UNIVERSITY OF CALIFORNIA

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW (BOALT HALL)
BERKELEY, CA 94720-7200
FAX NO. (510) 643-2673
TELEPHONE (510) 642-5049
EMAIL barnetts@law berkeley.edu

STEPHEN R. BARNETT
ELIZABETH JOSSELYN BOALT PROFESSOR OF LAW, EMERITUS

03-AP-032
Request To Testify
1/20/04

November 29, 2003

Mr. Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

Re: January 20, 2004, Hearing in Los Angeles
by Advisory Committee on Appellate Rules

Dear Mr. McCabe:

Pursuant to the published Notice, I hereby request to testify at the hearing to be held by the Advisory Committee on Appellate Rules in Los Angeles on January 20, 2004, on the Committee's proposed amendments to the Federal Rules of Appellate Procedure.

My testimony will be addressed to the Committee's proposed Rule 32.1 of the Federal Rules of Appellate Procedure. I will also be submitting comments on the proposed Rule.

I look forward to hearing from you in response to this request.

Thank you.

Sincerely,

Stephen R. Barnett
Elizabeth J. Boalt Professor of Law, Emeritus

Stephen Barnett <barnetts@law.berkeley.edu>
Sent by: barnetts@law.berkeley.edu

01/06/2004 07:33 PM

To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Proposed FRAP 32.1

03-AP-032
Addendum 1:
Article

Comments consist of attached article, "No-Citation Rules Under Siege: A Battlefield Report and Analysis," Journal of Appellate Practice and Process, vol. 5, no. 2, p.473 (2003).

Thank you.

Stephen R. Barnett

tel: 510-654-5394
fax: 510-653-6229

barnetts@law.berkeley.edu

BarnettSiege2.doc

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

NO-CITATION RULES UNDER SIEGE: A BATTLEFIELD REPORT AND ANALYSIS

Stephen R. Barnett*

"The assault upon the citadel of no-citation rules is proceeding in these days apace." Cardozo didn't exactly say that,[1] but if he were here today, he might. "Unpublished"[2] judicial opinions and rules prohibiting their citation are under attack on several fronts. I report here on three of those venues: (1) the federal circuit courts of appeals, (2) the states, and (3) the rulemaking process of the federal judiciary. Each has seen

* Elizabeth J. Boalt Professor of Law Emeritus, University of California, Berkeley. I am grateful to the several judges and numerous court officials who spoke to me for this Article; to Florence McKnight and Lauren McBrayer (Boalt '05) for superb research assistance; to Patrick Schiltz for magnanimous consultation; and to Jan Vetter for a helpful reading of the draft. No one but me is responsible for any of the views expressed here.

1. He said, of course, that the assault upon the "citadel of privity" was proceeding apace. *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931) (Cardozo, C.J.).

2. The term "unpublished" has become a misnomer, inasmuch as the opinions in question are now posted online by the courts issuing them and are even published in traditional print in West's *Federal Appendix*. *See* Stephen R. Barnett, *From* Anastasoff *to* Hart *to* West's Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. App. Prac. & Process 1, 2-3 (2002). But the designation "unpublished" functions usefully as a term of art, denoting opinions that the issuing court *labels* "unpublished." *See e.g.* 8th Cir. R. 28A(i) (2003) ("Unpublished decisions are decisions which a court designates for unpublished status"); *infra* n. 110.

important developments recently. The federal rulemakers, for their part, currently are receiving public comments on a major proposed new rule, one that presents significant questions of drafting as well as of policy.

I. THE FEDERAL CIRCUITS

Among the individual federal circuit courts of appeals, the major news is from the First Circuit. Effective in December 2002, that court dropped its rule that allowed citation of unpublished opinions only in "related cases."[3] The First Circuit adopted instead a rule cautioning that "[c]itation of an unpublished opinion of this court is disfavored," but allowing such citation "if (1) the party believes that the opinion persuasively addresses a material issue in the appeal; and (2) there is no published opinion from this court that adequately addresses the issue."[4] Further, "[t]he court will consider such opinions for their persuasive value but not as binding precedent."[5]

Grudging as the language may be, this move by the First Circuit, coming a year after a similar turnabout by the District of Columbia Circuit,[6] means that nine of the thirteen circuits now allow citation of their unpublished opinions. The circuits permitting citation are the First,[7] Third,[8] Fourth,[9] Fifth,[10] Sixth,[11]

3. 1st Cir. R. 36(b)(2)(F) (repealed Dec. 16, 2002). "Related cases" are those relevant under doctrines such as law of the case, res judicata, or collateral estoppel, or relevant for factual purposes such as showing double jeopardy or sanctionable conduct (or appealing from the opinion in question). *See e.g.* 9th Cir. R. 36-3(b)(i), (ii). So far as I know, every American court allows citation of unpublished opinions for related-case purposes; it is hard to imagine how a court could not do so. This article therefore will generally omit the omnipresent qualifier, "except for related cases."

4. 1st Cir. R. 32.3(a)(2).

5. *Id.*

6. *See* D.C. Cir. R. 28(c)(12)(B); Barnett, *supra* n. 2, at 3 n. 11.

7. *See* 1st Cir. R. 32.3(a)(2); *supra* text at nn. 4-5.

8. Notwithstanding Third Circuit Appellate Rule 1, I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority"), and the Third Circuit Press Release of December 5, 2001 ("the *court* will not cite to non-precedential opinions as authority") (emphasis in original), attorneys in the Third Circuit may and do cite to unpublished opinions. Telephone Interview with Trish Dodszuweit, Leg. Coord., 3d Cir. (Oct. 30, 2003).

Eighth,[12] Tenth,[13] Eleventh,[14] and D.C.[15] Circuits. Those still forbidding citation are the Second,[16] Seventh,[17] Ninth,[18] and Federal[19] Circuits. Nine of thirteen is a substantial majority; citability of unpublished opinions thus comes close to being the norm in the federal circuits today.[20]

9. *See* 4th Cir. R. 36(c) (citation of unpublished opinions "disfavored," but "[i]f counsel 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, such disposition may be cited").

10. *See* 5th Cir. R. 47.5.3 (unpublished opinions issued before January 1, 1996, "are precedent," but "because every opinion believed to have precedential value is published," unpublished opinions "normally" should not be cited); 5th Cir. R. 47.5.4 (unpublished opinions issued on or after January 1, 1996, are "not precedent"; such opinions "may, however, be persuasive," and may be cited).

11. *See* 6th Cir. R. 28(g) (citation of unpublished opinions "disfavored," but "[i]f counsel 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, such disposition may be cited").

12. *See* 8th Cir. R. 28(A)(i) (unpublished opinions "are not precedent and parties generally should not cite them," but parties may do so if the opinion has "persuasive value on a material issue and no published opinion of this or another court would serve as well").

13. *See* 10th Cir. R. 36.3 (unpublished decisions "not binding precedents" and their citation is "disfavored," but unpublished decision may be cited if it has "persuasive value with respect to a material issue that has not been addressed in a published opinion" and if it would "assist the court in its disposition").

14. *See* 11th Cir. R. 36-2 (unpublished opinions "not considered binding precedent" but may be cited as persuasive authority); *see also* 11th Cir. R. 36-3, I.O.P. 5 ("[o]pinions that the panel believes to have no precedential value are not published," and "[r]eliance on unpublished opinions is not favored by the court").

15. D.C. Cir. R. 28(c)(12)(B) (unpublished decisions issued on or after January 1, 2002, "may be cited as precedent"); *but cf.* D.C. Cir. R. 36(c)(2) ("a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition").

16. *See* 2d Cir. R. 0.23 (citation of written statements attached to summary orders prohibited).

17. *See* 7th Cir. R. 53(b)(2)(iv) (unpublished orders "shall not be cited or used as precedent").

18. *See* 9th Cir. R. 36-3 (unpublished dispositions "not binding precedent" and "may not be cited"). The Ninth Circuit has a provisional exception that allows citation of unpublished dispositions in petitions for rehearing or rehearing en banc and in requests to publish opinions, solely for the purpose of showing a conflict between panel opinions. *See id.*; Ninth Cir. Notice (Dec. 30, 2002). (This limited exception will be set aside here, and the Ninth Circuit's policy considered as one that does not allow citation of unpublished dispositions.)

19. *See* Fed. Cir. R. 47.6(b) (opinion or order "designated not to be cited as precedent . . . must not be employed or cited as precedent").

20. One report suggests that the switch to citability—at least when done prospectively—makes little observable difference. *See* Jonathan Groner, *Circuit's New*

In another federal court development, the Fifth Circuit, which already allowed its unpublished opinions to be cited, in July 2003 broke down and joined all but one of the other circuits in putting those opinions online at the court's website.[21] That leaves the Eleventh Circuit as the last holdout refusing to put its unpublished opinions online. This will have to change in two years, when the E-Government Act of 2002[22] takes effect. That Act requires each circuit to maintain a website affording access—in a "text searchable format"—to "all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter."[23]

Citation Rule: Few Takers, 26 Leg. Times 1 (Jan. 6, 2003) (D.C. Circuit after year of experience "has not noticed any problems with lawyers' use of unpublished . . . rulings. In fact, the court has hardly noticed any change at all"; D.C. Circuit judge suggests limited use of new rule reflects its prospective nature, applicable only to unpublished opinions issued after rule took effect).

21. *See Opinions Search Pages of the Fifth Circuit Court of Appeals* (available at http://www.ca5.uscourts.gov/Opinions/OpinHome.cfm) (accessed Dec. 11, 2003; copy on file with Journal of Appellate Practice and Process); Telephone Interview with Fritz Fulbruge, Clerk, U.S. Ct. of App. for 5th Cir. (Aug. 7, 2003). The online opinions are picked up by West Group for publication in its *Federal Appendix*. Fulbruge Interview, *supra* this note.

22. E-Government Act of 2002, Pub. L. No. 107-347, § 205(f), 116 Stat. 2899, 2914 (2003).

23. *Id.* at 2913. Some judges and others have suggested that action by the legislature to require citability of unpublished opinions might run afoul of the separation of powers. *See e.g.* Subcomm. on Cts., the Internet and Intellectual Property, H.R. Jud. Comm., *Unpublished Judicial Opinions*, 107th Cong. 15-16 (June 27, 2002) (testimony of the Honorable Alex Kozinski) (available at http://www.house.gov/judiciary/80454.PDF) (accessed Dec. 9, 2003; copy on file with Journal of Appellate Practice and Process) [hereinafter Kozinski Testimony]. The suggestion is regularly made in California when the state legislature considers bills that would require citability of appellate court opinions. *See e.g.* Cal. Assembly Jud. Comm., *Hearings on AB 1165—Appellate Opinions: New Publication and Citability Rules*, 2003-2004 Assembly 6 (May 6, 2003) (available at http://www.assembly.ca.gov/acs/acsframeset2text.htm) (accessed Dec. 9, 2003; copy on file with Journal of Appellate Practice and Process). The E-Government Act—assuming it is constitutional—would seem relevant here. If Congress can require that unpublished court of appeal opinions be put online, why could it not require—and why could a state legislature not require—the alternative form of public access that consists of making the opinions citable?

II. THE STATES

A. The Serfass-Cranford Findings and Judge Kozinski's Testimony

It may not have attracted much attention, but there is a lot going on in the states. State activity with respect to citation of unpublished opinions tends to draw little national notice; not only are there some four times as many states as federal circuits to take into account, but the states differ in their court systems and in the kinds of "opinions" their courts issue. Some states have no intermediate appellate courts, and hence, no unpublished opinions of those courts. In some states, the *supreme court* issues unpublished opinions. Some states have no unpublished opinions but do have unpublished dispositions without opinion. Further, a state's "rule" with respect to citing unpublished opinions may not be easy to find, existing as it sometimes does in caselaw (not always clear and consistent) or even in custom.

Merely to collect, let alone to classify and compare, the rules of all the states is therefore a substantial undertaking. Pioneers in the task were Melissa M. Serfass and Jessie L. Cranford, who reported their results in this Journal in 2001.[24] In June 2002, the Serfass-Cranford study was relied on by Judge Alex Kozinski of the Ninth Circuit in testimony he gave before a subcommittee of the House Judiciary Committee.[25] Judge Kozinski produced a chart counting and classifying the rules of all the states as reported by Serfass and Cranford.[26]

As a gauge of the trend in the states, it may be instructive to compare the situation that prevailed some two and one-half years ago, as reported by Serfass and Cranford and Judge Kozinski, with the situation prevailing today. I propose first to do this, in order to identify the changes that have taken place recently. Then I will integrate the most recent data into a complete survey of today's state rules on citing unpublished

24. Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251 (2001).

25. Kozinski Testimony, *supra* n. 23, at 15.

26. *Id.* at 18-19.

opinions, updating and revising the work of Serfass and Cranford.

B. Judge Kozinski's Report Compared With the Situation Today

In his statement to the House Judiciary subcommittee, Judge Kozinski, a champion of no-citation rules,[27] defended those rules with his usual force, pungency, and wit. Judge Kozinski said nothing about the then-existing rule count in the federal courts. (Eight of the thirteen circuits allowed citation of unpublished opinions, a figure since increased to nine of thirteen.[28]) Instead, Judge Kozinski looked to the states for numerical help.[29] He asked, "Are Federal Courts Unique in Prohibiting Citation to Unpublished Decisions?," and answered, "[E]mphatically no."[30] For this, Judge Kozinski cited the "very revealing" findings of Serfass and Cranford, which showed that "[t]he vast majority of state court systems restrict citation to unpublished decisions."[31] Specifically, Judge Kozinski calculated from the Serfass-Cranford findings that thirty-eight states (plus the District of Columbia) "restrict citation to unpublished opinions to some degree."[32] And, he continued, "by far the largest number (35) have a mandatory prohibition phrased much like the Ninth Circuit's rule."[33]

In comparing the Serfass-Cranford-Kozinski findings with the situation today,[34] the striking fact is that in the two and one-

27. *See Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (court's opinion authored by Kozinski, J.); *see also* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!* 20 Cal. Law. 43 (June 2000).

28. *See supra* pp. 474-75.

29. "The state courts, of course, hear vastly more cases in the aggregate than do the federal courts." Kozinski Testimony, *supra* n. 23, at 15.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. This comparison is aided by the research into state and federal citation rules reported in *McCoy v. State*, 59 P.3d 747, 753 (Alaska App. 2002) (Mannheimer, J., opinion on rehearing), republished at ___ P.3d ___, 2002 WL 32332961 (Alaska App. Oct 04, 2002); *see also* Jason B. Binimow, *Precedential Effect of Unpublished Opinions*, 105 A.L.R.5th 499 (2003).

half years since those findings were compiled, six states have switched from not allowing citation of unpublished opinions[35]—what Judge Kozinski calls a "mandatory prohibition"[36]—to allowing it. Three of those states now permit citation of unpublished opinions as "precedent": Texas,[37] Utah,[38] and West Virginia.[39] The other three permit it for "persuasive" value:[40] Alaska,[41] Iowa,[42] and Kansas.[43] A seventh state, Ohio, has

35. I use the term "unpublished opinions" here to encompass all forms of opinions, orders, or other dispositions by a state's appellate courts that are regarded as "unpublished" or unreported.

36. Kozinski Testimony, *supra* n. 23, at 15.

37. On January 1, 2003, Texas, which had prohibited citation of its unpublished court of appeals opinions, discontinued the category of unpublished opinions in civil cases and made all new civil-case opinions citable without restriction. Tex. R. App. P. 47.7; *see* Dorsaneo & Soules' Texas Rules Ann., Tex. R. App. P. 47, Comment to 2002 Change (Lexis 2003). Prior unpublished opinions "have no precedential value," but are citable. Tex. R. App. P. 47.7. Unpublished criminal-case opinions are still uncitable. Tex. R. App. P. 47.2(b), 77.3.

38. *See Grand Co. v. Rogers*, 44 P.3d 734, 738 (Utah 2002) (striking down "no citation" rule promulgated by Utah Judicial Council; unpublished opinions of court of appeals "are equally binding upon lower courts of this state, and may be cited to the degree that they are useful, authoritatively and persuasively"; such decisions, "although not 'officially published,' may be presented as precedential authority to a lower court or as persuasive authority to this court, so long as all parties and the court are supplied with accurate copies at the time the decision is first cited").

39. *See Walker v. Doe*, 558 S.E.2d 290, 296 (W. Va. 2001) ("a per curiam opinion [of the West Virginia Supreme Court of Appeals] may be cited in support of a legal argument"; the court "renounce[s] any prior statements of this Court to the effect that per curiam opinions are not legal precedent").

40. Jurisdictions that allow citation of unpublished opinions as "precedent" also allow it, of course, for the lesser effect of "persuasive" value. These "persuasive value" states therefore might more accurately be described as allowing citation "only" for persuasive value. I omit the "only" as a shorthand device.

41. *See McCoy v. State*, 59 P.3d 747, 753-760 (Alaska App. 2002) (interprets Alaska's Appellate Rule 214 (d), providing that unpublished opinions "may not be cited in the courts of this state," as meaning that they may not be cited "as precedent," and not as forbidding judges and lawyers "from relying on unpublished decisions for whatever persuasive power those decisions might have"). Judge Kozinski in his congressional testimony ironically cited Alaska's Rule 214 as "typical" of the "mandatory prohibition" of citation that he found in many states. Kozinski Testimony, *supra* n. 23, at 15.

42. Iowa rules prohibiting citation of unpublished opinions were replaced on February 15, 2002, by Iowa Appellate Rule 6.14 (5)(b). The new rule provides that an unpublished opinion of any appellate court "may be cited in a brief," but it "shall not constitute controlling legal authority." *Id.*

43. Kansas Supreme Court Rule 7.04, barring citation of unpublished opinions, was amended on February 7, 2003. The amended rule provides that "unpublished memorandum opinions of any court or agency," while "not binding precedents" and "not favored for citation," nonetheless "may be cited if they have persuasive value with respect to a material

switched from allowing citation for persuasive value to allowing it for whatever weight is deemed appropriate by the court.[44]

In addition, two states that still prohibit citation currently have before their supreme courts proposed rule changes that would allow citation for persuasive value: Hawaii[45] and Illinois.[46] The possibility thus exists that eight states will have moved out of the "no citation" column since Judge Kozinski compiled his data.

