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Precedent and Justice

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Precedent and Justice

William D. Bader and David R. Cleveland***

Abstract

Precedent is the cornerstone of common law method. It is the core mechanism by which the common law reaches just outcomes. Through creation and application of precedent, common law seeks to produce justice. The appellate courts' practice of issuing unpublished, non-precedential opinions has generated considerable discussion about the value of precedent, but that debate has centered on pragmatic and formalistic values. This essay argues that the practice of issuing non-precedential opinions does more than offend constitutional dictates and present pragmatic problems to the appellate system; abandoning precedent undermines justice itself. Issuance of the vast majority of decisions as non-precedential tears the justice-seeking mechanism of precedent from the heart of our common law system.

In Memoriam Judge Richard S. Arnold (1936—2004)

“It is the property of a diamond . . . to appear most brilliant in the dark, and surely a good man never shines to greater advantage than in the gloomy hour of adversity.”¹

Sarah Livingston Jay
December 1779

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***[Editor's Note: Portions of this article with respect to the historical background and development of precedent build off of the authors' previous insightful writings and extensive research on the topic of precedent, particularly David R. Cleveland, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. App. Prac. & Process 61 (2009) and William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5 (1994)].

1. WALTER STAHR, JOHN JAY: FOUNDING FATHER 125 (Hambleton and London, Inc. 2006).

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I. INTRODUCTION

Precedent is the cornerstone of common law method, the conceptual vehicle allowing law and justice to merge as one. Most proponents of precedent seem to miss the inherently justice-seeking value of the concept, and, instead extol its pragmatic value.² We contend much more: precedent is indeed where law meets justice.

In this essay, we will briefly examine the meaning of justice from classical times to the present and illustrate why precedent is justice-seeking compared to other adjudicative methods that have been employed in legal history. Then, we will demonstrate how failure to abide by precedent in a specific case, without distinguishing or overruling the precedent, is an injustice. Failure to respect precedent systemically, as with the issuance of non-precedential opinions, makes the law less just as a whole.

II. THE MEANING OF JUSTICE AND PRECEDENT AS A JUSTICE-SEEKING MECHANISM

Our philosophy of justice can be traced directly from the classical Greek philosophers.³ Although there was disagreement among them regarding the substantive content of justice, most philosophers regard "equality" (of some sort) as the framework of justice.⁴

2. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (providing a fine and legally important survey of the pragmatic rationale for adherence to precedent).

3. JOEL FEINBERG & JULES COLEMAN, *PHILOSOPHY OF LAW* 389-90 (Wadsworth 2000).

4. *Id.*

Aristotle is the most influential of the classical Greek thinkers on the subject of justice.⁵ He defines justice as proportionate equality. The essential requirement of justice for Aristotle is that like cases be treated alike or equally, in direct proportion to their likeness or equality.⁶

We certainly stand on the shoulders of the ancient Greeks and, most particularly, Aristotelian shoulders. Amartya Sen, the Nobel laureate and economist, recently wrote that, in theories of justice from the Enlightenment to the post-Enlightenment, through the present, equality is the common formal basis, regardless of substantive differences.⁷ Sen explains:

[These theories of justice] demand equality of *something*—something that is regarded as particularly important in that theory. The theories can be entirely diverse (focusing on, say, equal liberty or equal income or equal treatment of everyone's rights or utilities), and they may be in combat with each other, but they still have the common characteristic of wanting equality of something: (some feature of significance in the respective approach).⁸

The importance of precedent as inherently justice-seeking may be seen in the differences between the precedent-based common law compared to its immediate predecessors, such as trial by ordeal or trial by combat. While the latter methods are rooted in mere chance or physical strength, the former is based on reason, equality and fairness.

Trial by ordeal was prevalent in pre-Norman Anglo-Saxon England.⁹ For freemen, the most common ordeal was the hot iron. Specifically, a hot iron bar was carried nine feet by the accused. The accused's burns were bandaged for three nights and were then uncovered. If the burns had healed, the accused was deemed not guilty or not liable by the judgment of God. If the burns had not substantially healed, the accused was deemed guilty or liable.¹⁰ It is indeed shocking how the legal method of ordeal is com-

5. *Id.*

6. See generally ARISTOTLE, THE NICOMACHEAN ETHICS (J. L. Ackrill & J. O. Urmson eds., David Ross et al. trans., Oxford University Press 1998).

7. AMARTYA SEN, THE IDEA OF JUSTICE 291-93 (2009).

8. *Id.* at 291.

9. THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 102 (The Lawyers Co-Operative Publishing Co. 1929).

10. *Id.* at 102-03.

pletely unrelated to justice and is no different in rationality than a throw of the dice.

