches with respect to unpublished decisions creates a

significant problem for both lawyers and litigants. If a court can freely disregard an earlier unpublished decision without distinguishing or limiting its holding, then that court will generate inconsistencies that eviscerate any guidance that its decision, as well as the previous unpublished one, might otherwise have offered. If the two decisions are both published, however, then the court in the second case cannot disregard the first one without explaining its reasons for disagreement. Expanded publication will therefore provide greater certainty to litigants as to what the law permits and what the law forbids. The ultimate effect of this added clarity may be to reduce the overall judicial case load by deterring lawyers from bringing cases that prior precedential decisions have clearly foreclosed, and by deterring opposing counsel from raising defenses that earlier courts have rejected.

Fourth, the costs of litigation for both lawyers and litigants may fall if all decisions are given binding precedential weight. Not only will lawyers file fewer cases as precedent becomes clarified, but the costs associated with legal research may diminish as well. As the expansion of published cases fills the gaps in existing precedent, lawyers will more quickly and easily find the one published case directly on point instead of having to search for several different cases that are somewhat applicable, along with another two cases which appear to be on point, but which the Circuit decided not to publish.

Finally, TLPJ does not believe that increasing the amount of binding decisional law through mandatory publication will create an excessive body of precedent that will minimize opportunities for judicial flexibility. First, if unpublished cases truly are redundant of existing precedent, as many advocates of non-publication rules claim, then publishing them will not further rigidify the law one bit. Second, although judges worry about issuing overly broad

decisions that might create problems in the future if the reasoning turns out to be suspect, those decisions can be criticized and limited accordingly on the basis of any discovered flaws. Also, if the cases turn on different facts, then they can be factually distinguished. Third, if it turns out that a binding decision is issued that the Circuit later decides reached the incorrect result, that court can use its *en banc* procedures to rectify any defects. Finally, the fact that one Circuit decides a legal issue in a binding way does not halt all development of the law on that issue. The issue will continue to percolate in other Circuits as they evaluate that same issue independently when it arises before them.

CONCLUSION

Proposed Rule 32.1, by permitting unpublished cases to be cited for their persuasive value, is an important step in the right direction toward encouraging greater openness in the appellate system. The interests of the judicial system, however, will best be served by requiring all Circuit Courts to give each decision the authority of binding precedent. We accordingly recommend that the Committee adopt proposed Rule 32.1 as it is written currently and amend it further by requiring that every appellate decision be considered precedential. We thank the Committee for consideration of these views.