C. Classifying and Counting the States

Classifying the states with respect to their positions on citing unpublished opinions can be difficult, for reasons I have suggested. Not only are the facts often murky, but the bottom-

issue not addressed in a published opinion of a Kansas appellate court and they would assist the court in its disposition." *Id.*

44. The Ohio Supreme Court Rules for the Reporting of Opinions had provided (former Rule 2(G)) that unpublished decisions of Ohio's courts were not controlling authority but could be cited as persuasive. In May 2002, Rule 2(G) was superseded by a revised Rule 4. Rule 4(A) now provides that "distinctions between 'controlling' and 'persuasive' opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished"; Rule 4(B) states that all court of appeal opinions issued after the effective date of the new rules "may be cited as legal authority and weighted as deemed appropriate by the courts."

45. The Hawaii Supreme Court currently has before it a proposal to amend Rule 35 of the Hawaii Rules of Appellate Procedure to allow citation to unpublished appellate opinions for their "persuasive value." Comments were due in the Supreme Court by December 29, 2003. News Release, Hawaii Jud. Pub. Affairs Off., *Comment Wanted on Proposed Amendment to Hawai'i Rules of Appellate Procedure* (Mar. 25, 2003) (available at http://www.courts.state.hi.us) (accessed Dec. 1, 2003; copy on file with Journal of Appellate Practice and Process); *see State v. Uyesugi*, 60 P.3d 843, 874 (Haw. 2002) (Acoba, J., concurring) (discussing proposal).

46. The Illinois Supreme Court in February 2003 appointed a special committee to study Supreme Court Rule 23. *See* Press Release, *Supreme Court Forms Committee to Study Rule 23* (Feb. 27, 2003) (available at http://www.state.il.us/court/PressRel/2003/031403.pdf) (accessed Dec. 10, 2003; copy on file with Journal of Appellate Practice and Process). That Rule bars citation of unpublished opinions, including both "written orders" and "summary orders." Ill. S. Ct. R. 23(e). The committee has recommended that unpublished written orders henceforth issued be citable as "persuasive authority." *See* Letter from Justice Thomas R. Appleton, Comm. Co-Chair, to author, *Proposed Amendments, Ill. S. Ct. R. 23(e)* (Nov. 17, 2003) (on file with author). The Illinois Supreme Court has referred the proposal to the court's Rules Committee, which is expected to consider it in 2004. Telephone Interview with Patricia C. Bobb, Esq., Chair, Rules Comm., Ill. S. Ct. (Nov. 20, 2003).

line decision often involves a judgment call that could go either way. Indeed, I count five states as having a foot in both camps and thus being "too close to call"—although that call, too, is arguable. Nonetheless, I have grouped the states into five categories, as follows (in order of declining citability):

1. No unpublished opinions or no rule against citation

This category contains four states: Connecticut,[47] Mississippi,[48] New York,[49] and North Dakota.[50]

47. In Connecticut, all case dispositions by both the Supreme Court and the appellate court are published. *See* Conn. Gen. Stat. § 51-212(b) (West 2003) (Supreme Court); Conn. Gen. Stat. § 51-215a(b) (West 2003) (appellate court). Unpublished opinions that may issue from trial courts or courts in other jurisdictions are covered by Conn. R. App. P. 67-9, which provides that they may be cited if a copy is provided to the court and opposing counsel. Telephone interview with Cynthia Gworek, Asst. Clerk, Conn. S. Ct. (Aug. 15, 2003). (Statutes or rules that allow citation of unpublished opinions very commonly require that a copy of the opinion be provided to the court and opposing counsel; henceforth such "provide a copy" requirements generally will not be mentioned in describing citation rules.)

48. All opinions of the Mississippi Supreme Court and Court of Appeal issued on or after November 1, 1998, are published and hence may be cited; in addition, there is no law or rule that prohibits or limits citation of these opinions. Telephone Interview with Jack Pool, Dir. of C. Leg. Staff, Miss. S. Ct. (Aug. 27, 2003). Although the rules provide that unpublished opinions issued before November 1, 1998, are not citable, Miss. R. App. P. 35-A(b) (Supreme Court); Miss. R. App. P. 35-B(b) (Court of Appeals), in practice the Supreme Court entertains citation of those opinions and considers them on their persuasive merits, Pool Interview, *supra* this note. *See e.g. McBride v. Jones*, 803 So. 2d 1168, 1170, 1171 (Miss. 2002) (McRae, J., dissenting) (majority and dissent both cite unpublished opinion and debate its merits).

49. In New York, all opinions of the Court of Appeals and the Appellate Division are published. Trial court and Appellate Term opinions sometimes are not published. There is no law or rule that limits or prohibits the citation of unpublished opinions. Telephone Interview with Marjorie McCoy, Dep. Clerk, N.Y. Ct. of App. (Aug. 15, 2003); Telephone Interview with Gary Spivey, N.Y. St. Rptr. (Aug. 15, 2003).

50. The North Dakota Supreme Court issues some "summary dispositions," which consist of one or two paragraphs and avoid stating the facts. *See* N.D. R. App. P. 35.1. These are posted on the court's website and may be cited, as there is no law or rule that says they may not be. The same is true of opinions issued by the sporadically sitting North Dakota Court of Appeals. Telephone Interviews with Penny Miller, Clerk of N.D. S. Ct. (Aug. 18, 2003; Aug. 26, 2003).

2. States that allow citation of unpublished opinions as "precedent"

In this category I count five states: Delaware,[51] Ohio,[52] Texas,[53] Utah,[54] and West Virginia.[55]

3. States that allow citation for "persuasive value"

In this category I count twelve states: Alaska,[56] Iowa,[57] Kansas,[58] Michigan,[59] New Mexico,[60] Tennessee,[61] Vermont,[62] Wyoming,[63] Virginia,[64] Minnesota,[65] New Jersey,[66] and Georgia.[67]

---

51. Delaware's Supreme Court Rule 17(a) was amended in 1983 "to permit unreported orders of the Delaware Supreme Court to be cited as precedent." Del. Sup. Ct. R.I.O.P.X (8); *see New Castle County v. Goodman*, 461 A.2d 1012, 1013 (Del. 1983) (citing rule change and distinguishing unreported decision relied on).

52. *See supra* n. 44.

53. *See supra* n. 37.

54. *See supra* n. 38.

55. *See supra* n. 39.

56. *See supra* n. 41.

57. *See supra* n. 42.

58. *See supra* n. 43.

59. Michigan's Court Rule 7.215(C) states that an unpublished opinion "is not precedentially binding under the rule of stare decisis," but goes on, " [a] party who cites an unpublished opinion must provide a copy"—making clear that citation is allowed.

60. New Mexico's Appellate Rule 12-405(C) bars citing unpublished opinions "as precedent in any court." But the New Mexico Court of Appeals has ruled, "[I]f counsel concludes that language in a memorandum opinion or calendar notice is persuasive, we see no reason why it cannot be presented to the court for consideration. It would be more appropriate to present the language without reference to its source, so that the court to which it is presented is asked to consider it on its own merits, rather than as precedent or controlling authority." *State v. Gonzales*, 794 P.2d 361, 370-371 (N.M. App. 1990).

61. *See* Tenn. S. Ct. R. 4(H)(1) (unpublished opinions "persuasive authority"); *McConnell v. State*, 12 S.W.3d 795, 799 n. 5 (Tenn. 2000) ('persuasive force"); *State v. Kelley*, 2002 WL 927610 at *17 (Tenn. Crim. App., Oct. 21, 2002) (unpublished) ("persuasive authority only").

62. *See* Vt. R. App. P. 33.1(c) (unpublished order "may be cited as persuasive authority but shall not be considered as controlling precedent").

63. Although "abbreviated opinions" of the Wyoming Supreme Court are not published and "shall not constitute precedent of the appellate court," Wyo. R. App. P. 9.06, Wyoming has no rule against citing unpublished opinions, and they can be cited for persuasive value, Telephone Interview with Judy Pacheco, Clerk, Wyo. S. Ct. (Aug. 11, 2003).

4. States too close to call

Some states seem in equipoise between allowing citation and forbidding it. For example, they may have conflicting practices for different classes of unpublished opinions. Also included here are the two states, Illinois and Hawaii, that are considering proposals to reverse their rules and allow citation. I therefore classify five states as on the fence: Hawaii,[68] Illinois,[69] Maine,[70] Oklahoma,[71] and Oregon.[72]

64. *See Fairfax County Sch. Bd. v. Rose*, 509 S.E.2d 525, 528 n. 3 (Va. App. 1999) ("Although an unpublished opinion of the Court has no precedential value, a court or the commission does not err by considering the rationale and adopting it to the extent it is persuasive.") (citation omitted); *accord Johnson v. Paul Johnson Plastering & Natl. Sur. Corp.*, 561 S.E.2d 40, 45 n. 7 (Va. App. 2002); *but see Grajales v. Commonwealth*, 353 S.E.2d 789, 791 n. 1 (Va. App. 1987) (unpublished memorandum decisions of Court of Appeals "not to be cited or relied upon as precedent"); *Robdau v. Commonwealth*, 543 S.E.2d 602, 604 n. 4 (Va. App. 2001) (refusing to consider unpublished case). As these decisions indicate, the judges of the Court of Appeals are split on considering unpublished opinions for persuasive value; "it depends on which judge you get." Telephone Interview with Marty Ring, Dep. Clerk of Va. App. Ct. (Aug. 25, 2003). The unreceptive judges, however, pose no risk of sanctions—only that the cited case won't be considered. *Id.* (Given this fact, as well as the apparent willingness of the courts in the majority of recent cases to consider the cited opinions, I am classifying Virginia as a state that allows citation for persuasive value.)

65. Rule 136.01(b) of Minnesota's Rules of Civil Appellate Procedure provides that unpublished opinions "are not precedential . . . and may be cited only as provided" in Minn. Stat. Ann. § 480A.08(3). That statute says unpublished opinions "must not be cited unless" a copy is provided to opposing counsel. *Id.* Minnesota courts understandably have interpreted this statute as allowing citation for persuasive value. *See Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-801 (Minn. App. 1993); *State v. Rosillo*, 2001 WL 881279 at **3-5 (unpublished).

66. The New Jersey Courts' Rules of General Application, Rule 1:36-3, provides that unpublished opinions shall not "constitute precedent" or "be cited by any court." This rule is regularly ignored, with unpublished opinions commonly cited and considered for their persuasive value. *See e.g. Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.* (unpublished), 2003 WL 1904383 at *6 (N.J. Super. App. Div. Jan. 14, 2003) ("[p]laintiff relies on an unpublished opinion," which court cites and distinguishes); *Creskill Bd. of Educ. v. Creskill Educ. Assn.*, 826 A.2d 778, 783 (N.J. Super. App. Div. 2003) (unpublished opinion "not precedential and is distinguishable on its facts"); *accord* Telephone Interview with Paula Schlosser, Admin. Specialist, N.J. S. Ct. (Aug. 12, 2003) (unpublished cases regularly cited despite rule).

67. Georgia Appellate Court Rule 33(b) says unreported opinions of court of appeals are not precedents. But "there is no rule against" citing them for persuasive value, and that is done, though infrequently. Telephone Interview with William L. Martin III, Clerk, Ga. Ct. App. (Aug. 18, 2003).

68. *See supra* n. 45 and accompanying text.

69. *See supra* n. 46 and accompanying text.

70. Maine has an Administrative Order of the Supreme Judicial Court which states that

5. No-citation states

That leaves what Judge Kozinski calls "mandatory prohibition" states, in which citation is forbidden (except, of course, for related cases). Relying on the Serfass-Cranford data, Judge Kozinski counted thirty-five such states.[73] I now count twenty-five: Alabama,[74] Arizona,[75] Arkansas,[76] California,[77] Colorado,[78] District of Columbia,[79] Florida,[80] Idaho,[81] Indiana,[82]

unpublished Memorandum Decisions and Summary Orders of that court may not be cited "as precedent." S. Jud. Ct. of Me., *New Citation Form* (Aug. 20, 1996). But the court's clerk reports that lawyers do cite such decisions and orders, without incurring sanctions; "it depends on how bold the attorney is." Telephone Interview with James C. Chute, Clerk, S. Jud. Ct. of Me. (Aug. 11, 2003).

71. Oklahoma has conflicting rules for its Supreme Court (civil cases) and its Court of Criminal Appeals. Unpublished opinions of the Supreme Court are not precedential and may not be cited. Okla. S. Ct. R. 1.200(b)(5)-(8); Telephone Interview with Michael Richie, Clerk, Okla. S. Ct., App. Cts., & Ct. of Crim. App. (Aug. 18, 2003). Unpublished opinions of the Court of Criminal Appeals are "not binding" on that court, but may be cited to it, "provided counsel states that no published case would serve as well." Okla. Ct. Crim. App. R. 3.5(C)(3); Richie Interview, *supra* this note. (It might be said that if Oklahoma is on the fence, as I have classified it, so is Texas; Texas now allows citation of unpublished civil cases but not of criminal ones, while Oklahoma does the opposite. The situation in Texas, however, represents a dramatic recent change of policy by an important state.)

72. In Oregon, all opinions of both the Supreme Court and the Court of Appeals are published, and therefore citable. But decisions "affirmed without opinion"—or, in a recent development, reversed without opinion—by the Court of Appeals may not be cited. Or. R. App. P. 5.20(5); Telephone Interviews with Mary Bauman, Ed., Or. Reps. (Aug. 15, 2003; Oct. 30, 2003).

73. *See supra* text accompanying n. 33; Kozinski Testimony, *supra* n. 23, at 12, 17-20.

74. Ala. R. App. P. 53(d).

75. Ariz. S. Ct. R. 111(c); Ariz. R. Civ. App. P. 28(c). But, as in the Ninth Circuit, memorandum decisions may be cited to show a conflict. *See supra* n. 18.

76. Ark. S. Ct. & Ct. App. R. 5-2(d).

77. Cal. R. Ct. 977.

78. Colorado Ct. App., *Policy of the Court Concerning Citation of Unpublished Opinions* (Apr. 2, 1994) (reprinted in 23 Colo. Law. 1548 (July 1994)).

79. D.C. Ct. App. R. 28(h).

80. The Florida Supreme Court has ruled that per curiam affirmances without written opinion have no precedential value and should not be cited to a court, except that they may be cited to the court that issued the decision. *Dept. of Leg. Affairs v. Dist. Ct. of App.*, 434 So. 2d 310, 312-333 (Fla. 1983).

81. Idaho S. Ct. Internal R. 15(f) (copy on file with Journal of Appellate Practice and Process).

82. Ind. R. App. P. 65(D).

Kentucky,[83] Louisiana,[84] Maryland,[85] Massachusetts,[86] Missouri,[87] Montana,[88] Nebraska,[89] Nevada,[90] New Hampshire,[91] North Carolina,[92] Pennsylvania,[93] Rhode Island,[94] South Carolina,[95] South Dakota,[96] Washington,[97] and Wisconsin.[98] Because my count includes four states that Judge Kozinski did not include,[99] there are fourteen states that are counted as no-citation by Judge Kozinski but removed from that column by me, on the basis either of intervening events or of further research.[100]

D. Summary

A summary of my results is shown in the table in the

83. Ky. R. Civ. P. 76.28(4)(c).

84. La. Unif. R. Ct. App. 2-16.3.

85. Md. R. App. Rev. 8-114(b).

86. *Horner v. Boston Edison Co.*, 695 N.E.2d 1093, 1094 (Mass. App. 1998).

87. Mo. Sup. Ct. R. 84.16(b).

88. Mont. Internal Op. R. § I(3)(c) (1996) (available at http://www.lawlibrary.state.mt.us/dscgi/ds.py/Get/File-6441/Montana_Supreme_Court_Rules.pdf) (accessed Dec. 16, 2003; copy on file with Journal of Appellate Practice and Process).

89. Neb. S. Ct. R. 2(E)(4) (available at http://court.nol.org/rules/pracproc.htm) (accessed Dec. 16, 2003; copy on file with Journal of Appellate Practice and Process).

90. Nev. S. Ct. R. 123.

91. N.H. S. Ct. R. 12-D (3); N.H. S. Ct. R. 25(5).

92. N.C. R. App. P. 30(e)(3) (available at http://www.aoc.state.nc.us/www/public/html/pdf/redrules.pdf) (accessed Dec. 16, 2003; copy on file with Journal of Appellate Practice and Process).

93. Pa. R. Cmmw. Ct. I.O.P. § 414; Pa. R. Super Ct. I.O.P. 65.37(A); *accord U.S. v. Saunders*, 29 Fed. Appx. 78 (3d Cir.) (unreported), *cert. denied*, 535 U.S. 1071 (2002); *but see Commonwealth v. Booth*, 729 A.2d 1187, 1189 (Pa. Super. 1999) ("while we consider the arguments made in [unpublished case], we are not bound to follow it").

94. R.I. S. Ct. R. 16(h).

95. S.C. App. Ct. R. 220(a); S.C. App. Ct. R. 239(d)(2).

96. S.D. Codified Laws § 15-26A-87.1(E).

97. Wash. R. App. P. 10.4(h).

98. Wis. Stat. § 809.23(3); *see Tamminen v. Aetna Cas. & Sur. Co.*, 327 N.W.2d 55, 67 (Wis. 1982) (monetary sanction imposed; "violations of the noncitation rule will not be tolerated").

99. Florida, *see supra* n. 80; North Carolina, *see supra* n. 92; Pennsylvania, *see supra* n. 93; and South Carolina, *see supra* n. 95.

100. The fourteen are Alaska, *supra* n. 41; Georgia, *supra* n. 67; Hawaii, *supra* n. 45; Illinois, *supra* n. 46; Iowa, *supra* n. 42; Kansas, *supra* n. 43; Maine, *supra* n. 70; Mississippi, *supra* n. 48; New Jersey, *supra* n. 66; New Mexico, *supra* n. 60; Oklahoma, *supra* n. 71; Tennessee, *supra* n. 61; Texas, *supra* n. 37; Utah, *supra* n. 38.