The Norman Conquest of England in 1066 brought with it the trial by combat, which replaced the ordeal.¹¹ In civil cases, a battle was fought between “champions” who represented the parties.¹² The champion was “originally a witness who was . . . bound by homage to defend his lord’s title.”¹³ Later, champions formed a professional group and were hired by litigants in a manner vaguely similar to lawyers.¹⁴ In criminal cases, the litigants were required to personally fight each other to the death.¹⁵ As with trial by ordeal, trial by combat was a method completely unrelated to rational justice. Although it was believed that God determined the outcome of the combat, it was more accurately an institution of “might makes right.”

Within a century, however, Henry II began the process of uniting England under a common system of laws.¹⁶ Soon, a more coherent system of law, involving both learned judges and professional bar, emerged.¹⁷ The bench and bar, in the manner of all bureaucracies, began to keep records of their actions and the arguments and decisions of courts then served as tools to guide arguments by advocates and judgments by the courts.¹⁸ By 1250, the common law system saw Henry de Bracton, an accomplished judge, attempting to explain the principles and procedures of English law through a collection of cases and an accompanying treatise, demonstrating a strong belief in the value of precedents.¹⁹ Even at this early stage, the core justice-seeking premise of the common law was that, “if like matters arise let them be decided by like, . . . since the occasion is a good one for proceeding *a similibus ad similia*.”²⁰ Soon after Bracton’s effort, the arguments and decisions were being recorded in “the very words of judges and pleaders,” and both counsel and the court cited to prior decisions and

11. *Id.* at 104.

12. *Id.*

13. *Id.*

14. PLUCKNETT, *supra* note 9, at 105.

15. *Id.*

16. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 13-14 (4th ed. 2002) (“Against that uniform system, local custom would thereafter be seen at best as exceptional and at worst as exceptionable.”). *Id.* at 14.

17. *Id.* at 19.

18. *Id.*

19. J. W. TUBBS, THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTIONS 7-20 (2000).

20. *Id.* at 19

knew full well that a decision would be viewed as precedent in later cases.²¹ These records, while not individually binding in the modern sense, were viewed as evidence that the course of the common law was on the side of the advocate urging them.²²

In sixteenth century England, there was a dramatic transformation of legal methodology resulting in the modern common law.²³ Harold J. Berman writes of the period:

The new emphasis on the historicity of English law, that is, on the normative character of its historical development over generations and centuries, was manifested in new ways of systematizing it. The most obvious methodological manifestation of the new historical jurisprudence was the emergence of the modern doctrine of precedent.²⁴

In this historical approach, guided almost entirely by precedent or analogy to prior-similar cases, we see a critical connection between law and justice. Basic equality under the law, the essence of justice, was instituted by treating like cases alike.

Sir Edward Coke was the most powerful judicial and scholarly champion of this precedent-based common law. Coke writes "*Neminem oportet esse sapientiores legibus*: no man out of his own private reason ought to be wiser than the law, which is the perfection of reason."²⁵ Specifically, Coke defines law as an "artificial perfection of reason" that incorporates a judicial dialectic of experience and legal precedent over time.²⁶ A judge is personally constrained by precedent to applying the law in a just-equal way, while continually refining the law by studying the precedents and the facts of new cases. In Coke's work was seen a keen focus on the nexus between the common law and justice via the utilization of precedent.

Pioneering scholarship by William D. Bader²⁷ and Henry P. Monaghan,²⁸ respectively, and the great-seminal opinion of Judge

21. BAKER, *supra* note 16, at 225 (citing *Midhope v. Prior of Kirkham*, 36 S.S. 178 (1313) (Stanton, J.) (speaking of his decision, most likely directly to a reporter, "one may safely put that in his book for law.")).

22. BAKER, *supra* note 16, at 26.

23. HAROLD J. BERMAN, *LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 270 (2003).

24. *Id.*

25. Coke, *INSTITUTES OF THE LAWS OF ENGLAND*, Lib. 2. Cap. 6. Sect. 138 (3d. ed. 1633).

26. *Id.*

27. William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 9 (1994).

Richard S. Arnold in *Anastasoff v. U.S.*²⁹ demonstrate that the common law respect for precedent inheres in the judicial power of the United States under Article III by means of the Framers' intent. Judicial respect for precedent is, therefore, a constitutional imperative by virtue of original meaning.