Appendix. Setting aside the five fence-sitters, I find four states that have either no unpublished opinions or no rule against citation; five states that allow citation of unpublished opinions as precedents; and twelve states that allow citation for persuasive value. That adds up to twenty-one states in which citation is permitted, as compared with the twenty-five states in which it is forbidden. This slim margin would not appear to make the no-citation states today "by far the largest number," as Judge Kozinski reported that they were in 2002.[101] Nor would it seem accurate to say today that "[t]he vast majority of state court systems restrict citation to unpublished decisions, [102] or that "the overwhelming majority of states have adopted a prohibition against citation."[103]

In place of that "vast" and "overwhelming" majority, the two camps today, numbering twenty-five and twenty-one states, seem roughly equal. Moreover, the states allowing citation include populous ones such as New York, Ohio, Texas, Michigan, New Jersey, Virginia, and Georgia. (Indeed, comparing New York and Texas on the one hand with California on the other, one has to wonder how New York can operate its court system with no unpublished opinions from either the Court of Appeals or the Appellate Division and no rules against citing the unpublished opinions that it has;[104] or how Texas in 2003 could make all its civil appellate opinions citable;[105] while California, in contrast, issues ninety-three percent of its court of appeal opinions "unpublished" and refuses to allow their citation.[106] If these other populous states can decide their intermediate appellate cases with citable opinions, why can't

101. Kozinski Testimony, *supra* n. 23, at 15.

102. *Id.* (unless the term "restrict" includes states that permit citation for persuasive value but not as precedent, or states that discourage or disfavor citation of unpublished opinions but allow it). *See infra* pp. 489-94.

103. Kozinski Testimony, *supra* n. 23, at 13.

104. *See supra* n. 49.

105. *See supra* n. 37.

106. Cal. Jud. Council, *2003 Court Statistics Report* 31, tbl. 9 (Admin. Off. of Cts. 2003) (showing percentage of majority opinions published by courts of appeal) (available at http://www.courtinfo.ca.gov/reference/documents/csr2003.pdf) (accessed Dec. 10, 2003; copy on file with Journal of Appellate Practice and Process) [hereinafter *2003 Court Statistics*]; Cal. R. Ct. 977(a).

California?[107])

Whatever the roll call of states between the two camps today, the important thing is the trend. It is unmistakable. Since the Serfass-Cranford data were published in spring 2001, six states have switched from banning citation to allowing it; two more states are considering proposals to do the same; and no state during this period appears to have switched the other way. This clear trend among the states—like that among the federal circuits[108]—is significant not only in its own right. Just as Judge Kozinski argued that a supposed "overwhelming" state preference for no-citation rules showed such rules to be "an important tool in managing the development of a coherent body of caselaw,"[109] so the present trend in the states away from no-citation rules demonstrates something. It shows an increasing recognition by state courts that they can make their opinions citable without impairing performance of their judicial function. The sky does not fall.

III. FEDERAL COURT RULEMAKING

A. Introduction: The Proposed Rule

The weightiest attack on no-citation rules may come from the rulemaking power of the federal judiciary. In May 2003, the U.S. Judicial Conference's Advisory Committee on Appellate Rules approved a proposed new Federal Rule of Appellate

107. California's addiction to unpublished opinions may reflect habits of undue leisure on the part of the state's Court of Appeal justices. One judge who sat for twenty-one years on that court reported that "too many appellate court justices viewed the court as a kind of retirement." Craig Anderson, *Front-Row Seat at the Rerun*, S.F. Daily J. 1 (Dec. 19, 2002) (profile of former justice Marcel Poché). The *average* number of published opinions produced annually by justices of the California Court of Appeal, in the latest year reported, was nine. *See 2003 Court Statistics*, *supra* n. 106, at 20, tbl. 1 (total written opinions of courts of appeal 12,056, and full-time judge equivalents 92.7); *id.* at 31, tbl. 9 (seven percent of opinions published, producing 844 published opinions). It may be asked whether the public is getting its money's worth from appellate judges who produce, on average, well under one citable opinion per month. (The average number of *un*published opinions per judge was 121. *See id.* But unpublished opinions are more likely to be delegated entirely to staff and not to trouble the judge.)

108. *See supra* nn. 4-21.

109. Kozinski Testimony, *supra* n. 23, at 15.

Procedure, FRAP Rule 32.1, that would require all federal circuits to allow citation of their unpublished opinions.[110] The proposed Rule was put out for public comment with a deadline of February 16, 2004;[111] it could take effect, at the earliest, in December 2005.[112]

The proposed Rule 32.1 reads in part: [113]

Rule 32.1: *Citation of Judicial Dispositions*

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

110. *See* Memorandum from Judge Samuel A. Alito, Jr., Chair of Advisory Comm. on App. Rules, to Judge Anthony J. Scirica, Chair of Standing Comm. on Rules of Prac. & Proc., *Report of Advisory Committee on Appellate Rules* 27-36 (May 22, 2003) (proposed Rule at 28-29; Committee Note at 29-36) (available at http://www.uscourts.gov /rules/app0803.pdf) (accessed Nov. 3, 2003; copy on file with Journal of Appellate Practice and Process) [hereinafter *Alito Memorandum*]. The Advisory Committee's vote was seven to one, with one abstention.

The committee defines "unpublished," clumsily but workably, as a "term of art" denoting judicial dispositions "that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like." *Alito Memorandum*, *supra* this note, at 29. Somewhat compulsively, the committee proceeds to put the ubiquitous term "unpublished" in quotation marks throughout its Memorandum. *See e.g. id.* at 30 (proposed rule "says nothing about what effect a court must give to one of its 'unpublished' opinions or to the 'unpublished' opinions of another court").

111. *See Memorandum to the Bench, Bar, and Public on Proposed Amendments to the Federal Rules* (available at http://www.uscourts.gov/rules/memo0803.pdf) (accessed Dec. 12, 2003; copy on file with Journal of Appellate Practice and Process). Public hearings by the Advisory Committee were scheduled for Los Angeles on January 20, 2004, and Washington, D.C., on January 26, 2004. *Id.*

112. The Rule and any comments received will be considered by the Advisory Committee at its spring 2004 meeting. If approved there (with or without modification), the Rule then would have to run the gauntlet of the Standing Committee on Rules (June 2004), the Judicial Conference itself (September 2004), the Supreme Court (by May 1, 2005), and the Congress, before possibly taking effect—if still standing—on December 1, 2005.

113. Part (b) of the proposed Rule provides that a party who cites an unpublished opinion that is "not available in a publicly accessible electronic database" must file and serve a copy of the opinion along with the brief or other paper in which it is cited. *Memorandum to the Bench, Bar, and Public on Proposed Amendments to the Federal Rules*, *supra* n. 111. As noted earlier (*supra* n. 47), such "provide a copy" requirements exist in most jurisdictions where citation of unpublished opinions is allowed; in the following discussion they will generally be taken for granted and not mentioned.

> citation of all judicial opinions, orders, judgments, or other written dispositions.[114]

As one who believes that judicial opinions by their nature should be citable, I applaud the committee's development of this proposed Rule. The committee rightly points out that the conflicting citation rules of the various circuits "create a hardship for practitioners," especially because citing an "uncitable" opinion can bring sanctions or professional discipline.[115] The committee is also correct, I believe, in concluding that no-citation rules are "wrong as a policy matter."[116] In principle, then, the proposed Rule 32.1, in my view, deserves the profession's support.

The way the Rule is presently drafted, however, launches a cascade of questions. I propose to explore these questions and to offer an alternative draft of the Rule (which I'll call "Draft B").

B. Citation and the Weight Given Citation

Perhaps the most conspicuous question raised by the proposed Rule 32.1—or by any rule authorizing citation of unpublished opinions—is the weight to be given to the cited opinions. May they be regarded as "precedents," possibly even binding precedents, or only as "persuasive" authority? And who

---

114. *Alito Memorandum*, *supra* n. 110, at 28-29. A colleague, on encountering this language, thought it so dense and awkward as to need a translation.

115. *See Tamminen v. Aetna Casualty & Sur. Co.*, 327 N.W.2d 55, 67 (Wis. 1982) (sanction imposed); *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) (sanctions not imposed because of good-faith constitutional challenge).

116. *Alito Memorandum*, *supra* n. 110, at 27. The committee further observes, "[I]t is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own 'unpublished' opinions." *Id.* at 33 (emphasis in original). This seems overstated; parties are barred from telling a court, for example, about facts outside the record. *See e.g.* R. S. Ct. U.S. 24-6 ("A brief shall be concise. . . and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph") (available at http://supremecourtus.gov/rulesofthecourt.pdf) (accessed Dec. 30, 2003; copy on file with Journal of Appellate Practice and Process). What can be said is that a *prior judicial decision*, under our system of law based on precedent, is a special kind of information that attorneys have a specially strong claim—arguably a constitutional claim—to be able to disclose to a court when they think it will aid their client's case. *Cf. Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 545 (2001) (congressional ban on use of Legal Services Corp. funds to challenge welfare laws violates First Amendment as attempt to "prohibit the analysis of certain legal issues and to truncate presentation to the courts").

is to decide this question—the Judicial Conference of the United States (overseen by Congress and the Supreme Court), through a national rule, or the individual circuits through their local rules?

There is a case for national uniformity in the weight given unpublished opinions. The nine federal circuits that presently allow citation of unpublished opinions are divided almost evenly in the weight they accord those citations.[117] If one of the goals of Rule 32.1 is to unify divergent citation rules of the circuits,[118] that goal arguably applies as much to weight as to citability.

On the question of weight, though, the value of uniformity does not seem strong enough to overrule circuit choice. There are compelling considerations of judicial integrity, constitutional rights, and public policy that make it "wrong as a policy matter" to prohibit citation of judicial opinions. No equally forceful arguments require the cited opinions to be accorded any particular weight, whether "precedential" or only "persuasive."[119] If nothing else, the considerable variation in circuit practice probably makes it too soon to impose a uniform rule.

The Advisory Committee apparently agrees. The committee is at pains to make clear that its proposed Rule "says nothing whatsoever about the effect that a court must give" to an

117. In five circuits, the First, Eighth, Tenth, Eleventh, and—with respect to opinions issued on or after January 1, 1996—the Fifth, unpublished opinions may be cited not as "precedents," but only for "persuasive" value. *See supra* nn. 4, 10, 12-14. In four circuits, the Fourth, Sixth, D.C., and—with respect to opinions issued before January 1, 1996—the Fifth, such opinions may also be cited as "precedent" (or for "precedential value"). *See supra* nn. 6, 9-11. In the Third Circuit the opinions simply may be cited, with no weight specified in the rule. *See supra* n. 8.

118. *See Alito Memorandum*, *supra* n. 110, at 35. ("Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice . . . .").

119. The "precedential" camp does claim the imprimatur of Article III. *See Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc). But that camp is a minority among the circuits (though a slim one) and does not seem likely, at least for a good while, to obtain Judicial Conference endorsement in preference to the "persuasive" approach. *See supra* n. 117. Moreover, the concepts of "precedential" and "persuasive" authority are not so crystalline and distinct that a rule distinguishing between them could be enforced. On the one hand, there are various levels of precedent. On the other, the "persuasive" effect of any prior decision may be impossible to disentangle, in the mind of a common law judge, from the fact that it *is* a prior decision—and hence, in fact, a precedent. *See* Barnett, *supra* n. 2, at 9-12.

unpublished opinion.[120] "The one and only issue addressed by proposed Rule 32.1 is the ability of parties to *cite* opinions designated as 'unpublished' or 'non-precedential,'" the committee states.[121]

C. "Restrictions" on Citation: Introducing Draft B

Despite this assurance, under the present drafting it is not clear that the proposed Rule 32.1 does preserve circuit choice on the question of citation weight. When the proposed Rule says, "No prohibition or restriction may be imposed upon the citation of [unpublished] judicial opinions," what does "restriction" mean? If a circuit's rule provides—as several do[122]—that unpublished opinions may be cited only for their "persuasive" value, is that not a "restriction" on their citation? One might think so. And if so, it would follow that circuit rules limiting citation to persuasive value are forbidden by Rule 32.1, because no such limit is imposed on the citation of published opinions.[123]

Two possible remedies come to mind. One is legislative history, or drafter's gloss. The Committee Note might declare the committee's view that the Rule deals only with citability and "says nothing whatsoever about the effect that a court must give" to the cited opinions.[124] If we may assume that the judges and lawyers operating in the federal appellate courts have no aversion to legislative history,[125] this approach might produce the committee's desired interpretation of its Rule.

The other approach would proceed on the basis that if you

120. *Alito Memorandum*, *supra* n. 110, at 28.

121. *Id.* (emphasis in original).

122. *See supra* n. 117.

123. In an apparent effort to avoid this problem, the committee minimizes the differences that exist among the circuits with respect to the weight given to citations of unpublished opinions, downplaying in particular the extent to which those opinions are treated as precedents. Thus, the committee says that "the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of 'unpublished' opinions for their persuasive value," *Alito Memorandum*, *supra* n. 110, at 31, without mentioning that the circuits have differed even more dramatically with respect to the restrictions they have placed on citation of unpublished opinions for their precedential value. *See supra* n. 117.

124. *Alito Memorandum*, *supra* n. 110, at 28.

125. *But see e.g.* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutman ed., Princeton U. Press 1997).

want to permit citation, you might just say that citation is permitted.[126] Draft B thus would simply provide:

> Any opinion, order, judgment, or other disposition by a federal court may be cited to or by any court.

This language would make quite clear the committee's view that the Rule deals only with permitting citation and says nothing about the weight to be given citations. Draft B also would take the lead out of the drafting. You don't have to be Bryan Garner to object to the present draft's double negative ("[n]o prohibition)"; its vast passive ("may be imposed"); its awkward laundry list of unpublished dispositions; or its backhanded approach of making opinions citable by banning restrictions on citation.

Before concluding, however, that the elegant Draft B should replace the committee's cumbersome Draft A, it is necessary to consider how each draft would handle a major problem that will arise.

D. Discouraging Words

This is the problem of discouraging words. Although nine of the thirteen circuits now allow citation of their unpublished opinions, all nine discourage the practice; they all have language in their rules stating that such citation is "disfavored," that unpublished opinions should not be cited unless no published opinion would serve as well, that the court "sees no precedential value" in unpublished opinions, and so forth.[127] The question is whether such discouraging words are a forbidden "restriction" on citation under proposed Rule 32.1.

The Advisory Committee addresses this question with the following Delphic pronouncement:

> Unlike many of the local rules of the courts of appeals,

126. The committee does just say that in the two-word preamble to its Rule: "*Citation permitted.*" This language does not seem operational, however, because it does not say citation *of what* is permitted. Instead, the drafters turn to a prohibitory approach and forbid any "prohibition or restriction" on citation. Under this approach, to know what is permitted you have to know what is a "prohibition or restriction."

127. *See supra* nn. 8-15.

> Rule 32.1(a) does not provide that citing "unpublished" opinions is "disfavored" or limited to particular circumstances (such as when no "published" opinion adequately addresses an issue). Again, it is difficult to understand why "unpublished" opinions should be subject to restrictions that do not apply to other sources.[128]

The first sentence of this passage does not say that Rule 32.1 would overrule those local rules—only that it is "[u]nlike" them. The second sentence, however, characterizes the discouraging words as "restrictions," so in the committee's apparent view, Rule 32.1 *would* overrule them.

Four questions follow: (1) *Are* discouraging words "restrictions" on citation under Rule 32.1? (2) What difference, if any, does it make? (3) What is the risk of judicial resistance to no-citation rules, through discouraging words or other means? and (4) *Should* discouraging words be forbidden?

1. Are discouraging words "restrictions" under Rule 32.1?

The committee's statement notwithstanding, it is not clear that discouraging words have to be considered "restrictions" on citation under the proposed Rule 32.1. These words may be wholly admonitory—and unenforceable. The Fourth Circuit's rule, for example, states that citing unpublished opinions is "disfavored," but that it may be done "[i]f counsel believes, nevertheless, that [an unpublished opinion] has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well."[129] On the question of what counsel "believes," surely counsel should be taken at her word; counsel's asserted belief that an unpublished opinion has precedential or persuasive value should not be considered a falsifiable fact. Hence no sanction should be available for violating the Fourth Circuit's rule, and the rule's discouraging language in turn would not be a "prohibition or restriction" that was barred by Rule 32.1 as presently drafted.

In the rules of some other circuits, however, the language disfavoring citation of unpublished opinions is unmoored from anyone's "belief" and arguably does impose an objective

128. *Alito Memorandum, supra* n. 110, at 34.

129. *See supra* n. 9.

"prohibition or restriction" determinable by a court.[130] A court might find, for example, that the required "persuasive value with respect to a material issue that has not been addressed in a published opinion"[131] was not present, and hence that the citation was not permitted by the circuit rule.

With what result? It would follow, paradoxically, that the opinion could be cited—because the circuit rule would be struck down under Rule 32.1 as a forbidden "restriction" on citation.

The committee's double-negative drafting thus creates a Hall of Mirrors in which citation of an unpublished opinion would be allowed either way. If the local rule's discouraging language is merely hortatory, it is not a "restriction" forbidden by Rule 32.1; but that doesn't matter, because such a rule does not bar the citation in the first place. If, on the other hand, the local rule's language has bite and is a "restriction," then Rule 32.1 strikes it down, and again the citation is permitted.

2. What difference does it make whether discouraging words are "restrictions"?

There is one live question, however, that would turn on whether a local rule's discouraging language constituted a "restriction" on citation. If the language was a restriction, it would be condemned by Rule 32.1[132] *and so presumably would have to be removed from the local circuit rule*. Each circuit's rule thus would have to be parsed to determine whether its discouraging words were purely hortatory or legally enforceable; and each circuit thus would have to decide—subject to review by the Judicial Conference?—which of its discouraging words it could keep.

This not only would present each circuit with a tricky job of drafting or redrafting. More importantly, imposing this task

130. The Tenth Circuit's rule, for example, states that although citation of unpublished opinions is "disfavored," such an opinion 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." *See supra* n. 13. There is nothing here about what counsel "believes."

131. *See supra* n. 130.

132. That Rule, of course, provides that "no prohibition or restriction may be imposed."

on the circuits, and thus invalidating many of their existing rules, could well forfeit the political support from the circuits that Rule 32.1 needs to survive the Judicial Conference and its committees.

Here again, Draft B may come to the rescue. Its simple statement that unpublished opinions "may be cited" would trump whatever a local rule might say to disfavor or discourage citation. There would thus be no "prohibition or restriction" on citation, and hence no need to rewrite all the local rules to remove the discouraging words.

3. The risk of judicial resistance

Before concluding that the permissive Draft B works better than the prohibitory Draft A, however, one must ask how the two versions would stand up, respectively, to possible opposition by adamant anti-citationists. The committee reportedly chose the prohibitory Draft A over a permissive Draft B out of concern that, the Rule's permission notwithstanding, a recalcitrant circuit might impose some "prohibition or restriction" that would make it difficult or impossible for attorneys to cite unpublished opinions.[133] This fear of a rogue circuit defying duly adopted Federal Rules seems overblown (if not fantastic).

A circuit might more plausibly react, however, not by restricting attorneys in what they can cite, but by restricting the circuit judges themselves. The Third Circuit, for example, while allowing attorneys to cite unpublished opinions, has an announced "tradition" that it will not itself cite those opinions.[134]

It might be said that such foreswearance by judges should not bother lawyers, who remain free to cite unpublished opinions *to* the judges. But surely a lawyer's chance of prevailing in her case is greater if the judge can cite the authority on which the lawyer and the judge rely. In practice, then, a court's policy of not itself citing unpublished opinions may undermine the right of attorneys to cite those opinions. So if a

133. It reportedly has been suggested, for example, that a circuit's local rule might require permission of the court clerk before citing one of the court's unpublished opinions.

134. *See* 3d Cir. I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority."); *see also supra* n. 8.

rule is adopted that allows citation of unpublished opinions, policies by which courts foreswear citing those opinions should be eliminated.

For this purpose, the committee's more explicit Draft A might be more effective than my Draft B.[135] No explicit command should be needed, however. Federal circuit judges can be expected to obey the Federal Rules of Appellate Procedure, and to do so in spirit as well as in letter. It therefore should be sufficient, if a rule is adopted stating that unpublished opinions "may be cited," to include in the Committee Note a statement that judicial policies, practices, or traditions of not citing such opinions therefore should be lifted.[136]

4. Should discouraging words be allowed?

Finally, whether or not discouraging words would violate Rule 32.1, there remains the normative question whether such words should be allowed to persist in a circuit's rules. The Advisory Committee apparently thinks not, embracing equal rights for published and unpublished opinions.[137] I disagree.

135. Draft A presumably would ban the Third Circuit's "tradition" of non-citation, deeming it a forbidden "prohibition" or "restriction." Draft B, stating only that unpublished opinions "may be cited," would not on its face strike down self-imposed practices of not citing.

136. If a more explicit approach is considered necessary, an effective one can be found short of Draft A. One could retain Draft B—

> (1) Any opinion, order, judgment, or other disposition by a federal court may be cited to or by any court —

and add a second paragraph:

> 2) No federal court may decline to consider or to cite any judicial disposition on the ground that such disposition has been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

This approach, no less than Draft A, would expressly invalidate the no-citation-by-judges policy now existing in the Third Circuit, as well as any such policies or rules that might be devised in the future to undermine citability. (The Third Circuit judges avowedly "decline to . . . cite" opinions because they are unpublished.) At the same time, the new language would be limited to judicial words or actions that specifically "decline to consider or to cite" any disposition on the ground of its being unpublished. This language would avoid the vagueness of the term "restriction" in the present Draft A; it thus would avoid having to parse the discouraging words in each circuit's rule to determine whether those words represent a "restriction" and have to be removed.

137. "[I]t is difficult to understand why 'unpublished' opinions should be subject to restrictions that do not apply to other sources." *Alito Memorandum, supra* n. 110, at 34.

Discouraging words have been adopted by all the circuits—and many of the states—that allow citation of unpublished opinions, and I think with reason. Unpublished opinions are different from published ones. This is partly because the courts give them "published" status in traditional case reporters, but more importantly, because unpublished rulings do not get as much attention and consideration from judges as published rulings do. Given these differences, courts treat unpublished opinions as second-class precedents in various ways—for example, by regarding them as citable only for "persuasive" value and not as precedents. If unpublished opinions may be treated that way after they have been decided, the same logic indicates that citation of those opinions may be discouraged beforehand—as long as the citation is *allowed*.[138]

In the longer term, the discouraging words are likely to prove needless. As the Advisory Committee points out, citing an unpublished opinion "is usually tantamount to admitting that no 'published' opinion supports a contention, [so] parties already have an incentive not to cite 'unpublished' opinions."[139] But as long as the local rule's admonitions against citation are only admonitions, so the decision on citation remains wholly and freely up to the lawyer, no harm appears in letting circuits maintain the second-class status of unpublished opinions. If words discouraging citation will reassure judges and lawyers as they venture into a new world of citable judicial opinions, toleration of such comforting judicial speech is not too high a price to pay.

IV. CONCLUSION

The citadel of no-citation rules is falling. There is a clear trend, both in the individual federal circuits and in the states, toward abandoning those rules. Nine of the thirteen circuits now allow citation of unpublished opinions. And while a majority of the states still prohibit such citation, the margin is slim and dwindling. Rule 32.1, proposed by the Federal Rules Advisory

138. *See also* Barnett, *supra* n. 2, at 22 (in defense of treating unpublished opinions as second-class precedents).

139. *Alito Memorandum*, *supra* n. 110, at 34.

Committee, accords with this trend and deserves the support of the legal profession.

At the same time, the Rule's drafting should be reconsidered. Its double-negative approach—forbidding any "prohibition or restriction" on citation—should be replaced with a statement that unpublished opinions "may be cited." This change would make it clear that the forbidden "restriction[s]" do not include local circuit rules stating either (a) that unpublished opinions may be cited only for "persuasive value," or (b) that citation of unpublished opinions is "disfavored," or the like, or should not be done unless there is no published opinion that serves as well ("discouraging words"). Discretion to employ statements of both kinds should be left, for now, to the individual circuits. The Advisory Committee is correct, however, on the fundamental proposition that decisions of the federal courts should be citable in those courts.

APPENDIX

State Court Rules on Citation of Unpublished Opinions 2003

I All Opinions Freely Citable*	II Citable as Precedent	III Citable for Persuasive Value	IV Too Close to Call	V Citation Prohibited
Connecticut	Delaware	Alaska	Hawaii	Alabama Arizona
Mississippi	Ohio	Georgia	Illinois	Arkansas
New York	Texas	Iowa	Maine	California
North Dakota	Utah	Kansas	Oklahoma	Colorado
	West Virginia	Michigan	Oregon	District of Columbia
		Minnesota		Florida Idaho
		New Jersey		Indiana Kentucky
		New Mexico		Louisiana
		Tennessee		Maryland
		Vermont		Massachusetts
		Virginia		Missouri Montana
		Wyoming		Nebraska Nevada
				New Hampshire
				North Carolina
				Pennsylvania
				Rhode Island
				South Carolina
				South Dakota
				Washington
				Wisconsin
4	5	12	5	25
21 Citation States				25 No-Citation States

*These states either publish all opinions or place no restrictions on the citation of unpublished opinions.

Stephen Barnett
<barnetts@law.berkeley.edu>
Sent by:
barnetts@law.berkeley.edu

01/06/2004 07:52 PM

To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Proposed New FRAP Rule 32.1

03-AP-032
Addendum 2:
Article

These Comments on proposed FRAP Rule 32.1 consist of the attached article, "From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules," 4 Journal of Appellate Practice and Process 1 (2002.

Thank you.

Stephen R. Barnett

Tel: 510-654-5394
Fax: 510-653-6119
barnetts@law.berkeley.edu

JAPPfinal.doc

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAYS

FROM *ANASTASOFF* TO *HART* TO WEST'S *FEDERAL APPENDIX*: THE GROUND SHIFTS UNDER NO-CITATION RULES

Stephen R. Barnett*

I. INTRODUCTION: A FAST-PACED YEAR

Last year's mini-symposium on unpublished opinions[1] seems to have unleashed a wave of further developments. The fast-breaking events include these:

1. Judge Richard S. Arnold's opinion for the Eighth Circuit in *Anastasoff v. United States*,[2] holding—until vacated as moot—that the circuit's rule denying precedential effect to unpublished opinions exceeded the Article III judicial power,

* Elizabeth J. Boalt Professor of Law, University of California, Berkeley. I thank the several federal circuit judges, the many court officials, and the West Group representative who spoke to me for this essay. I also thank Bob Berring for helpful comments, Florence McKnight for research assistance, and the reference staff of the Boalt Hall Library.

1. Anastasoff, *Unpublished Opinions, and "No Citation" Rules*, 3 J. App. Prac. & Process 169 (2001).

2. 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

has been ringingly answered by Judge Alex Kozinski's opinion for the Ninth Circuit in *Hart v. Massanari*.[3]

2. The American Bar Association's House of Delegates has declared that the practice of some federal circuits in "prohibiting citation to or reliance upon their unpublished opinions" is "contrary to the best interests of the public and the legal profession."[4] The ABA urges the federal appellate courts to "make their unpublished opinions available through print or electronic publications [and] publicly accessible media sites," as well as to "permit citation to relevant unpublished opinions."[5]

3. In a startling action that drains the meaning from the term "unpublished" opinion, the West Group in September 2001 launched its *Federal Appendix*.[6] This is a new case-reporter series in West's National Reporter System that consists entirely of "unpublished" opinions from the federal circuit courts of appeals (except, currently, the Fifth and Eleventh Circuits).[7] By late April 2002, West had published twenty-seven volumes of the *Federal Appendix*, averaging some 400 cases per volume,

3. 266 F.3d 1155 (9th Cir. 2001). Meanwhile, two federal appeals cases in which panels refused to follow unpublished opinions have drawn pro-*Anastasoff* dissents. *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001), *petition for reh. en banc denied*, 256 F.3d 260 (5th Cir. 2001) (Smith, Jones & DeMoss, JJ., dissenting); *Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1368 (Fed. Cir. 2002) (Newman, J., dissenting). *See infra* n. 72.

4. American Bar Association, Sections of Litigation, Criminal Justice, Tort and Insurance Practice and Senior Lawyers Division, *Report to the House of Delegates*, Resolution No. 01A115 (Aug. 1, 2001).

5. *Id.*

6. *See* West Group Press Release, *West Group Launches New National Reporter System Publication for Unpublished Decisions* (Sept. 5, 2001) (copy on file with author). The press release explained that "many legal researchers want access to unpublished opinions because they often include relevant fact situations and particular applications of settled law." *Id.* It stated that "all U.S. Court of Appeals unpublished decisions" issued from January 1, 2001, would be included, and that each case would "receive full West Group editorial enhancements, be given a new citation and be made available in print in the *West's Federal Appendix* volumes, on CD-ROM and on Westlaw." *Id.*

7. In line with their policy of denying online access to their unpublished opinions (while allowing citation of them), *see infra* nn. 12, 27-28 and accompanying text, the Fifth and Eleventh Circuits make available to West only the information needed for the Decisions Without Published Opinions tables in the Federal Reporter. Telephone Interviews with West Group representative (Jan. 10, 2002, Mar. 4, 2002, May 3, 2002). (All interviews for this essay with judges, court personnel, and West Group representatives were conducted on the understanding that the sources' identities would not be disclosed. Redacted notes of each interview are on file with the author.)

and was expecting to report some 12,000 cases per year.[8] The cases in the *Federal Appendix* are supplied with headnotes, indexed to West's Key Number system, garnished with the other "editorial enhancements" of West's reporting system, and christened with their own citation form: "__ Fed. Appx. __." Except for its citation restrictions,[9] the Federal Appendix looks, reads, and quacks like a book of "published" case reports. If nothing else, West's action is requiring that definitions of "unpublished" be radically revised.[10]

4. The most significant move by the federal courts has come from the District of Columbia Circuit. Effective January 1, 2002, that court abandoned its no-citation rule and declared that all unpublished opinions issued on or after that date "may be cited as precedent."[11] Meanwhile, the Third Circuit has become

8. Telephone Interview with West Group representative (Mar. 4, 2002); *see also e.g.* West's *Federal Appendix*, vol. 27 (West Group 2002).

9. West runs a disclaimer on each volume's title page and on the report of each case, stating that the cases "have not been selected for publication in the Federal Reporter." This implies, misleadingly, that West has made some sort of case-by-case selection, and it fails to state the central point that the cases are all "unpublished." However, the title-page notice does advise readers to "consult local court rules to determine when and under what circumstances these cases may be cited," and each case bears a notice reciting whatever formula the issuing circuit employs to designate its unpublished opinions and restrict their usage. *See e.g. U.S. v. Martini*, 27 Fed. Appx. 1 (1st Cir. 2001) ("[NOT FOR PUBLICATION—NOT TO BE CITED AS PRECEDENT]").

10. The First Circuit reacted with instant alarm, hurriedly amending its rules to redefine a "published opinion" as "one that appears in the ordinary *West Federal Reporter* series (*not* including *West's Federal Appendix*)." 1st Cir. Interim Loc. R. 36 (b)(2)(F) (Sept. 24, 2001) (emphasis in original). *See also* 8th Cir. R. 28A(i) (amended Jan. 16, 2002) ("Unpublished decisions are decisions which a court designates for unpublished status"). The need for other rule-makers to take similar steps is suggested in Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. App. Prac. & Process 199, 205-206 (2001) ("In regard to federal circuit court opinions, 'unpublished' appears to mean that the opinion is not available in print.").

11. D.C. Cir. R. 28(c)(12)(B). A companion rule advises counsel, however, that "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition." D.C. Cir. R. 36(c)(2). The D.C. Circuit simultaneously amended its *Handbook of Practice and Internal Procedures* to caution that while the new rule "makes a major change in the Court's practice," and while counsel "will now be permitted to argue that an unpublished disposition is binding precedent on a particular issue," the court's decision to issue an unpublished disposition "means that the Court sees no precedential value in that disposition, . . . i.e., the order or judgment does not add anything to the body of law already established and explained in the Court's published precedents." D.C. Cir., *Handbook of Practice and Internal Procedures* 42, 52 (as amended through Jan. 1, 2002). Further, "counsel should recognize that the Court believes that its published precedents already establish and adequately explain the legal principles applied

the eleventh of the thirteen federal circuits to post its unpublished opinions online and make them available to legal publishers.[12]

5. The action by the D.C. Circuit tips the balance in the federal courts against no-citation rules. Of the thirteen circuits, there remain only five—the First,[13] Second,[14] Seventh,[15] Ninth,[16] and Federal[17]—that ban citation of unpublished

in the unpublished disposition, and that there is accordingly no need for counsel to base their arguments on unpublished dispositions." *Id.* at 41.

Asked why they made the rule change, two D.C. Circuit judges called the move "long overdue" and mentioned variously the *Federal Appendix*, the *Anastasoff* opinion, the broad availability of unpublished opinions through online sources and elsewhere, and that "we don't like secret law." Telephone Interviews with D.C. Cir. judges (Jan. 11, 2002, Feb. 28, 2002).

12. *See* 3d Cir. Press Release (Dec. 5, 2001) (announcing that as of January 2, 2002, all court opinions in counseled cases "will be posted on the court's web site . . . and available for dissemination by legal publishers"; the court, however, will continue to observe Internal Operating Procedure (I.O.P.) 5.8, "which provides that the *court* will not cite to non-precedential opinions as authority") (emphasis in original) (available at <http://www.ca3.uscourts.gov/> (accessed Apr. 4, 2002; copy on file with *Journal of Appellate Practice and Process*)). This surrender to the online world was an about-face for the Third Circuit. Until this year it had been "generally considered that the Third, Fifth and Eleventh circuits have banned electronic dissemination of unpublished opinions, and these cases are neither added to Westlaw or LEXIS nor available from the courts' websites." Hannon, *supra* n. 10, at 211. The Third Circuit clarified its new procedures in late February, announcing that opinions in counseled cases will now be labeled either "precedential" or "not precedential," and that "the court will continue to observe its practice of not citing not precedential opinions as authority." 3d Cir. Press Release (Feb. 21, 2002) (available at <http://www.ca3.uscourts.gov>) (accessed Apr. 14, 2002; copy on file with *Journal of Appellate Practice and Process*)).

The Fifth Circuit, on the other hand, lost heart. After announcing that it would put its unpublished opinions online, in late January 2002 it reconsidered and decided to maintain the status quo. Telephone interview with Fifth Cir. official (Feb. 1, 2002). *See also* 5th Cir. Website FAQ ("*Only opinions designated for publication (published opinions) are put on our website.*") (emphasis in original) (available at <http://www.ca5.uscourts.gov> (accessed Mar. 25, 2002; copy on file with *Journal of Appellate Practice and Process*)).

13. *See* 1st Cir. R. 36(b)(2)(F) (unpublished opinions may be cited "only in related cases").

14. *See* 2d Cir. R. 0.23 (citation of written statements attached to summary orders prohibited, since they "do not constitute formal opinions of the court and are unreported or not uniformly available to all parties").

15. *See* 7th Cir. R. 53(b)(2)(iv) (unpublished orders "shall not be cited or used as precedent").

16. *See* 9th Cir. R. 36-3 (unpublished dispositions "not binding precedent" and "may not be cited") A provisional rule in effect for the thirty-month period ending December 31, 2002, allows citation of unpublished dispositions in petitions for rehearing or rehearing en

opinions (except, of course, for related-case uses such as *res judicata*). The other eight circuits discourage citation of unpublished opinions, typically calling it "disfavored," but grudgingly allow it. They do this generally under one of two formulas—(1) that the opinions may be cited as "precedent" or for "precedential value" (the Fourth,[18] Sixth,[19] and D.C.[20] Circuits), or (2) that they are "not precedent" but may be cited for their "persuasive" value (the Fifth,[21] Eighth,[22] Tenth,[23] and Eleventh[24] Circuits). The Third Circuit, a loner, uses no formula but allows citation.[25]

---

banc and in requests to publish an opinion, but only for the purpose of showing conflict among published and/or unpublished dispositions. *Id.* R. 36-3(b)(iii).

17. *See* Fed. Cir. R. 47.6(b) (opinion or order "designated as not to be cited as precedent . . . must not be employed or cited as precedent").

18. *See* 4th Cir. R. 36(c) (citation of unpublished opinions "disfavored," but "[i]f counsel 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, such disposition may be cited").

19. *See* 6th Cir. R. 28(g) (citation of unpublished decisions "disfavored," but "[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, such decision may be cited") .

20. *See* D.C. Cir. R. 28(c) (unpublished orders entered before January 1, 2002, "are not to be cited as precedent," but ones entered on or after January 1, 2002, "may be cited as precedent"). *See also* D.C. Cir. R. 36(c)(2) (panel's decision to issue unpublished disposition "means that the panel sees no precedential value in that disposition"); *D.C. Circuit Handbook*, *supra* n. 11, at 42, 52.

21. The Fifth Circuit uses both formulas, depending on when the opinion was issued. *See* 5th Cir. R. 47.5.3 (unpublished opinions issued before January 1, 1996, "are precedent," but "because every opinion believed to have precedential value is published," unpublished opinions "normally" should not be cited); 5th Cir. R. 47.5.4 (unpublished opinions issued on or after January 1, 1996, are "not precedent"; such opinions "may, however, be persuasive," and may be cited).