There is a consensus that Sir William Blackstone's *Commentaries on the Laws of England* was the singularly most important intellectual influence on the attorneys who drafted the Constitution.³⁰ In fact, Blackstone's *Commentaries* "rank second only to the Bible as a literary and intellectual influence on the history of American institutions."³¹

William D. Bader has previously concluded that Blackstone, in the tradition of Coke, "regarded precedent as the ultimate cornerstone of the common law" and as a constraint on judges to justly decide like cases alike rather than ruling according to their individual prejudices.³² Blackstone writes on the justice-seeking function of precedent: "For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion."³³ Blackstone concludes, "the doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust."³⁴

One of the most important Framers, Alexander Hamilton, was among the Blackstone-educated lawyers of the Founding.³⁵ Hamilton's intellectual preparation is manifest in his Federalist No. 78, where he explains and defends Article III, the judicial article, of the Constitution.³⁶ Bader has demonstrated that Hamilton "maintained that the common law method, and more specifically a Blackstonian reverence for precedent, as the principal guarantee of the rule of law, was inherent in Article III."³⁷ Thus, justice-

28. Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988).

29. 223 F.3d 898, 899-900 (8th Cir. 2000).

30. See generally Bader, *supra* note 27, at 6-9.

31. Bader, *supra* note 27, at 8 (citing ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984)).

32. Bader, *supra* note 27, at 8-9 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 69 (New ed., with the last corrections of the author ..., with notes/by John Frederick Archbold, London, 1811)).

33. Bader, *supra* note 27, at 8 (quoting BLACKSTONE, *supra* note 32, at 69).

34. Bader, *supra* note 27, at 9 (internal quotation omitted) (quoting BLACKSTONE, *supra* note 32, at 70).

35. Bader, *supra* note 27, at 9 (citing JACOB COOKE, ALEXANDER HAMILTON 29 (1982)).

36. Bader, *supra* note 27, at 9.

37. *Id.*

seeking precedent, treating similar cases equally, is built into the judicial function under the Constitution. In Hamilton's words: "To avoid arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."³⁸

The earliest treatise of importance about the U.S. Constitution was Justice Joseph Story's *Commentaries on the Constitution of the United States*.³⁹ Bader has shown that Story believed, "the common law method, as characterized by a Blackstonian-style reverence for precedent, was rooted in Article III."⁴⁰

This essentially served justice by insuring that judges would treat similar cases equally. In a pertinent passage from his *Commentaries on the Constitution of the United States*, Story wrote:

Ours is emphatically a government of laws, and not of men; and judicial decisions of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws, which are brought into controversy before it. The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.⁴¹

38. Bader, *supra* note 27 (citing THE FEDERALIST NO. 78, at 442 (Alexander Hamilton) (Isaac Krammick ed. 1987)).

39. RONALD D. ROTUNDA AND JOHN E. NOWAK, *Introduction to JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, XI-XII (photo. Reprint 1987) (1833).

40. Bader, *supra* note 27, at 10.

41. Bader, *supra* note 27, at 10-11 (citing ROTUNDA, *supra* note 39, at 126-27).

Justice Benjamin Cardozo, in his most important extra-judicial scholarship, *The Nature of the Judicial Process*, provides a glimpse into his understanding of precedent. Justice Cardozo wrote: "If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles."⁴² Clearly, Justice Cardozo described, in other words, the essence of precedent as treating similar cases equally and therefore justly.

Justice William O. Douglas, in a fascinating extra-judicial piece, also attributed faithfulness to precedent as a matter of equality of justice. He wrote "there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon."⁴³

Surprisingly, Karl Llewellyn, hardly a legal formalist, sensed that equal justice was the key to understanding the common law concept of precedent. He wrote, most perceptively, that "[t]he force of precedent in the law is heightened by . . . that curious, almost universal, sense of justice which urges that all men are properly to be treated alike in like circumstances."⁴⁴

Most of the U.S. Supreme Court's more recent jurisprudence supportive of precedent is best exemplified by *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴⁵ In *Casey*, exclusively pragmatic issues are adduced to support adherence to precedent.⁴⁶

A rare exception to such pragmatically-driven cases is an opinion authored by Justice Souter and joined by Justice Stevens, in which four additional justices concurred in judgment, *James B. Beam Distilling Co. v. Georgia*.⁴⁷ The Court in *Beam* held that a prior Supreme Court civil ruling, *Bacchus Imports, Ltd. v. Dias*, which invalidated a Hawaiian distillery tax scheme, applies retroactively to *Beam's* present claim at bar arising out of similar facts antedating the prior ruling.⁴⁸

Justice Souter wrote that when the Supreme Court has applied a rule of law to litigants in one civil case, it must apply the same

42. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 33 (1921) (quoting W. G. MILLER, *THE DATA OF JURISPRUDENCE* 335 (1903)).

43. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

44. WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 232 (Robert Stevens et al. eds., University of Oklahoma ed., University of Oklahoma Press 1985) (citing Karl N. Llewellyn, *Case Law*, 3 ENCYC. OF SOC. SCI. 249 (1931)).

45. 505 U.S. 833 (1992).

46. *Id.*

47. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

48. *James B. Beam Distilling Co.*, 501 U.S. at 532-544.

rule, now a precedent, to similarly situated civil litigants who subsequently appear before the Court, unless it is barred by procedural requirements or *res judicata*.⁴⁹ He rejected various pragmatic arguments for such adherence to precedent and announced, instead, that “selective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally.”⁵⁰ Justice Souter went on to succinctly state his justice-seeking rationale in applying precedent, when he wrote that “equality drives us.”⁵¹

III. ABANDONING PRECEDENT UNDERMINES THE LAW’S ABILITY TO RENDER JUSTICE

Despite the importance of precedent to justice, modern American courts frequently abandon precedent by issuing “unpublished opinions.” These opinions are generally viewed as non-precedential, though no principled basis for removing some decisions from the body of precedent has ever been enunciated.⁵² If the principle of precedent is intrinsic to the common law system of justice, and we argue that it is, then it must be adhered to unless some other principal is deemed to be overriding. Mere expediency or efficiency is not sufficient.⁵³

The initial proposal for denying precedential value to some decisions failed to locate any principle of jurisprudence that would justify the creation of unpublished opinions and non-precedential

49. *Id.* at 544.

50. *Id.* at 537.

51. *Id.* at 542. In an earlier case, *Griffith v. Kentucky*, Justice Blackmun had ruled pragmatic considerations are trumped by the requirement of equal justice, with the latter mandating that similarly situated criminal defendants be treated the same in questions regarding the retroactivity of a new constitutional-criminal law precedent to pending or non-final criminal cases. 479 U.S. 314 (1987).

52. See David R. Cleveland, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61,70-84 (2009) (noting the creators of the federal unpublication system’s intentional refusal to consider the propriety of their *sub silentio* denial of precedent to some opinions, viewing it as a “morass of jurisprudence.”). See also FED. JUDICIAL CTR., ADVISORY COUNCIL ON APPELLATE JUSTICE, COMM. ON USE OF APP. CT. ENERGIES, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REPORT OF THE COMMITTEE ON USE OF APPELLATE ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE 20 (1973) [hereinafter STANDARDS FOR PUBLICATION].

53. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (“although efficacious administration of governmental programs is not without some importance, ‘the Constitution recognizes higher values than speed and efficiency.’”); citing *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

precedents.⁵⁴ In fact, the whole idea of justifying such a fundamental departure from the common law's treatment of precedent was dubbed a "morass of jurisprudence," and no further inquiry was made into the propriety of courts removing their decisions from the body of precedent.⁵⁵ Without any jurisprudential justification or even open examination, our federal judicial system has abandoned the core mechanism of the common law in order to manage the increased caseload. By creating and perpetuating a system of non-precedential decision-making within our common law courts, it has unwittingly and unreflectively weakened the cornerstone of our system of justice.

Hopefully, upon long-overdue reflection, we will find a different way to address the "crisis of volume" in the federal courts (and our American courts generally), and end this system that runs counter to human conceptions of justice, United States constitutional guarantees, and the very notion of justice itself.

A. *Abandoning Precedent Is Contrary to Lay and Lawyer Conceptions of Justice*

Failure to abide by precedent in a single case is an injustice, unless the court can distinguish the case or overrule the law. Failure to abide by precedent systemically also makes the law less certain, less reliable, and less just as a whole.

Humans have an inherent expectation that precedent will be followed and that, when followed, it results in fair outcomes.⁵⁶ Failure to follow precedent results in a sense of unfairness and injustice unless a reason for departure is given.⁵⁷ From young children asking to be treated as older siblings were treated to the expectation of equal work for equal pay, we perceive justice in fairness and equality and injustice in different treatment without justification. Indeed, decision-makers of all kinds fear "setting a bad precedent" because they feel they will be expected to act the same in the future, even though no formal mechanism exists for enforcing precedent in that fashion. Precedent is fundamental to even our lay perceptions of fairness and justice.⁵⁸

54. Cleveland, *Overturing the Last Stone*, *supra* note 52, at 89-90; *see also* STANDARDS FOR PUBLICATION, 20 (1973) (avoiding the issue of denying cases precedent as a "morass of jurisprudence").

55. STANDARDS OF PUBLICATION, *supra* note 52, at 20-21.

56. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572 (1987).

57. Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205 (1985).