22. *See* 8th Cir. R. 28A(i) (unpublished opinions "are not precedent and parties generally should not cite them," but parties may do so if the opinion "has persuasive value on a material issue and no published opinion of this or another court would serve as well").

23. *See* 10th Cir. R. 36.3 (unpublished decisions "are not binding precedents," and their citation is "disfavored"; but an unpublished decision may be cited if it has "persuasive value with respect to a material issue that has not been addressed in a published opinion" and it would "assist the court in its disposition").

24. *See* 11th Cir. R. 36-2 (unpublished opinions "are not considered binding precedent," but "may be cited as persuasive authority"); *see also* 11th Cir. R. 36-3, I.O.P. 5 (stating that "[o]pinions that the panel believes to have no precedential value are not published," and that "[r]eliance on unpublished opinions is not favored by the court").

25. *See* 3d Cir. I.O.P. 5.8 (explaining that "the court by tradition does not cite its unpublished opinions as authority"); 3d Cir. Press Release, Dec. 5, 2001 ("The court will continue to observe Internal Operating Procedure 5.8, which provides that the *court* will

The balance tips toward citability in numbers of cases as well. The citable unpublished cases from the eight territorial circuits that allow citation total some 15,000 per year, while the noncitable cases from the four territorial circuits that ban citation total about half that.[26] It should be noted, however, that the Fifth and Eleventh Circuits, which each put out more than 3,000 unpublished opinions per year, withhold those opinions from online distribution (or West's *Federal Appendix*), while schizophrenically allowing them to be cited.[27] It appears, nonetheless, that these opinions are not effectively suppressed and in fact are cited. [28]

6. While this essay focuses on the federal courts, there is noteworthy movement in the state courts as well. In what would be a seismic shift, the Texas Supreme Court has tentatively decided to lift the "Do Not Publish" stamp now affixed to some eighty-five percent of the opinions of the Texas court of appeals and to "remove prospectively any prohibition against the citation

not cite to non-precedential opinions as authority." (emphasis in original)). In stating carefully that "the court" does not cite to unpublished opinions, the Third Circuit tacitly allows lawyers to do so. Telephone Interview with 3d Cir. official (Jan. 9, 2002) (First Amendment cited as reason for the policy).

26. *Judicial Business of the United States Courts, 2001*, tbl. S-3 (available at <http://www.uscourts.gov/judbus2001/tables/s03Sep00.pdf> (accessed April 20, 2002; copy on file with *Journal of Appellate Practice and Process*)). The eight "citable" circuits have 14,806 unpublished cases, while the four noncitable circuits have 7,114. *Id.* (The Federal Circuit is not included in Table S-3, so the number of unpublished cases it issues is not available. Telephone Interview with Fed. Cir. official (Jan. 11, 2002). The statistics show a total of 1,500 case dispositions for the Federal Circuit, but do not indicate how many of them are unpublished. *See Judicial Business*, at tbl. B-8.)

27. *See supra* nn. 7, 12, 21, 24.

28. An official in the Fifth Circuit reports that the unpublished opinions of that court are not uncommonly cited and that lawyers obtain them principally in two ways: (1) Lawyers who practice in a given area (immigration law, for example) have their own "networks" within which relevant unpublished opinions are passed around and even bound into mini-collections; law offices such as those of the U.S. Attorney and Public Defender also collect opinions relevant to their work; and (2) the opinions are available in chronological binders in the circuit's library. Telephone Interview with 5th Cir. official (Mar. 15, 2002); *see also Williams v. Dallas Area Rapid Transit*, 242 F.3d at 318 n. 1 (discussing unpublished Fifth Circuit cases). In the Eleventh Circuit, two court officials state that unpublished opinions are cited. One reports that "some of the larger law offices keep track" of the opinions, in some cases "running their own data banks." The other notes that the opinions are available in the court clerk's office and that unpublished opinions are commonly cited in briefs filed with that circuit. Telephone Interviews with 11th Cir. officials (Jan. 11, 2002, Mar. 15, 2002).

of opinions as authority."[29] Meanwhile, California's court of appeal, which brands some ninety-four percent of its opinions "unpublished,"[30] has begun posting all its unpublished opinions on the court's website.[31] Citation is still prohibited, but the technological (and psychological) infrastructure is in place for possible pressure to follow a Texas lead.

Against the backdrop of these developments, I shall in this Essay first appraise the face-off between Judge Arnold and Judge Kozinski in *Anastasoff* and *Hart*, setting their disagreement about "precedent" against the spectrum of meanings which that word may convey. I will argue that Judge Kozinski's opinion in *Hart*, for all its scholarly brilliance, demonstrates, in part, something different from what he may have intended. I will then consider Judge Kozinski's arguments against no-citation rules, finding them inadequate, and will conclude by considering the degree of "precedential" force that unpublished opinions should be accorded in the federal courts.

---

29. Texas Supreme Court, *Comparison of Advisory Committee TRAP Recommendations and Supreme Court's Tentative Conclusions* 12-15 (Jan. 14, 2002) (addressing Rule 47.7) (available at <http://www.supreme.courts.state.tx.us/rules/Committee/> (accessed Mar. 26, 2002; copy on file with *Journal of Appellate Practice and Process*)). The court was divided on the issue of retroactivity and sought further guidance from its Advisory Committee, with a final decision expected by summer of 2002. Telephone Interviews with Tex. Sup. Ct official (Jan. 10, 2002, Feb. 1, 2002, Mar. 28, 2002).

The debate over unpublished opinions has become something of a public issue in Texas, with several of the state's leading newspapers editorializing in favor of the proposed rule change. *See e.g. Publish or Perish: Unpublished Appellate Court Opinions Corrode Texas Law*, Houston Chron. 2C (Dec. 9, 2001); *Court Blackout: Too Many Opinions Are Kept Under Wraps*, Dallas Morning News 14A (Dec. 31, 2001); *Court Opinions Should Become Public*, San Antonio Express-News 2G (Dec. 16, 2001) (characterizing no-citation rules as "unfair to Texans who must pick their judges in the voting booth"); *Editorial*, Forth Worth Star-Telegram 10 (Dec. 17, 2001) ("One would think that, any time a Texas appeals court issues a ruling, anyone could find it in the law books and rely on it to make an argument in one's own case. One would be wrong.").

30. *See* Cal. R. Ct. 977(a); Jud. Council of Cal., Admin. Off. of the Cts., *2001 Court Statistics Report, Courts of Appeal*, tbl. 9 (available at <http://www.courtinfo.ca.gov/> (accessed Mar. 21, 2002; copy on file with *Journal of Appellate Practice and Process*)).

31. *See Unpublished Opinions* (available at <http://www.courtinfo.ca.gov/opinions/nonpub.htm/> (accessed May 8, 2002; copy on file with *Journal of Appellate Practice and Process*)).

II. *ANASTASOFF*, *HART*, AND THE SPECTRUM OF PRECEDENT

A. Anastasoff *and* Hart

Amid the continued controversy over unpublished opinions and the uses of precedent, the debate between Judge Arnold in *Anastasoff* and Judge Kozinski in *Hart* focuses, perhaps surprisingly, on one facet of this subject. These two intellectual heavyweights go to the mat over whether Article III requires that all decisions of the federal courts of appeals be regarded as "binding precedents." Judge Arnold finds from his examination of eighteenth-century sources that "[t]he Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases."[32] He thus concludes—given the "law-of-the-circuit" rule, under which a panel's decision cannot be overruled by another panel, but only by the court en banc[33]—that his panel was required to follow an unpublished Eighth Circuit decision.[34] Judge Arnold further concludes that the Eighth Circuit's Rule 28A(i), stating that unpublished opinions "are not precedent," purports to "expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional."[35]

In *Hart*, Judge Kozinski—who, like Judge Arnold, had previously written extra-judicially on this subject[36]—seized on the opportunity presented by a lawyer who cited an unpublished Ninth Circuit opinion and then defended his violation of the court's no-citation rule by arguing that the rule was unconstitutional under *Anastasoff*. Meeting Judge Arnold on his chosen ground of eighteenth-century history, Judge Kozinski offers a scholarly account that refutes *Anastasoff*'s claim of a

32. 223 F.3d at 902.

33. *Id.* at 904; *see* n. 41 *infra* and accompanying text.

34. The issue was the scope of the "mailbox rule" for filing federal tax refund claims. *See Anastasoff*, 223 F.3d 898.

35. 223 F.3d at 900. Judge Arnold's opinion was vacated as moot when the Government acceded to the contrary decision of another circuit. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

36. *See* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!* 20 Cal. Law. 43 (June 2000); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999).

historically-based constitutional requirement of binding precedent. The modern concept of binding precedent required two conditions, reliable case reports and a settled hierarchy of courts, that were not in place until at least the mid-nineteenth century, Judge Kozinski points out.[37] When the Constitution was drafted, then, it was "emphatically not the case that all decisions of common law courts were treated as precedent binding on future courts unless distinguished or rejected."[38] Judge Kozinski's panel thus declines to follow *Anastasoff* and holds the Ninth Circuit's no-citation rule constitutional.[39]

Fascinating as this historical duel is, the opinions by Judge Arnold and Judge Kozinski deal with only one variety of precedent. That word can mean many things; "binding" precedent is only one of those things, and arguably not the most important for the current debate. Although the categories overlap and the lines blur, one can identify at least five species of precedent that may be relevant to this discussion.

B. The Spectrum of Precedent

1. *Binding precedent.* "Binding" precedent is what the shouting is about in *Anastasoff* and *Hart*. It is the rule, as stated by Judge Kozinski, that a court's decision "must be followed by courts at the same level and lower within a pyramidal judicial hierarchy."[40] By virtue of the words "at the same level," this formulation incorporates in the concept of binding precedent the law-of-the-circuit rules, existing in all circuits, which mandate that only the en banc court can overrule a panel decision.[41]

37. 266 F.3d at 1164 n. 10 (*quoting* R.M.W. Dias, *Jurisprudence* (2d ed., Butterworth 1964)).

38. *Id.* at 1167.

39. The court also held that the rule (9th Cir. R. 36-3) had been violated, but declined to impose sanctions in view of the attorney's good-faith constitutional challenge. 266 F.3d at 1180. Attorneys who henceforth cite unpublished cases in the Ninth Circuit presumably cannot expect such leniency, at least not from Judge Kozinski. *But cf. U.S. v. Rivera-Sanchez*, 222 F.3d 1057, 1063 (9th Cir. 2000) (court asks counsel to submit list of unpublished opinions superseded by its decision and cites them in its opinion, "[t]o avoid even the possibility that someone might rely upon them").

40. 266 F.3d at 1168.

41. *See e.g. Hart*, 266 F.3d at 1171 ("[T]he first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals."); *U.S. v. Humphrey*, 2002 U.S. App. LEXIS 6984 (6th Cir. 2002), at *71 ("It is

Accordingly, an unpublished opinion recognized under a particular circuit's rules as "precedent"—which can happen in the D.C. Circuit[42]—and possibly one recognized as having "precedential value"—which can happen in the Fourth and Sixth Circuits[43]—may become binding precedent for other panels in that circuit.[44]

2. *Overrulable precedent.* "Overrulable" precedents are decisions the court ordinarily will follow under *stare decisis*, but may overrule if sufficient reasons present themselves. The category typically includes earlier decisions of the same court. Some kinds of precedents, even from the same court, can be overruled more readily than others. The Supreme Court's summary dispositions, for example, receive "less deference" from the Court than its decisions made "after briefing, argument, and a written opinion."[45] Under the law-of-the-circuit rule, on the other hand, overruling is restricted; one circuit panel cannot overrule another panel's decision.

3. *"Precedent," or "precedential value."* In the third category are simply "precedents," or cases having "precedential value." These are omnibus terms whose meaning can run the

axiomatic that a court of appeals must follow the precedent of prior panels within its own circuit."); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. App. Prac. & Process 287, 288 n. 5 (2001).

42. *See supra* nn. 11, 20. The D.C. Circuit expressly permits lawyers to argue that an unpublished disposition is "binding precedent," or at least "precedent." *See supra* n. 11. In the Fifth Circuit, unpublished opinions issued before January 1, 1996, likewise "are precedent." *See supra* n. 11 and text accompanying n. 20.

43. *See supra* nn. 18, 19.

44. The Sixth Circuit apparently disagrees. *See Humphrey*, 2002 U.S. App. LEXIS 6984 at * 71 ("unpublished decision[s] with no binding effect"; "unpublished opinions are not controlling precedent") (*citing U.S. v. Ennenga*, 263 F.3d 499, 504 (6th Cir. 2001); *Salamalekis v. Commr.*, 221 F.3d 828 (6th Cir. 2000)). The explanation could be that in all these cases the court rejected the claim that the particular unpublished opinion cited had precedential value; the cases, however, are categorical in what they say about unpublished opinions. The cases do all use qualifying terms such as "binding" or "controlling" precedent. So the point may be that the Sixth Circuit does not regard "precedential value" as translating into "binding" precedent or as constituting the law of the circuit.

45. *See e.g. Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 920 n. * (1990) ("The Court gives less deference to summary dispositions . . . ."); *Caban v. Mohammed*, 441 U.S. 380, 390 n. 9 (1979) ("not entitled to the same deference given a ruling after briefing, argument, and a written opinion"); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 216 (7th ed., BNA 1993) ("It thus seems fair to say that the whole Court agrees that summary affirmances are entitled to some weight, but to less than fully articulated decisions.").

gamut from binding precedent to mere citable precedent (discussed shortly). Of the eight circuits that allow citation of unpublished opinions, one—the D.C. Circuit—permits their citation "as precedent,"[46] while two—the Fourth and Sixth Circuits—allow that unpublished opinions may have "precedential value" (which may or may not be the same thing).[47]

4. *Persuasive value*. A fourth category comprises cases citable for their "persuasive value." This somewhat elusive term evidently means persuasive force independent of any precedential claim; the decision must persuade on its own argumentative merits, without regard for its status as a precedent or for any notions of *stare decisis*.[48] The problem is, of course, that the concepts of precedent and persuasiveness are difficult to disentangle. The habit of *stare decisis* is hard-wired into the brains of common law judges. And, other things being equal, it is easier to follow a lead than to blaze one's own trail. Nonetheless, as Judge Kozinski stresses in *Hart*, "persuasive" authority is a concept familiar to judges and lawyers.[49] Of the eight circuits that allow citation of unpublished opinions, four—the Eighth, Tenth, Eleventh, and Fifth—provide that such opinions are "not precedent," or "not binding precedent," but that they may be cited for their "persuasive value."[50] This presumably has the important effect of denying these opinions the force conferred by the law-of-the-circuit rule, thus allowing

46. *See supra* n. 11 and accompanying text. The Fifth Circuit also regards unpublished opinions issued before January 1, 1996, as "precedent." *See supra* n. 21.

47. *See supra* nn. 18, 19, 44.

48. The idea resembles the administrative-law concept of "*Skidmore* deference," under which an agency's informal interpretations of its statute are "'entitled to respect,' . . . but only to the extent [they] have the power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001). Justice Jackson stated in *Skidmore* that the weight accorded to the administrative judgment in a particular case "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

49. "[C]ommon law judges knew the distinction between binding and persuasive precedent. The vast majority of precedents at common law were considered more or less persuasive." 266 F.3d at 1165 n. 13.

50. *See supra* nn. 21-24.

them to be overruled—or simply rejected as unpersuasive—by subsequent panels of the same circuit.

5. *Citable precedent.* Last comes citable precedent. This term means only that the case may be cited, with the weight to be given it left open. Minimal as the concept may seem, the ability to cite a case is, of course, precisely what is at stake in no-citation rules. The ABA's recent resolution, for example, urges only that the federal appeals courts "[p]ermit citation" to unpublished opinions.[51] Given the habit of *stare decisis* and the attraction of following a path already broken, I would say that, if opinions may be cited, they will be followed more often than if they may not be. Judge Kozinski memorably disagrees.[52] Be that as it may, the concept of citability may have important symbolic value in a system of law based on precedent, value essential to respect for the law and to the rule of law itself. Judge Kozinski in *Hart* has usefully articulated the rationale for citability, grounding it on a court's obligation to "acknowledge[] and consider[]" prior decisions.[53]

Precedent thus is a rich palette. In depicting unpublished opinions as "precedents," one needs to consider the broad range of colors that may be applied.

III. THE BACKHANDED IMPACT OF *HART*: NO-CITATION RULES AT THE BAR OF THE COMMON LAW

The key issue today is not whether unpublished opinions must be binding precedents; it is whether they may be cited at all. The central split among the circuits, for example, is not over binding precedent. Of the eight circuits that permit citation, only one (the D. C. Circuit) explicitly contemplates "binding precedent"; two (the Tenth and Eleventh) state that unpublished opinions are *not* "binding precedent[s]"; while another two (the Fifth and Eighth) deny that they are even "precedents."[54] The

51. *See supra* nn. 4-5 and accompanying text.

52. "Citing a precedent is, of course, not the same as following it; 'respectfully disagree' within five words of 'learned colleagues' is almost a cliche." *Hart*, 266 F.3d at 1170.

53. "So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities." *Id.* at 1170.

54. *See supra* nn. 11, 20-24.

battle is over citability. Judicial defenders circle their wagons around the no-citation feature of the rules,[55] while many critics aim their arrows at only that feature.[56] Emblematic of the debate is Judge Arnold's widely-quoted comment in *Anastasoff*: "[S]ome forms of the non-publication rule even forbid citation. Those courts are saying to the bar: 'We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday.'"[57]

Judge Kozinski in *Hart*, while rejecting the claim that unpublished opinions must be binding precedents, goes further and upholds the Ninth Circuit's rule banning citation of those opinions.[58] This issue indeed was presented; the validity of the no-citation rule, as applied to a citation carrying no claim of binding authority, was the question raised by the facts of *Hart*.[59] Judge Kozinski concentrated, however, on the binding-authority

55. *E.g.* Kozinski & Reinhardt, *supra* n. 36 at 43; Boyce F. Martin, Jr., *In Defense of Unpublished Opinions,* 60 Ohio St. L.J. 177, 196 (1999).