58. Schauer, *supra* note 56.

It is understandable then that adherence to precedent is critical to our formal, government-run system of justice.⁵⁹ At its core, the common law is about determining the applicable legal principles and whether they apply to given facts by referencing past applications to similar facts.⁶⁰ Karl Llewellyn explained this well when he wrote:

We have discovered that rules *alone*, mere forms of words, are worthless. We have learned that the concrete instance, the heaping of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, *mean* anything at all.⁶¹

In every case, the court applies the law to the litigants' facts and doing justice in harmony with what has been done before and providing another example for future parties to know what the law is. This is the process of building and refining the common law that Lord Coke viewed as the strength of the common law form of meting out justice.⁶²

The law is made up of applications of law, not just enunciations of law, which is why we talk of the common law being "deprived" of precedent⁶³ and why Judge Arnold was troubled by the issuance of unpublished opinions:

If we mark an opinion as unpublished, it is not precedent. We are free to disregard it without even saying so We are perfectly free to depart from past opinions if they are un-

59. See, e.g., Lauren Robel, *The Practice of Precedent: Anastosoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002) (examining the contemporary surveys of federal judges and lawyers). See also Lauren Robel, *The Myth of the Disposable Opinion*, 87 MICH. L. REV. 940 (1989).

60. KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 66-69 (1930).

61. *Id.* at 12.

62. Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 108 n.503 (2001); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1537, n.91 (1987).

63. See, e.g., Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 73 (2001). See also Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 785-801 (1995); Pamela Foa, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309, 338-41 (1977); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981).

published, and whether to publish them is entirely our own choice.⁶⁴

This practice would not have sat well with the many common law thinkers noted in Part I of this article, it does not sit well with us, and it did not sit well with Judge Richard S. Arnold:

I would take the position that all decisions have precedential significance. To be sure, there are many cases that look like previous cases, and that are almost identical. In each instance, however, it is possible to think of conceivable reasons why the previous case can be distinguished, and when a court decides that it cannot be, it is necessarily holding that the proffered distinctions lack merit under the law. This holding itself is a conclusion of law with precedential significance . . . Every case has some precedential value, maybe not much, but some.⁶⁵

The fundamental nature of precedent as inherent in our legal system is apparent in the actions of both lawyers and judges, who have continued to use unpublished opinions despite the practice during the last three decades of limited publication, citation, and precedent.

Lawyers and judges continue to find value in unpublished opinions and seem to reject the idea that these opinions lack value.⁶⁶ Surveys of judges and lawyers in the federal system demonstrate that designating opinions unpublished has not prevented their use.⁶⁷ The White Commission Report, the result of a study of the federal judiciary's structure undertaken in the late 1990s, revealed that federal judges and lawyers looked to and cited unpublished opinions with a frequency that suggested that they found them to be of value.⁶⁸ More recent studies by the Federal

64. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221 (1999).

65. *Id.* at 222-23 (emphasis in original removed).

66. Robel, *The Practice of Precedent*, *supra* note 59, at 401 ("[E]vidence suggests that lawyers and judges value these opinions despite the rules limiting citation. This valuation, in turn, suggests a cultural, rather than rule-based conception of stare decisis.").

67. Robel, *The Practice of Precedent*, *supra* note 59. See also Robel, *The Myth of the Disposable Opinion*, *supra* note 59.

68. See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FED. CTS. OF APPEALS, WORKING PAPERS, at 3 (1998); COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FED. CTS. OF APPEALS, FINAL REPORT, at ix (1998). See also Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 235, tbl. 6 (2001); Robel, *The Practice of Precedent*, *supra* note 59, at 405-07 (summa-

Judicial Center (“FJC”) and the Administrative Office (“AO”) support these findings.⁶⁹ Likewise, when the federal bench and bar were invited to discuss the new rule permitting citation of unpublished opinions, these findings were further corroborated and “often stated in emphatic terms.”⁷⁰ For example, many lawyers and judges reject the idea that a court can predict which cases will have precedential value because “[o]nly when a case comes along with arguably comparable facts does the precedential relevance of an early decision-with-opinion arise . . . Lacking omniscience, an appellate panel cannot predict what may come before its court in future days.”⁷¹ Recent studies by academics confirm the courts’ inability to determine *ex ante* which cases are of interest to later litigants as precedent and which are not.⁷² That is because no such distinction exists.⁷³ Every decision a court makes is as precedential or non-precedential as a later court applying that decision finds it to be based on the facts at bar.⁷⁴ It has been aptly noted that, “[l]arge numbers of participants in the federal appellate system, including judges, use unpublished opinions in ways not contemplated by the publication, although completely consistent with common-law understandings of practice surrounding precedent.”⁷⁵

rizing the relevant data from the White Commission’s surveys of federal judges and lawyers).

69. TIM REGAN ET AL., FEDERAL JUDICIAL CENTER, CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT 10, 24-26, 39, 45-48 (2005); see also *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 30, 65-66, 71 (2005); David R. Cleveland, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 101-02.

70. Minutes of the 2004 Advisory Committee on Appellate Rules and Procedure, 8 (Apr. 13-14 2004) available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/app0404.pdf>.

71. Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 773 (2003).

72. Stephen R. Barnett, *The Dog that Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders*, 62 WASH. & LEE L. REV. 1491, 1550-51 (2005); Merritt & Brudney, *supra* note 63, at 120. See also Mark D. Hindberks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 Washburn L.J. 155 (1992) (collecting an overwhelming number of Kansas appellate cases in which law-making opinions were designated as non-precedential).

73. The United States Supreme Court has never explicitly acknowledged the concept of a non-precedential opinion. At most, it has acknowledged that the circuits believe unpublished opinions to be without precedential value. See *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) (“The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.”).

74. LLEWELLYN, *supra* note 60, at 52 (stating that it is the later precedent-applying court that determines the scope of the earlier precedent-writing court’s decision regardless of the words earlier court).

75. Robel, *The Practice of Precedent*, *supra* note 59, at 414.

The adoption of non-citation rules regarding unpublished opinions allowed circuits to strip these decisions' precedential value *sub silentio* and without justification.⁷⁶ In fact, the committee that proposed the non-citation rules considered declaring the decisions non-precedent outright but decided not to, fearing it a "morass of jurisprudence."⁷⁷ The committee, therefore, decided to rely on the principle of out of sight, out of mind, hoping that the "correspondence of publication and precedential value on one hand, and of non-publication and non-precedential value on the other" would reduce the precedential value of unpublished opinions without anyone ever having to justify that result.⁷⁸

But some of the circuit judges charged with issuing these decisions perceived the threat to justice such a practice entails. Judges Holloway, Baldock, and Burnett of the Tenth Circuit expressed their justice-focused concern in a dissent to the adoption of a non-citation rule:

The most important reasons for permitting citation of published precedents are just as cogent to me in the case of unpublished rulings. Each ruling, published or unpublished, involves the facts of a particular case and the application of law to the case. Therefore all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation. *No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness.* To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule.⁷⁹

The dissenters questioned what they ought to do if they discovered a prior unpublished opinion whose ruling would be controlling if it were not technically unpublished and theoretically not precedential. Principle and common law jurisprudence demands, they determined, "[w]e would clearly have the duty as a matter of

76. STANDARDS FOR PUBLICATION, *supra* note 52, at 20-21.

77. STANDARDS FOR PUBLICATION, *supra* note 52, at 20-21.

78. STANDARDS FOR PUBLICATION, *supra* note 52, at 20-21.

79. Re: Rules of U.S. Court of Appeals for Tenth Circuit. Adopted Nov. 18, 1986, 955 F.2d 36, 37 (10th Cir. 1992) (Holloway, J., dissenting) (internal citation omitted) (emphasis added).

basic justice to apply it, and in so doing logic would demand citing the earlier ruling.”⁸⁰

Precedent’s centrality to justice, or at least common law justice, is apparent in the actions of lawyers and judges and their willingness to ignore and eventually remove rules contrary to precedent. The power of precedent within our legal system is too fundamental and necessary to be set aside forever by rule. Three decades of circuit rules creating non-precedential precedents have been unable to overcome the strong cultural and practical commitment to the idea of precedent as inherent in every decision courts make.⁸¹

B. Abandoning Precedent Denies Justice-Seeking Constitutional Guarantees

Precedent is the cornerstone of common law adjudication and is the vehicle by which the common law system achieves justice. Indeed, as Justice Story has noted, “[a] more alarming doctrine could not be promulgated by any American court than that it was at liberty to disregard all former rules and decisions and to decide for itself, without reference to the settled course of antecedent principles.”⁸² Yet, a court issuing an unpublished opinion essentially declares, “this law is good only for this one time and place; we need not follow or even acknowledge this decision in the future.” That the federal courts issue over eighty percent of its opinions this way, suggests that Justice Story’s fear has come to pass: the American courts have abandoned precedent as a touchstone of jurisprudence.⁸³ A court that can decide that its decision in the present case need not be followed in the future and that prior decisions need not be followed because of the manner in which they were published has abandoned fidelity to precedent as a governing concept.

To the individual party, abandonment of precedent creates an unjust, perhaps unconstitutionally unjust, outcome. First, courts are expected to exercise judicial authority over disputes to determine how the law applies to each case. This authority is limited

80. *Re: Rules of U.S. Court of Appeals*, 955 F.2d at 37 (Halloway, J., dissenting).

81. Robel, *Practice of Precedent*, *supra* note 59, at 414.

82. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 349-50 (1833) (1991).