56. *E.g.* Katsh & Chachkes, *supra* n. 41; Stephen R. Barnett, *"Unpublished" Judicial Opinions in the United States: Law Or Not?* 2 European Bus. Org. L. Rev. 429, 434-437 (2001). The claim that no-citation rules violate the First Amendment by prohibiting litigants from telling the court about a prior court decision, *see* Katsh & Chachkes, *supra* n. 41, at 289, draws support from *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533 (2001). The Court there struck down, under the First Amendment, a Congressional prohibition against the use of LSC funds in cases involving an effort to "amend or otherwise challenge existing welfare law." *Id.* at 537. Calling the ban "inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case," the Court declared that the enactment under review, in its attempt to "prohibit the analysis of certain legal issues and to truncate presentation to the courts, . . . prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545.

57. 233 F.3d at 904.

58. 9th Cir. R. 36-3 (unpublished dispositions "are not binding precedent" and "may not be cited").

59. The attorney whose citation of an unpublished Ninth Circuit opinion precipitated Judge Kozinski's ruling in *Hart* was not citing that opinion as precedent, at least not in the sense of asking the court to follow it, but was using it to illustrate his statement that "[t]he Ninth Circuit has not explicitly ruled on the issue before this court." *See* Appellant's Brief at 13 n. 6, *Hart v. Massanari, sub nom. Hart v. Apfel,* filed Dec. 13, 1999 (*citing Rice v. Chater*, No. 95-35604, 1996 WL 583605 (9th Cir., Oct. 9, 1996) (reported in Decisions Without Published Opinions, 98 F.3d 1346 tbl. (9th Cir. 1996)). Judge Kozinski did not consider arguments of history or common law practice that might make the rule unconstitutional in prohibiting the mere citation of an unpublished opinion, which the attorney in *Hart* was doing, as distinct from application of the rule to deny an unpublished opinion the force of binding precedent, which was not involved in *Hart*.

question,[60] and almost as an afterthought[61] addressed the rule's ban on citation.[62] At this point, moreover, his argument (to which I'll return) exchanged history and constitutional principle for wholly prudential considerations.

Nevertheless, much of what Judge Kozinski says in his discussion of binding precedent seems quite relevant to no-citation rules. Backhandedly, Judge Kozinski provides a fresh and cogent rationale for regarding those rules as inconsistent with the common law tradition and with modern federal practice. In the course of arguing that the principle of "strict binding precedent"[63] is not constitutionally compelled, Judge Kozinski goes a long way toward demonstrating that the principle of citable precedent may be.

Consider two examples:

(1) In his discussion of history and the Constitution, Judge Kozinski writes:

> While we agree with *Anastasoff* that *the principle of precedent was well established in the common law courts by the time Article III of the Constitution was written*, we do not agree that it was known and applied in the strict sense in which we apply binding authority today .... The concept of binding case precedent, though it was known at common law, was used exceedingly sparingly. For the most part, common law courts felt free to depart from precedent where they considered the earlier-adopted rule to be no longer workable or appropriate.
>
> *Case precedent at common law thus resembled much more what we call persuasive authority than the binding authority* which is the backbone of much of the federal judicial system today.[64]

Judge Kozinski thus appears to say that "the principle of precedent was well established" when the Constitution was

60. Together, the terms "binding authority" and "binding precedent" appear forty-five times in the twenty-two page opinion.

61. On page twenty of the twenty-two-page opinion.

62. 266 F.3d at 1178.

63. *Id.* at 1164.

64. *Id.* at 1174-1175 (citations omitted) (emphasis added); *see also id.* at 1165 n. 13 ("[C]ommon law judges knew the distinction between binding and persuasive precedent. The vast majority of precedents at common law were considered more or less persuasive....").

written, but that it "resembled much more what we call persuasive authority" than it did "binding authority." Does this not suggest that a principle akin to persuasive authority may have been embodied in Article III, or at least in the "common law traditions" that federal courts follow?[65] Given the distinguished common law pedigree that Judge Kozinski credits to the principle of persuasive authority, one might have expected him to consider that principle before upholding a rule that prohibits lawyers from citing court decisions they claim to be persuasive. While Judge Kozinski writes that "common law judges knew the distinction between binding and persuasive precedent,"[66] he himself seems to rub out that distinction.

(2) In discussing the common law tradition, Judge Kozinski writes:

> Federal courts today do follow some common law traditions. When ruling on a novel issue of law, they will generally consider how other courts have ruled on the same issue.
>
> . . .
>
> Citing a precedent is, of course, not the same as following it; "respectfully disagree" within five words of "learned colleagues" is almost a cliche. . . . While *we would consider it bad form to ignore contrary authority by failing even to acknowledge its existence*, it is well understood that—in the absence of binding precedent—courts may forge a different path than suggested by prior authorities that have considered the issue. *So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.*[67]

When a rule prohibits citation of unpublished opinions, does that not require courts to "ignore contrary authority by failing even to acknowledge its existence"? If an earlier authority cannot be cited to the court, it cannot be "acknowledged and considered" by the court; hence, it would

65. *See* 266 F.3d at 1169 ("Federal courts today do follow some common law traditions.").

66. *Id.* at 1165 n. 13.

67. *Id.* at 1169-1170 (emphasis added).

seem, courts have not "complied with their common law responsibilities." It is hard to see why these considerations of judicial responsibility should not have been considered in *Hart* as bearing on the validity of the Ninth Circuit's no-citation rule.

The case against no-citation rules asks not that unpublished opinions be regarded as binding precedents, or as precedents at all in the normative, *stare decisis* sense. It asks only that they be acknowledged and considered.[68] This obligation serves the ends of fairness and consistency, assuring that the prior decision not be rejected without on-the-record consideration and explanation. It is a lesser requirement than the "burden of justification" that Judge Arnold considers necessary for overruling a prior decision.[69] But it serves the same purpose, assuring that when the law changes, it does so "in response to the dictates of reason, and not because judges have simply changed their minds."[70] It is one thing to tell a litigant she lost her case because the court reconsidered and rejected a prior opinion that was in her favor; it is another thing to tell her she lost her case under a rule that barred her lawyer from telling the court about that prior opinion. As Judge Kozinski says, it is "bad form to ignore contrary authority by failing even to acknowledge its existence."[71] Why is it bad form? Because, at bottom, it disrespects the principle of precedent on which our court-made law is based, and hence dishonors the rule of law itself. Judge Kozinski's articulation of the need to "acknowledge and consider" prior decisions thus provides an apt and cogent rationale for rejecting no-citation rules.[72]

68. On this point Judge Kozinski and Judge Arnold seem to agree. Judge Arnold rejects the courts' message that "you cannot even tell us what we did yesterday," while Judge Kozinski insists that earlier authority be "acknowledged and considered." *See Anastasoff*, 223 F.3d at 904; *Hart*, 266 F.3d at 1170.

69. *Anastasoff*, 223 F.3d at 905.

70. *Id.*

71. *Hart*, 266 F.3d at 1170.

72. The relevant difference can be seen in two recent cases in which federal appeals panels refused to follow unpublished opinions, provoking dissents based on *Anastasoff*. In *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001), *rehearing en banc denied*, 256 F.3d 260 (2001), a Fifth Circuit panel held that DART was not an arm of the State of Texas for purposes of Eleventh Amendment immunity, in the face of three prior unpublished dispositions to the contrary. The unpublished opinions were cited to the panel, under the Fifth Circuit rule allowing citation as "persuasive authority," *see supra* n. 21, and the panel discussed them in a lengthy footnote, finding them unpersuasive. 242 F.3d at

IV. VANISHING TIME: THE KOZINSKI DEFENSE OF NO-CITATION RULES

When Judge Kozinski ultimately moves in *Hart* from whether unpublished opinions are binding authority to whether they are citable, he departs from his earlier consideration of history, common law practice, and "persuasive precedent" and makes an argument that is wholly prudential. "Should courts allow parties to cite to these dispositions," Judge Kozinski writes, "much of the time gained [from not having to write precedential opinions in every case] would likely vanish."[73] In support of this conclusion Judge Kozinski offers two arguments, one based on the additional time that judges (and their staffs) assertedly would need to produce opinions worthy of citation, the other stressing the extra time that judges and lawyers assertedly would need to research and process those opinions once produced. Both are legitimate concerns—especially for the Ninth Circuit, with the highest case volume of any federal circuit.[74] Both concerns, however, appear exaggerated.

Judge Kozinski first argues that if unpublished opinions could be cited, "conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. Language adequate to inform the parties how their case has been

318-319 n. 1. Three judges dissented from the denial of rehearing en banc, saying the court should "revisit the questionable practice of denying precedential status to unpublished opinions." 256 F.3d at 260 (Smith, Jones & DeMoss, JJ., dissenting).

In *Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361 (Fed. Cir. 2002), a divided panel upheld a defense of laches to a claim of patent infringement, contrary to two prior non-precedential opinions of the Federal Circuit. (The court "reluctantly" permitted those opinions to be discussed despite the Circuit's no-citation rule, *see* 277 F.3d at 1370 (Newman, J., dissenting).) While the defendant argued that the court was bound by those opinions, citing *Anastasoff*, the majority agreed instead with Judge Kozinski in *Hart*. It thus concluded: "[W]e decline to consider" the opinions. 277 F.3d at 1368. The dissenting judge agreed that the opinions were not binding, but found them worth considering at some length. 277 F.3d at 1370.

While *Williams* and *Symbol* both declined to follow unpublished opinions, they differ crucially. The Fifth Circuit considered the opinions and rejected them, while the Federal Circuit "decline[d] to consider" them. The Federal Circuit's failure even to acknowledge and consider the opinions was, in Judge Kozinski's term, "bad form," *Hart*, 266 F.3d at 1170; it may also have been unconstitutional. *See* Katsh & Chachkes, *supra* nn. 41, 56; *Velasquez*, 531 U.S. at 545.

73. 266 F.3d at 1178.

74. And especially for Judge Kozinski, whose superb published opinions are worth all the time he can put into them.

decided might well be inadequate if applied to future cases arising from different facts."[75] Further, "[w]ithout comprehensive factual accounts and precisely crafted holdings to guide them, zealous counsel would be tempted to seize upon superficial similarities between their clients' cases and unpublished dispositions."[76] This exaltation of judges' language not only harks back to Legal Realism, as Judge Danny J. Boggs and Brian P. Brooks have pointed out.[77] It also ignores what we all were taught in the first year of law school:[78] that the law is not what the judges *say*—that's dictum; it's what they *decide*. Although imprecise language indeed may mask the true facts of a case, law clerks and staff attorneys are good at stating facts—they do it often enough in published opinions—and lawyers and judges have abundant experience in distinguishing cases on their facts. When a lawyer cites an unpublished opinion, it is less likely to be because of its language than because the facts of that case are closer to those in the case before the court than are the facts of any case decided with a published opinion.[79] As Judge Richard Posner, himself a backer of no-citation rules, has conceded: "Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are two few on point."[80] When a lawyer finds one of those few precedents on point, why shouldn't she be allowed to tell the court about it?

Judge Kozinski further predicts that court time will be lost because "publishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts," since "different opinion writers may use slightly different language to express the same idea."[81] And under the

75. 266 F.3d at 1178.

76. *Id.*

77. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 Green Bag 2d 17, 22 (2001).

78. Even, I'm told, at Yale.

79. Circuit rules so require. *See e.g.* 4th Cir. R. 36(c) (allowing citation of unpublished opinion only if "there is no published opinion that would serve as well").

80. Richard A. Posner, *The Federal Courts: Challenge and Reform* 166 (Harvard U. Press 1996).

81. *Hart*, 266 F.3d at 1179.

law-of-the-circuit rule, "conflicts—even inadvertent ones—can only be resolved by the exceedingly time-consuming and inefficient process of en banc review."[82]

Whatever the apparent conflicts in judicial language, though, circuit judges surely are expert at distinguishing cases on their facts. (Take a look at almost any unsuccessful petition for rehearing en banc.) And for true intra-circuit conflicts involving unpublished opinions, en banc review is not the only remedy. Others are—as I'll consider shortly—(a) making unpublished opinions citable for their "persuasive" value only, and (b) lifting the law-of-the-circuit rule for unpublished opinions, so they can be overruled by subsequent panels in published opinions.[83]

Furthermore, any diversion of judicial time that might originally have resulted from allowing citation of unpublished opinions may already have occurred, thanks to the availability of those opinions on line, in LEXIS and Westlaw, and now in West's *Federal Appendix.* Indeed, the entire controversy over unpublished opinions may be laid at the feet of LEXIS, Westlaw, and the Internet, with their technological capacity to make everything available; the issue would not have come up, at least not with anything like its present force, in the world of books.[84] With the online cat now out of the bag, judges know

82. *Id.*

83. Judge Kozinski sees yet another drain on judicial time under a citable-opinion regime resulting from an increase in dissenting and concurring opinions: "Although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning of the rule to be applied to future cases," and hence "[u]npublished concurrences and dissents would become much more common." 266 F.3d at 1178. A survey of Volume 27 of the *Federal Appendix* (the latest one available as I write) yields the following figures. Among the 220 cases reported from circuits where citation is permitted, there were four dissents or concurrences, representing 1.8 percent of the cases. Among the 149 cases reported from circuits where citation of unpublished cases is banned, there were likewise four dissents or concurrences, representing 2.7 percent of the cases. The "citable" circuits thus had a *lower* rate of dissenting or concurring opinions than the "noncitable" circuits. Further, among the eighty-two cases reported from the Ninth Circuit, there were four dissents or concurrences, or 4.9 percent. The only other dissents or concurrences were from the (citable) Fourth and Sixth Circuits, which had two such opinions each (among forty-five and 116 reported cases, respectively). The rates of dissenting or concurring opinions thus were 4.4 percent in the Fourth Circuit and 1.7 percent in the Sixth—both figures lower than the 4.9 percent in the noncitable Ninth Circuit. Although admittedly limited, these data are inconsistent with Judge Kozinski's hypothesis that making the opinions citable increases the rate of dissents and concurrences.

84. I owe this observation to Bob Berring.

that their opinions, designated for publication or not, are going to be read, collected, and analyzed.[85] In most federal circuits, moreover, they may be cited. Since the sky has not fallen in those circuits, one may conclude that allowing citation not only recognizes a technological *fait accompli*, but need not produce the dire results that Judge Kozinski fears.

Judge Kozinski's second argument is based on the resources assertedly needed to research and process the unpublished opinions if they are citable. "[A]dding endlessly to the body of precedent—especially binding precedent—can lead to confusion and unnecessary conflict," he writes.[86] The primary victims would be lawyers and their clients:

> Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions. Writing a second, third or tenth opinion in the same area of the law, based on materially indistinguishable facts, will, at best, clutter up the law books and databases with redundant and thus unhelpful authority. Yet once they are designated as precedent, they will have to be read and analyzed by lawyers researching the issue, materially increasing the costs to the client for absolutely no legitimate reason.[87]

If a case involves facts "materially indistinguishable" from those of prior published opinions, one wonders in the first place why it was appealed.[88] And if it was, one wonders why a lawyer—wanting to make her best arguments and facing a page limit on briefs—would cite the unpublished opinion instead of a published one.[89] In any event, the law books and legal databases

85. *See U.S. v. Rivera-Sanchez*, 222 F.3d 1057, 1063 (9th Cir. 2000) ("While our present circuit rules prohibit the citation of unpublished memorandum dispositions, [citation omitted] we are mindful of the fact that they are readily available in on line legal databases such as Westlaw and Lexis"); Katsh & Chachkes, *supra* n. 41, at 301-302 ("[I]n practice, citation prohibitions hardly ease the case-review burden on the prudent practitioner.").

86. 266 F.3d at 1179.

87. *Id.*

88. *See* Katsh & Chachkes, *supra* n. 41, at 301 ("[T]he myth that there exist great batches of redundant unpublished appellate cases is true only in certain discrete areas of law where meritless cases are litigated even to appeal—e.g., cases involving prisoners and social security claimants," and even if those cases were citable, courts and practitioners "would understand . . . that the case law is well settled").

89. Especially since such citation likely would violate a circuit rule. *See supra* n. 79.

already are "clutter[ed] up" with unpublished opinions, which many lawyers now routinely research whether they are citable or not.[90] And it seems not insignificant that lawyers themselves tend to be strongly opposed to no-citation rules.[91]

While Judge Kozinski's fears thus seem overstated, they do give pause. This is especially so for the Ninth Circuit, which issues some 4,100 unpublished opinions per year.[92] But that is not so many more than the 3,500 issued by the Eleventh Circuit, or the 3,200 by the Fifth—opinions that in both circuits are citable.[93] With eight circuits now allowing citation, the burden of proof would seem to lie with those who say that citability cannot be acceptably managed.

V. WHAT PRECEDENTIAL FORCE FOR UNPUBLISHED OPINIONS?

If unpublished opinions are to be citable, the question remains, what degree of "precedential" force should they carry? I see three possibilities: (1) binding precedent, fully subject to the law-of-the-circuit rule and thus overrulable only by the en banc court; (2) "persuasive" authority that is "not precedent," and hence not subject to the law-of-the-circuit rule; and (3) a new "overrulable" status based on lifting the law-of-the-circuit rule to allow panel overruling of a prior panel's unpublished opinion, but only if the second panel does so in a published opinion.

90. *See* Katsh & Chachkes, *supra* n. 41, at 301-302 (observing that prudent practitioners research uncitable cases "to mine them for new ideas," because they indicate how a court has ruled in past and thus might rule in future, and because they "still may influence a court that reads (or remembers deciding) them itself").

91. *See* ABA Resolution, *supra* n. 4; *see also* Kozinski & Reinhardt, *supra* n. 36, at 43 ("At bench and bar meetings, lawyers complain at length about being denied this fertile source of authority. Our Advisory Committee on Rules of Practice and Procedure, which is composed mostly of lawyers who practice before the court, regularly proposes that memdispos be citable. When we refuse, lawyers grumble that we just don't understand their problem"). A court official in a circuit in which unpublished opinions are not citable reports "a lot of clamor" to allow citation. Telephone Interview with circuit official (May 8, 2002). (Of course, the lawyers may just want to pad their bills, but that seems a questionable conclusion for a court to draw *a priori*.)

92. *Judicial Business of the United States Courts*, *supra* n. 26.

93. *Id.* It is true that they are not posted online or given to legal publishers. But they are citable by rule and, apparently, cited in practice. *See supra* nn. 12, 21, 24, 28.

1. Unpublished opinions, in my view, should not be regarded as binding precedents, or otherwise as equivalent to published opinions. Judge Kozinski has shown in *Hart* that the Constitution does not require that all precedents be viewed as binding. Of the eight circuits that allow citation of unpublished opinions, none treat them as full-fledged, first-class, binding precedents. All eight circuits discourage citation of these opinions, and four of the eight—the Fifth, Eighth, Tenth, and Eleventh Circuits—declare that they are "not precedents" and may be cited only for their "persuasive" value.

Treating unpublished opinions as second-class precedents—but, of course, citable ones—is readily defended. Just as the Supreme Court gives "less deference" to its summary dispositions than to cases decided with briefing, argument, and a full opinion,[94] no reason appears why a court of appeals may not devote less of its time and attention to a designated class of opinions and accordingly treat those opinions as having less precedential weight than others. The legitimate caseload concerns support at least this much adjustment of judicial technique. And there is little danger of deception or surprise in allowing citation. An "unpublished" opinion, even when published in the *Federal Appendix*, wears a scarlet "U"; no one should be surprised to discover that it carries less authority than a "published" opinion.[95]

2. If citable unpublished opinions are not to be binding precedents, some way must be found to free them from the law-of-the-circuit rule, which says a panel opinion is binding on all subsequent panels. The easiest way out would appear to lie in the approach presently taken by the Fifth, Eighth, Tenth, and Eleventh Circuits; these courts declare unpublished opinions to be "not precedent" (or "not binding precedent") and citable only for their "persuasive" value. Under this regime, the law-of-the-circuit rule apparently does not apply to unpublished opinions,

94. *See supra* n. 45.

95. *See supra* n. 9 (citation restrictions in *Federal Appendix*). Indeed, citation of unpublished opinions makes clear their unpublished status and avoids confusion that may otherwise result. *Cf. Rivera-Sanchez*, 222 F.3d at 1063 (citing unpublished opinions superseded by court's (published) decision "[t]o avoid even the possibility that someone might rely upon them").

because they are not "precedents."[96] The "persuasive authority" approach thus enables a circuit panel to reject an unpublished opinion as unpersuasive—with reasons, of course—without having to take the case en banc or otherwise to formally overrule the opinion. This approach can claim an extensive historical and common law pedigree, as Judge Kozinski demonstrates in *Hart.* It also has a familiar administrative-law analogue in *Skidmore* deference.[97] In sum, there is much to be said for the persuasive-authority approach.

3. The other approach would accord unpublished opinions "precedential" status that requires overruling, but would lift the law-of-the-circuit rule to let subsequent panels overrule them. In the D. C. Circuit, which now allows citation of unpublished opinions "as precedent," and possibly in the Fourth and Sixth Circuits, which allow citation for "precedential value," it apparently follows today that an unpublished opinion found to meet these tests becomes the law of the circuit and hence cannot be overruled by another panel.[98] The proposed approach would alter the law-of-the-circuit rule to allow a citable unpublished opinion to be overruled by a subsequent panel, as long as the subsequent panel did so in a published opinion.

A circuit apparently would have power to revise its rules this way. While it has been suggested that the law-of-the-circuit rule rests on constitutional,[99] or at least statutory,[100] compulsion,

96. *See In re: United States of America*, 60 F.3d 729, 732 (11th Cir. 1995) (cited unpublished opinion is "not law of this circuit and will not be binding on any future panel"). (The Eleventh Circuit's Rule 36-2, allowing citation as "persuasive authority," *see supra* n. 24, was in effect in 1995. Telephone Interview with 11th Cir. official (May 7, 2002)).

97. *See supra* n. 48.

98. *But see* Sixth Cir. cases cited *supra* n. 44.

99. *See* Katsch & Chachkes, *supra* n. 41, at 288 n. 5 (pointing out that *Anastasoff* assumes law-of-circuit rule is constitutionally required and refuting that assumption).

100. The court in *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996), described the law-of-the-circuit rule as "derived from legislation and from the structure" of the federal circuits. But the court's quotation of 28 U.S.C. § 46(c), stating that the circuits normally sit in panels, or divisions, of "'not more than three judges,'" and its quotation of the Revision Notes to 28 U.S.C. § 46, stating that "the 'decision of a division' is the 'decision of the court,'" 87 F.3d at 1395, do not appear to make the case. The Revision Notes state that the new statutory language "preserves the interpretation established by" *Textile Mills Sec. Corp. v. Commr.*, 314 U.S. 326 (1941)—which held that circuits may sit en banc, and not only in three-judge panels. But, the Notes continue, the new language provides normally for three-judge panels and "makes the decision of a division, the

neither appears to be the case.[101] And such modification would promote, not subvert, the rule's purpose of avoiding intra-circuit conflicts: As between two conflicting panel decisions, it would be clear which one governed—the one that was published. Panels thus would not have to resort to finespun factual distinctions or aggressive claims of dictum in order to avoid the force of an unpublished precedent with which they disagreed. They could simply overrule it, if willing to do so in a published opinion. Such an approach also accords with the responsibilities of law-making. If the issuing panel did not consider its decision important enough to publish and make into law, why should that panel's opinion be binding on another panel which, having duly considered it, comes out differently and *is* willing to make its opinion into law? As between the two panels, the one that is consciously making law, that is willing to put its precedential money where its mouth is, ought to prevail.

Lifting the law-of-the-circuit rule thus seems desirable for circuits in which citable unpublished opinions are regarded as "precedents" and thus might invoke the rule. It might well also be done by circuits taking the "persuasive"-authority approach. While that approach allows a panel to deem a prior, unpublished panel opinion "unpersuasive" without overruling it, there will be cases in which the subsequent panel thinks the prior opinion should be formally overruled.[102] When a panel desires to overrule an unpublished opinion by a published one, it should not have to go en banc.

For circuits deciding between "persuasive" authority and "precedent," the "persuasive" approach might be better for large circuits, where volume argues for giving less weight to unpublished authority. For any circuit, moreover, the

decision of the court, unless rehearing in banc is ordered." The issue to which this quotation was directed thus was the size of the panel in which the judges would sit, three judges or en banc, and not the relationship between panels. The Court's concern in *Textile Mills*, paraphrased in *LaShawn A.*, that "[w]ere matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit," 87 F.3d at 1395, was expressed in support of the Court's holding that en banc courts were permissible. *See Textile Mills*, 314 U.S. at 335. The statement was not made in support of an argument that en bancs could be avoided by application of the law-of-the-circuit rule.

101. *See supra* nn. 99-100.

102. *Cf. Rivera-Sanchez*, 222 F.3d at 1063 (unpublished opinions affected by decision not citable but court nonetheless lists them as "superseded").

"persuasive" approach has the virtue of providing a brighter line, one making clear that unpublished opinions, though citable, are in a class by themselves, and thus reducing the uncertainty involved in having different levels of "precedential" authority.

VI. CONCLUSION

Judge Kozinski's opinion in *Hart* shoots down *Anastasoff*'s claim that unpublished opinions must be binding precedents, but simultaneously demonstrates that they must be citable. The arguments of history and common law tradition that Judge Kozinski invokes, particularly his insistence that earlier authority be "acknowledged and considered," confirm the essential role of precedent in our law and undermine the case for no-citation rules. Advancing technology is compelling the same result. In all but two federal circuits, unpublished opinions now are available not only on line, but also in West's *Federal Appendix*, a published reporter of unpublished opinions that is worthy of *Alice in Wonderland*. It is no wonder that a majority of the federal circuits, recognizing reality, now allow citation of their unpublished opinions.

While rules permitting citation of these decisions thus seem inevitable, it does not follow that unpublished opinions should be treated as binding precedents, or as precedents at all in the *stare decisis* sense. They may be citable only for their "persuasive" value. And even where they are regarded as precedents, the circuits should lift their law-of-the-circuit rules so that unpublished opinions may be overruled by published panel opinions. The better choice, probably, is to treat unpublished opinions as citable only for their persuasive value.

Whatever the degree of deference to be accorded unpublished opinions, the arguments for making them citable seem likely to carry the day. These arguments combine the claims of fairness, due process, public access, and respect for law itself with a new technological reality that is transforming the terms of the debate. As it becomes increasingly difficult to use the term "unpublished" with a straight face, the necessary replacement becomes the candid "uncitable." The power of courts to issue uncitable opinions is difficult to defend, and the task will only get harder as the opinions become more

accessible. Powerful as the federal courts may be, they cannot hold back this wave.

Stephen Barnett <barnetts@law.berkeley.edu>
Sent by: barnetts@law.berkeley.edu

02/17/2004 08:21 PM

To: rules_comments@ao.uscourts.gov
cc:
Subject: FRAP 32.1

03-AP-032
Addendum 3:
Comments

To: John Rabiej

John -- Here -- under the wire, I trust -- is another set of FRAP 32.1 Comments, these in reply to Judge Kozinski.

Thanks,
Steve Barnett

KozinskiReplyRule32.1No.2.d

February 17, 2004

The Honorable Samuel A. Alito, Jr.
United States Court of Appeals
for the Third Circuit
357 United States Courthouse
Post Office Box 999
Newark, N.J.07101-0999

Re: Further Comments of Stephen R. Barnett
On Proposed Federal Rule of Appellate Procedure 32.1
In Reply to Judge Kozinski

Dear Judge Alito:

These are Comments in support of the proposed Federal Rule of Appellate Procedure 32.1; they reply to the Comments of Judge Alex Kozinski submitted to you by letter dated January 16, 2004 (Kozinski Comments). I have previously submitted in this proceeding two sets of Comments consisting of published articles: Stephen R. Barnett, From Anastasoff to Hart to West's Federal Appendix, 4 J. App. Prac. & Process 1 (2002) (Barnett I); and Stephen R. Barnett, No-Citation Rules Under Siege: A Battlefield Report and Analysis, 5 J. App. Prac. & Process 473 (2003) (Barnett II). I apologize for the length of this filing; at the same time, I am sorry that time has prevented me from replying to all of Judge Kozinski's points.

I urge the Committee to propose adoption of FRAP Rule 32.1. My reasons appear in these Comments and in those I have previously submitted. If adoption of the Rule is not at present feasible, however, I suggest as an alternative -- as explained in my Conclusion, infra -- that the Advisory Committee hold the issue in abeyance for two years. Given the fast-moving pace of both technological and legal developments in this area, such a waiting period could well produce new facts and new perspectives that would clarify the decision presented.

TABLE OF CONTENTS

1. Law Is Not What Judges Say; It's What They Decide

The case for or against the proposed Rule depends, in part, on what law is. For Judge Kozinski, it appears that law is what judges say. Thus, in his view an essential part of the judge's task involves "anticipating how the language of the disposition will be read by future litigants and courts, and how small variations in wording might be imbued with meanings never intended . . . ." Kozinski Comments, p. 5. Given this view, Judge Kozinski sees danger in letting unpublished dispositions be cited; for such a disposition "in all probability was drafted by a law clerk or central staff attorney," and it thus may embody "fine nuances of wording" that are believed to, but do not in fact, "reflect the views of three court of appeal judges." Id., p. 3.

I submit that law is not what judges say, but what they decide. As we all learned in the first weeks of law school, what judges say is only "dictum"; such words are to be distinguished from the "holding" of a case, or the ratio decidendi, which alone is the law that is made. "No court is required to follow another court's dicta." Indiana Harbor Belt RR Co. v. American Cyanamid Co., 916 F.2d 1174, 1176 (7th Cir. 1990) (Posner, J.). This limitation on judicial lawmaking power rests, I believe, on Article III, which limits the federal judicial power to "cases" and "controversies." The power of judges to make law, unlike the lawmaking power of legislators or executive officials, is limited to -- and circumscribed by -- the judicial function of deciding cases. For judges to assert a power to declare the law, beyond the scope of a judicial decision based on actual facts, exceeds the judicial power. And likewise, the bounds of the law that judges make in a case are determined by the facts presented and the decision made, not by the identity, intent, or will of the judges.

I thus agree with one of the conflicting pictures of the Ninth Circuit's judicial product that Judge Kozinski presents. I do not agree

with his characterization of the unpublished dispositions of the Ninth Circuit as "sausage" that the makers tell us is "not safe for human consumption." Kozinsky Comments, p. 4. Rather, I accept Judge Kozinski's assurance that "[w]e are very careful to ensure that the result we reach in every case is right, and I believe we succeed." Id., p. 5 (emphasis in original). I agree that the essential thing is the result that the court reaches. That is the law that a court makes when it decides a case. And under the common law system, every court decision does make law. "To the common lawyer, every decision of every court is a precedent; . . . [and] it is the decision -- not the opinion -- that constitutes the law." Danny P. Boggs and Brian P. Brooks, Unpublished Opinions & the Nature of Precedent, 4 Green Bag 17 (2000) (Boggs and Brooks). The value of a decision as a precedent for future cases, however, cannot be determined by the judges who decide the case at the time they decide it; that determination must wait until a subsequent case comes along with facts that are arguably governed by the prior decision.

These points are well expressed in a recent article by Professor Cappalli. Richard B. Cappalli, The Common Law's Case Against Non-Precedential Opinions, 76 S. Cal. L. Rev. 755 (2003). Among many other apt observations, Professor Cappalli makes these points:

* "One who is trained in legal method must have difficulty accepting Judge Kozinski's views about an appellate judge's duties in creating law." Id. at 774. [1] This is in part because "the power to determine the holding of a judicial precedent resides in future judges applying it." Id. "Lacking omniscience, an appellate court cannot predict what may come before its court in future days." Id. at 773. "The common law method accepts the impossibility of such prevision

[1] Professor Cappalli refers throughout to Judge Kozinski's opinion for the court in Hart v. Massanari, 166 F.3d 1155 (9th Cir. 2001); Judge Kozinski expressed there essentially the same positions that he takes in his Comments here.

by judges and wisely leaves the implications of a precedent in the hands of future courts." Id. at 775.

* "When Judge Kozinski stated in Hart that the 'rule must be phrased with precision and with due regard to how it will be applied in future cases,' he confused the judicial with the legislative role. Every word of a statute is law; no word of a judge is law. . . ." Id. at 774-775.

* "Judge Kozinski and others have posited a new common law in which a precedent controls not through its ideas but through its verbal expression. This reverses the maxim, 'It is not what a court says, but what it does.'" Id. at 775.

* "[T]he common law insists that far more important than verbiage to the understanding of a decisional rule is an appreciation of the case facts that generated the rule." Id. at 779.

* "Judge Kozinski is not saying that the ruling has been so scantily considered that it may be wrong and its error should not proliferate. All supporters of the current policy defend the quality of these non-precedential rulings. He is saying that: (1) We will determine ex ante that this case makes no usable law under whatever circumstances may arise, (2) having made that determination, we see no need to write a careful opinion, and (3) because of our guess as to the ruling's future inutility, and because our ruling is rough, we prefer to hide it in a file." Id. at 773.

I respectfully urge the Advisory Committee to read Professor Cappalli's article.

2. As Judge Kozinski Has Previously Recognized, Common Law Tradition Requires That Prior Decisions on Point by Courts of Equal Jurisdiction Be Acknowledged and Considered; It Thus Requires That Opinions Be Citable

Since Judge Kozinski, in his present Comments, evidently views unpublished dispositions of the Ninth Circuit as not embodying the words of judges and thus not "making law," he can defend the Ninth Circuit's rule banning the citation of those dispositions. In the past, however, Judge Kozinski appeared to take a different position. In his opinion for the court in Hart v. Massanari, supra (266 F.3d 1155), Judge Kozinski wrote that "we would consider it bad form to ignore contrary authority by failing even to acknowledge its existence"; and "[s]o long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities." Id. at 1169-1170. Why must earlier authority be "acknowledged and considered"? Because, one would think, case decisions, under our common law system, are law. See Boggs & Brooks, supra, at 17.

It is not easy to square the rule that Judge Kozinski defends now with what he wrote in Hart. The Ninth Circuit's Rule 36-3, by prohibiting courts of the circuit from citing unpublished dispositions, requires those courts to "ignore contrary authority by failing even to acknowledge its existence." When an earlier authority cannot be cited to a court, it cannot be "acknowledged and considered" by the court. Thus the Ninth Circuit itself, through Judge Kozinski's opinion in Hart, would appear to have acknowledged that the circuit's no-citation rule fails to comply with the court's "common law responsibilities."

Judge Kozinski has heard this point before (Barnett I, at 14-16). In his comments here he offers no explanation for the apparent conflict in his positions.

3. Judge Kozinski Wrongly Claims That Rule 32.1 Would Make All Opinions Precedential

Judge Kozinski attributes to the Advisory Committee a "spurious attempt to draw a distinction between citability and precedential value." Kozinski Comments, p. 4. "No such distinction is possible," he asserts, and the Committee "naively" claims otherwise. Id.

The ground of Judge Kozinski's assertion is not clear. The Committee's proposed Rule plainly bars restrictions on simply the "citation" of judicial opinions, without requiring that the cited opinions be precedential. [2] The Committee's chair is at pains to stress that the proposed rule "says nothing whatsoever about the effect that a court must give" to an unpublished opinion, and that the "one and only issue" addressed by the rule is "the ability of parties to cite opinions . . . . " Committee Memorandum at 28 (emphasis in original).

---

[2] Proposed FRAP Rule 32.1 (a) reads:

> (a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.
>
> See Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, Re: Report of Advisory Committee on Appellate Rules (May 22, 2003) (Committee Memorandum), at 28-29.

A.

Judge Kozinski may be relying on a sort of syllogism. He states, correctly, that "[b]y saying that certain of its dispositions are not citable, a court of appeals is saying that they have zero precedential value." Kozinski Comments, p. 4. From this, Judge Kozinski suggests that the converse also applies: "By requiring that all cases be citable, proposed FRAP 32.1 is of necessity saying that all prior decisions have some precedential effect." Id. (emphasis in original). But this does not follow. From stating that if opinions are not citable, they have no precedential effect, it does not follow that if they are citable, they must have some precedential effect.

B.

Another possible ground for Judge Kozinski's all-precedential claim is his asssertion that "cases are cited almost exclusively for their precedential value." Id. p. 4 (emphasis in original). The party citing a case is saying, Judge Kozinski writes: "This is what that court did in very similar circumstances, and therefore, under the doctrine of stare decisis, this court ought to do the same." Id. The party indeed may be saying that, but party claims are not necessarily law. Where the unpublished opinions are "not precedential" and are citable only for their "persuasive" value, as is true now in four circuits, [3] and as could be true in any circuit under the proposed Rule 32.1, [4] the party's reliance on stare decisis, if admissible at all, would lack legal force. The court would decide whether the prior decision was persuasive, regardless of its status as a prior decision. [5]

---

[3] 5th Cir. R. 47.5.3 (opinions issued on or after Jan. 1, 1996); 8th Cir. R. 28A(i); 10th Cir. R. 36.3; 11th Cir. R. 36-2; see Barnett I at 11-12.