83. One review of unpublished opinions found them replete with evidence that precedent is not being followed, resulting in unpublished opinions containing novel interpretations of the law, reversals of what the district court believed to be the law, split decisions, decisions at variance with other panels of the same appellate courts, and decisions that evidence circuit splits. See Merritt & Brudney, *supra* note 63.

by precedent such that what has been done in the past is done again, unless some rational basis for a departure is found.⁸⁴ Litigants expect their case to be decided in adherence to the court's prior rulings and repeat-litigants expect that a ruling they receive one day is the same ruling they would receive the next. The court's unfettering itself from creating and following precedents leads to blatantly unjust results for litigants involved. Take, for example, the travails of Dallas Area Rapid Transit (DART), a quasi-governmental agency that received qualified immunity in an unpublished opinion of the Fifth Circuit, only to have that qualified immunity stripped away by a published opinion of the Fifth Circuit two years later without any distinguishing of the facts of the two cases, nor any dispute about the principle of law involved.⁸⁵

Similarly, the court's failure to explain its departure from prior law leads to unjust results. For example, in *NLRB v. Family Fare, Inc.*,⁸⁶ the Sixth Circuit issued an unpublished opinion that directly contradicted the published law of the circuit.⁸⁷ Both parties were confused by the alteration of substantive law in an unpublished opinion. Both parties perceived that this opinion was precedent for future decisions. Family Fare felt that it was treated differently than litigants in prior cases, noting, "[t]he Sixth Circuit has subjected the election here to a legal standard different than the one that applies in every other comparable union election case in the Sixth Circuit."⁸⁸ Likewise, the NLRB also perceived this as an alteration of the governing law, albeit a favorable one, and to make sure that alteration would be made permanent, it urged the Sixth Circuit to publish the opinion because it "provides

84. *Anastasoff v. U.S.*, 223 F.3d 898, 902 (8th Cir.), *vacated* 235 F.3d 1054 (8th Cir. 2000) (noting that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . .").

85. *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 261 (5th Cir. 2001) (Smith, J., dissenting) (dissenting from denial of petition for rehearing en banc); *Anderson v. Dallas Area Rapid Transit*, No. CA3:97-CV-1834-BC, 1998 U.S. Dist. LEXIS 15493 (N.D. Tex. Sept. 29, 1998), *aff'd*, 180 F.3d 265, (5th Cir. 1999) (*per curiam*) (*unpublished*), *cert. denied*, 528 U.S. 1062 (1999).

86. *N.L.R.B. v. Family Fare, Inc.*, 205 F. App'x 403 (6th Cir. 2006).

87. Petitioner Family Fare explained that the Sixth Circuit's published standard held that "[t]he party challenging the election need not introduce proof of actual coercion," while the Sixth Circuit panel's unpublished opinion in *Family Fare, Inc. v. N.L.R.B.* held, "[s]ome showing of coercion is required to sustain a finding of objectionable conduct." See *Petition for Writ of Certiorari, Family Fare, Inc. v. N.L.R.B.*, 551 U.S. 1133 (2007) (No. 06-1536), 2007 WL 1481871 at *4.

88. *Petition for Writ of Certiorari, Family Fare*, 551 U.S. 1133 (No. 06-1536) at *6.

much-needed guidance on a new approach to what previously [has] been an area of dispute between the Board and the Sixth Circuit.”⁸⁹

If, as we have proposed, justice is primarily a matter of equality, few constitutional protections embody that justice more than Equal Protection.⁹⁰ The practice of abandoning precedent by issuing unpublished opinions has long been viewed as contrary to Equal Protection.⁹¹ The uncertain precedential status of the court’s unpublished opinions leads to situations that treat similarly situated litigants in a disparate manner.⁹² As the *Family Fare* and *DART* cases above starkly illustrate, similarly situated parties (or even the same party at different times) can come before the court and receive diametrically opposed treatment. That is unjust on a fundamental level. It is the opposite of how the common law should function.

Another constitutional protection aimed at promoting justice is that of due process. Due process is the duty owed by government to afford fair process before depriving someone of life, liberty, or property.⁹³ This constitutional guarantee is fundamentally a duty of government to follow a fair process of decision-making and to both ensure fair play toward individuals and to minimize substantively unfair deprivations of life, liberty, or property.⁹⁴ Traditional common law procedures have been considered the lodestar for determining fair process:

As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis. Because the basic procedural protections of the common law have been regarded as so fundamental, very few

89. *Id.* at 6–7 (emphasis omitted) (quoting N.L.R.B.’s Motion for Publication).

90. The requirement of treating similarly situated litigants in a similar manner is a direct application of Aristotle’s “proportionate equality.” See generally ARISTOTLE, *supra* note 6.