[4] See Committee Memorandum at 28.

[5] For a decision rejecting three prior unpublished dispositions as not persuasive" under such a rule, see Williams v. Dallas Area Rapid Transit,

C.

It is true that the concepts of precedent and persuasiveness may overlap. A prior decision on point, cited to the court, tends to be more persuasive than the absence of such a decision. Other things being equal, it is easier to follow a lead than to blaze one's own trail. So if prior opinions may be cited, they will be followed, I think, more often than if they may not be cited. Judge Kozinski, however, has disagreed, suggesting that citation does not have even a persuasive effect: "Citing a precedent is, of course, not the same as following it; 'respectfully disagree' within five words of 'learned colleagues' is almost a cliche." Hart v. Massanari, supra, 256 F.3d at 1170. If citing a case thus may not have even persuasive effect, a fortiori it need not have precedential effect, as Judge Kozinski claims. Moreover, four circuits, [6] as well as a number of states, [7] have rules providing that unpublished opinions may be cited for "persuasive" value alone, and expressly not for "precedential" value.

The Advisory Committee's distinction "between citability and precedential value" thus is not a "spurious" one. By requiring that all cases be citable, the proposed Rule would not be saying that all prior decisions have some precedential effect.

4. The Advisory Committee Is Correct That No-Citation Rules Are "Wrong As a Policy Matter"; They May Be Unconstitutional As Well

The Advisory Committee takes the view that no-citation rules are "wrong as a policy matter" and suggests that they may raise First

---

242 F.3d 315, 318-19 n. 1 (5th Cir. 2001), rehearing en banc denied, 256 F.3d 260 (2001).

[6] See supra note 3.

[7] See Barnett II at 482, 299.

Amendment problems. Committee Memorandum at 27, 35. Judge Kozinski, usually one of our most stalwart defenders of First Amendment values, staunchly defends no-citation rules and dismisses any First Amendment concerns. Kozinski Comments, p. 20. I want simply to suggest that there is an entire case, untouched by Judge Kozinski, to be made against no-citation rules.

While Judge Kozinski complains that the Committee Note "provides no authority" for its suggestion that no-citation rules may violate the First Amendment (Kozinski Comments, at 20), such authority is readily available. See, e.g., Salem M. Katsch and Alex V. Chachkes, Constitutionality of "No-Citation" Rules, 3 J. App. Prac. & Process 287 (2001) (no-citation rules unconstitutional under First Amendment and Article III); Marla Brooke Tusk, No-Citation Rules As a Prior Restraint on Attorney Speech, 103 Colum. L. Rev. 1202 (2003) (impermissible prior restraint on attorney speech); Jon A. Strongman, Comment, Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional, 5 U. Kan. L. Rev. 195, 212 (2001) ("[d]enying litigants the opportunity to rely on the prior decisions of a court offends the notion of fairness demanded by procedural due process"); cf. Legal Services Corp. v. Velasquez, 531 U.S. 533, 545 (2001) (congressional prohibition on using Legal Services Corp. funds to challenge existing welfare law struck down under First Amendment as "inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for the proper resolution of the case").

As a matter of policy, moreover, bans on citation of judicial opinions override what Professor Schauer has identified as the values of precedent -- fairness (or equality), predictability, and efficiency. See Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 595-602 (1987).

Judge Kozinski himself has framed the essential vice of no-citation rules. He argues: "By saying that certain of its dispositions are not citable, a court of appeals is saying that they have zero precedential value -- no inference may be drawn from the fact that the court appears to have acted in a certain way in a prior, seemingly similar case." Kozinski Comments, p. 4. That is the trouble. Why doesn't a litigant have the right to be treated by a court in a similar way to a litigant in a "prior, seemingly similar case"? For a court to deny such treatment arguably achieves a constitutional hat-trick, offending simultaneously the First Amendment and the Equal Protection and Due Process Clauses. Judge Kozinski never confronts these normative and constitutional arguments against a rule that prohibits an attorney from telling a court what a judge has decided in a prior, similar case.

5. The Student Casenote From the Yale Law Journal Does Not Support the Fairness Claim It Makes

Judge Kozinski devotes three pages of his Comments (pp. 13-17) to reprinting and praising a student casenote from the Yale Law Journal -- homage worthy of the student's mother. The student author asserts, "persuasively" in Judge Kozinski's view, that allowing citation of unpublished dispositions "would systematically and unfairly disadvantage individual litigants with limited resources (including pro se and public-interest litigants and public defenders) by making it harder for them to present their cases." See Kozinski Comments, p. 14 (reprinting casenote). This would happen in two ways: "First, [allowing citation] would increase delays in adjudication, delays from which the poorest litigants are likely to suffer the most, and second, it would create a less accessible class of precedents." Id.

How would citability of unpublished opinions "increase delays in adjudication"? The author's only specific claim relates not to lawyers but to judges: "The high volume of cases makes the production of

fully reasoned opinions enormously expensive." Id. at 14. This is not only hyperbolic (the opinions would not have to be "fully reasoned"), [8] but the author provides not the slightest evidence in support of the claim -- easily obtained evidence such as, for example, comparative case-disposition times of circuits that do, and ones that do not, allow citation of their unpublished opinions.

Just as the author does not show increased delays in adjudication, neither does he show that such delays, if they existed, would be ones from which "the poorest litigants are likely to suffer the most." Id. at 14. The author asserts that "prisoners bringing habeas claims who rely on the efficient adjudication of their cases will suffer particularly from clogged dockets." Id. at 15. Prisoners bringing habeas claims will suffer from delay only if their claims will be successful and produce their release; that is true, surely, of only a small fraction of habeas claimants. (The more numerous habeas claimants who will lose their claims may benefit from delay, because it extends their period of hope.) But the whole idea of prisoners languishing in jail because unpublished opinions may be cited is so speculative, far-fetched, and unencumbered by facts as to verge on the absurd.

The author's second claim is that citability of unpublished opinions "would create a less accessible class of precedents." Id. at 14. He avoids saying how, and never confronts the fact that the citable unpublished opinions would be easily searchable in LEXIS, Westlaw, and other data bases. [9] There is some suggestion that "impecunious litigants" cannot afford "commercial databases" like LEXIS and

---

[8] See New York's "memorandum" opinions discussed below.

[9] Such computerized searches are notably unlike the quests for the "proverbial needle in the haystack" to which the author equates them (id. at 15); or rather it's a radio-transmitting needle that quickly identifies itself to the searcher.

Westlaw (id. at 15); but the author, wisely, does not deny that public defenders and public-interest litigants have access to these now-standard methods of legal research. If they do not, then they and their clients are at a real disadvantage in being unable to search published cases, and the existence of citable unpublished cases that they cannot search will add little to their plight. As for the "pro se" litigants, to remove all their comparative disadvantages would require switching to a system of free legal services for all in civil cases (and they still would be disadvantaged in their choice of lawyers); since we have not done that, the additional disadvantage resulting from not having access to commercial databases to search for unpublished opinions is de minimus. [10]

In sum, although Judge Kozinski not only endorses the Yale student's claim but inflates it to assert "colossal disadvantages [imposed] on weak and poor litigants" (Kozinski Comments, at 1), it is hard to conclude that this political plaint is not, indeed, "exaggerated" and "misplaced." Id. at 16.

6. Only Four of the Thirteen Circuits -- the Second, Seventh, Ninth, and Federal -- Still Refuse to Allow Citation of Their Unpublished Opinions; And Now District Courts in the Second Circuit Are Citing That Circuit's Unpublished Opinions

In deciding whether to adopt a uniform rule for the Federal Circuit Courts of Appeals, it is highly relevant, of course, to take account of what the circuits are now doing. There is a clear trend

---

[10] Judge Dannny J. Boggs and Brian P. Brooks have provided an apt response to the Yale student's argument, suggesting that his proposal ntails dumbing down the system (Yale n. 37): "Surely proponents of this 'fairness' rationale cannot mean that the courts ought to adopt Harrison Bergeron-like rules that level the playing field by imposing artificial impediments on lawyers smart enough to follow developments in their field of specialty." Boggs and Brooks, supra, at 17.

toward citability, with the result that nine of the thirteen circuits now allow citation of their unpublished opinions (apart from related cases, where it is always allowed). [11] See Barnett II at 474-476. I so reported in my second set of comments in this proceeding, noting that the Second, Seventh, Ninth, and Federal Circuits were the remaining holdouts. Id.

There is reason now to suggest that one of these holdout circuits, the Second, may be on the way to changing its position. The facts are reported by Ira Brad Matetsky, Esq., in his Comments filed in this proceeding on February 10, 2004, and his article attached to those Comments. See Ira Brad Matetsky, Ignoring Rule 0.23: Citing Summary Orders in the Second Circuit, N.Y.L.J. 4 (Feb. 9, 2004). Mr. Matetsky points out that Second Circuit Local Rule 0.23 has provided since 1973 that the court's "summary orders" -- orders accompanied by brief written statements, which the court uses to resolve about 60 percent of its cases -- "shall not be cited or otherwise used in unrelated cases before this or any other court." 2d Cir. Local Rule § 0.23. This is because the summary orders "do not constitute formal opinions of the court and are unreported or not uniformly available to all parties." Id.

Nevertheless, within the past two years, three district judges in the Second Circuit -- Senior Judge Charles S. Haight, Judge Gerard E. Lynch, and Judge Kimba M. Wood -- have cited and relied on summary orders of the Second Circuit. Four other district judges then have cited the same Second Circuit cases, and a visiting district judge from another circuit has cited two others. One of the district judges, Judge Gerard E. Lynch, has explained:

---

[11] Judge Kozinski's cavil that most of the rule changes "impose some limitations -- such as the requirement that there be no published authority directly on point" (p. 11), seems irrelevant, since FRAP 32.1 could and should allow individual circuits to impose such a requirement. See Barnett II, at 496-497.

> There is apparently no published Second Circuit authority directly on point for the proposition [at issue]. In the "unpublished" opinion in Corredor, which of course is published to the world on both the LEXIS and Westlaw services, the Court expressly decides the point . . . Yet the Second Circuit continues to adhere to its technological[ly] outdated rule prohibiting parties from citing such decisions, Local Rule § 0.23, thus pretending that this decision never happened and that it remains free to decide an identical case in the opposite manner because it remains unbound by this precedent. This Court nevertheless finds the opinion of a distinguished Second Circuit panel highly persuasive, at least as worthy of citation as law review student notes, and eminently predictive of how the Court would in fact decide a future case such as this one.

Harris v. United Federation of Teachers, 2002 U.S. Dist. LEXIS 15024, *2 n.2 (S.D.N.Y. 2002); see also Security Insurance Co. v. Old Dominion Freight Line, Inc., No. 02 Civ. 5258 (GEL) (2003) (Lynch, J.) ("the Court of Appeals prefers to pretend that such 'unpublished' opinions . . . do not exist").

Mr. Matetsky also reports finding fifty instances in which federal district judges in New York "have noted that counsel cited a Second Circuit summary order in violation of the rule." Matetsky, supra, at 6. It is impossible to know how many parties and judges have cited such orders without that fact's surfacing in a court opinion.

With at least seven district judges in the Second Circuit citing and relying on unpublished summary orders of the Circuit, and with an unknown number of litigants doing so as well, it may be suggested that citability is the present practice in that circuit at the district court level. With one of the district judges in addition openly criticizing the

Circuit rule that prohibits such citation, and with the Second Circuit itself remaining silent (in the rulemaking forum as well as in adjudication), it soon may be suggested that the court of appeals has acquiesced in what the district judges are doing, and has de facto abrogated its rule. Such a conclusion would draw support from the rule itself. The reason given for and by the rule is that summary orders "are unreported or not uniformly available to the parties." Local Rule § 0.23. That may well have been true in 1974, when the rule was adopted, but it is not true today, when the summary orders are both reported and uniformly available -- when, as Judge Lynch put it, they are "published to the world on both the LEXIS and Westlaw services." The need to save shelf space that originally animated the rule also no longer applies in the online era. The reasons for the rule having expired, the rule should as well. Thus it may be that adoption of FRAP Rule 32.1 would not change the citation practice as it presently exists in district courts of the Second Circuit.

7. Fears of a Crushing New Burden of Research Resulting form Citable Unpublished Opinions Ignore the Way Legal Research Is Done Today and the Experience of Both Federal and State Jurisdictions

Finally, Judge Kozinski and others claim that making unpublished opinions citable would impose a crushing new burden of research on attorneys and courts. As Judge Kozinski puts it, while noting that unpublished dispositions in the Ninth Circuit outnumber published dispositions by a factor of 7 to 1,

> Once all of these cases become citable authority, lawyers will be required as a matter of professional responsibility to read them, analyze them and figure out a way they might be helpful to their clients. All of this will take time and money,

contributing greatly to the appalling rise in the cost of litigation. [Kozinski Comments at 12-13.]

This picture of lawyers having to "read" and "analyze" the four thousand unpublished dispositions issued by the Ninth Circuit each year -- one sees a mountain of paper burying the hapless lawyer -- has little to do with the way legal research is done today. [12] (If the fact were otherwise, we scarcely would see the pronounced trend we do see among both federal circuits and state courts toward embracing what would be such a suffocating burden.)

Legal research is done today, of course, by computerized data-base searches. Some data bases are segregated into published and unpublished cases, such as Westlaw's California Reported Cases and California Unreported Cases (which can be combined for search purposes, of course). More often, the unpublished and published cases are included in the same data base, with the unpublished cases plainly marked as such; as Judge Kozinski states, "[e]very single unpublished disposition that appears online has a reference to the local rule limiting its citability." Kozinski Comments, p. 18. See, e.g., Westlaw's data base of Ninth Circuit opinions, which includes both published and unpublished ones.

---

[12] The same solecism comes from Professor Kelso in his article quoted by Judge Kozinski at page 12 of his testimony. Professor Kelso wrote that "if these opinions were published and citable, lawyers would have to search them to confirm that nothing useful was in them, thereby increasing the cost of legal research." (p. 12) Searching sources "to confirm that nothing useful [is] in them" is done today by computers; sources with "nothing useful in them" simply are not reported as search results. (Judge Kozinski mistakenly calls this a "later article" by Professor Kelso (p. 12), when it was dated 1994, seven years prior to the Task Force Report to which Judge Kozinski refers. See p. 12. In 1994, computer searching was not nearly so familiar and universal as it is today.)

So if there are 4,000 unpublished cases added annually to the data base, this means, not that the attorney must read or examine those 4,000 cases, but that a given search may retrieve more cases than previously. The attorney may simply narrow the search terms accordingly. Among the retrieved cases, the attorney will prefer published cases to unpublished ones (other things being equal), viewing unpublished cases more critically and using them more rarely, both because of court rules frowning on their use and because the published cases in any event will remain superior as precedents. See Barnett I, at 22. Any additional research time required by the presence of unpublished cases in the data base thus should be small and could well be imperceptible.

The cost of any such time may well be outweighed, moreover, by the value to the client, the court, and the legal system of finding a case that is in point on its facts. As Judge Richard A. Posner has written, "Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are two few on point." Richard A. Posner, The Federal Courts: Challenge and Reform 166 (1996). See also Harris v. United Federation of Teachers, supra.

Consider the experience of one state, New York. New York's intermediate appellate courts (Appellate Division and Appellate Term) decide some twelve thousand cases per year. See State of New York, Twenty-Fifth Annual Report of the Chief Administrator of the Courts for Calendar Year 2002 (www.courts.state.ny.us.%2F), at 6, 7. All these cases are decided with opinions -- of which some 92 percent are brief "memorandum" opinions, averaging about a page in the printed reports but often running a good deal longer. All the Appellate Division decisions are published in the Official Reports. And all of New York's appellate decisions, all 12,000 of them, are citable.

These 12,000 new opinions per year are more than twice the roughly 5,000 annual dispositions in the Ninth Circuit. See Kozinski Comments, p. 6. How do New York lawyers and judges survive under this supposedly crushing burden of cases to research? I put this question recently to about a dozen lawyers, judges, and court administrators in New York. They uniformly report that it is simply no problem. The people I questioned had differing views about the ubiquitous Memorandum decisions -- some finding them generally too brief to be useful in research -- but all agreed that the Memorandum decisions are often cited and that they can be useful, "especially when the facts are right on point." Most important, no one in New York voiced any problem with the task of researching all those citable decisions. It used to be difficult to research them, before computers came along, but now it can easily be done on line, one lawyer said.

Nor is New York marching to its own drummer. Texas last year abolished its category of "unpublished" appellate opinions in civil cases and made all those cases citable. See Barnett II, at 479 n. 37. Back in the federal courts, other circuits that allow citation of their unpublished opinions have numbers comparable to the Ninth Circuit's volume -- some 3,000 unpublished opinions yearly in both the Fifth and Eleventh Circuits. [13] In the light of the experience of these state and federal courts, Judge Kozinski's fear of great new burdens of research time being imposed by making opinions citable may well be chimerical.

CONCLUSION

The Advisory Committee should propose that FRAP Rule 32.1 be adopted. The fundamental reason, never addressed by Judge

---

[13] Judicial Business of the U.S. Courts, Table S-3 (period ending Sept. 30, 2000) (www.uscourts.gov/judicialfactsfigures).

Kozinski, lies in the Committee's recognition (p. 27) that no-citation rules are "wrong as a policy matter" -- that the federal courts cannot defensibly prohibit lawyers and litigants from telling a court what another court (or even the same court) has done in a similar case, and that judicial decisions should be fully in the public domain. Now that online capability is available to obviate any burden of additional research or additional shelf space, and now that nine of the thirteen circuits have "voted" to allow citation of their unpublished opinions, the Judicial Conference should not perpetuate conflict among the circuits on such a fundamental question.

If it is considered, however, that opposition from one or a few circuits prevents adoption of the proposed rule at this time, then I would make an alternative proposal: That the Advisory Committee hold this issue in abeyance -- put its proposal on the shelf -- for two years. Developments are moving so rapidly in this area, both in technology and in rule-making by both state and federal jurisdictions, that the picture could well look different, and clearer, two years from now. At that time, based on the trove of Comments which this rule-making proceeding has produced and perhaps on supplemental comments reflecting the two-year hiatus, the Committee as then informed could decide whether to recommend adoption of the proposed Rule.

Respectfully submitted,

Stephen R. Barnett
Elizabeth J. Boalt Professor of Law Emeritus

cc: The Honorable David F. Levi

Mr. Peter McCabe
Professor Patrick Schiltz