91. See, e.g., William J. Muller, *Chipping Away at the Dam: Anastasoff v. United States and the Future of Unpublished Decisions in the United States Court of Appeals and Beyond*, 50 DRAKE L. REV. 181 (2001); Lance A. Wade, *Honda Meets Anastasoff: The Procedural Due Process Argument Rules Prohibiting Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001); Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. KAN. L. REV. 195 (2001).

92. Strongman, *supra* note 91, at 220.

93. Analisa Pratt, *A Call for Uniformity in Appellate Courts’ Rules Regarding Citation of Unpublished Opinions*, 35 GOLDEN GATE U. L. REV. 195, 214 (2005); Wade, *supra* note 91, at 717.

94. *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972).

cases have arisen in which a party has complained of their denial. In fact, most of our due process decisions involve arguments that traditional procedures provide too little protection and that additional safeguards are necessary to ensure compliance with the Constitution. Nevertheless, there are a handful of cases in which a party has been deprived of liberty or property without the safeguards of common-law procedure. When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.⁹⁵

There are no traditional practices more fundamental to the common law than the practice of precedent. What was adjudicated yesterday must be followed, distinguished, or the underlying principle rejected, and failure to do so is an abandonment of the common law system itself. Individuals order their affairs and plan their behaviors to conform with existing law. They do so with an expectation that the law as applied to them will be the same as it has been applied to others. Failure to do so denies individuals justice by denying the basic protections that: 1) past decisions can be relied upon as law and 2) the court deciding the individual case will do so in a manner that shapes the law going forward. It is obvious why the public desires the first of these protections; they have ordered their affairs in reliance and fairness requires equal treatment. But the second protection is also important. Knowledge that the decision stands as possible precedent for future cases assures litigants that their case is not *sui generis* and holds the court accountable. A common law court ought not be able to issue a decision good only for a single time and place.

Abandoning precedent causes great harm to individual litigants and individuals in society who might be litigants (which, given the breadth of conduct governed by modern law, is all of us). But it also causes dire systemic harms to our common law system of justice. It creates perverse incentives and allows for unjust practices and outcomes.

95. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430-32 (1994) (holding that "Oregon has removed that safeguard which the common law provided without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time") (internal citation omitted). *See also* Wade, *supra* note 91, at 717.

C. *Abandoning Precedent Causes Systemic Harm to our Justice System*

The ability of a deciding court to mark its opinions as precedential or non-precedential at the time of rendering the decision is an abandonment of the notion of precedent and results in a less just system overall. These systemic injustices fall into roughly five categories of harms.

First, the ability to render decisions that are not precedential encourages inappropriate strategic thinking among judges.⁹⁶ Judge Richard S. Arnold expressed this grave concern:

[I]f, after hearing argument, a judge in conference thinks that [sic] a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug.⁹⁷

Judge Patricia M. Wald of the D.C. Circuit confirmed that such “horse-trading” behavior does take place:

[A] double track system allows for deviousness and abuse. I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would be dissenters go along with a result they do not like so long as it is not elevated to a precedent. We do occasionally sweep troublesome issues under the rug.⁹⁸

The frequency of strategic thinking of this type, the type that causes cases to be decided based on factors not related to the case at bar, is unknown. But at least one study has found such thinking on a broader scale.⁹⁹ A study of asylum cases in the Ninth Circuit has indicated that there is strategic decision-making about publication among judges unrelated to the facts of the underlying

96. Arnold, *supra* note 64, at 223.

97. Arnold, *supra* note 64, at 223.

98. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995) (discussing her own observations as a judge on the D.C. Circuit).

99. David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 823 (2005) (“[t]he empirical literature on publication is sparse.”).

case.¹⁰⁰ Other studies have indicated that many unpublished opinions are lengthy, complex, or otherwise bear indicia of being publication-worthy—yet something unrelated to the substance of the case has caused them to go unpublished.¹⁰¹ This inappropriate use of strategic thinking about publication in making judicial decisions has long concerned Justice Stevens.¹⁰² He recently expressed his concern quite candidly, stating: “I tend to vote to grant [certiorari] more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.”¹⁰³ There is a significant and warranted concern that judges who seek a particular result not justified by current law may be able to obtain that result, co-opt would-be dissenters, or otherwise subvert the normal judicial process simply by agreeing that any decision rendered would be unpublished and outside the body of precedent.¹⁰⁴ This problem does not presuppose judges of ill-will or malice. Even in the earliest experimentation with limited publication and precedent plans, important members of the federal judiciary real-

100. *Id.* at 820 (“[V]oting and publication are, for some judges, strategically intertwined: for example, judges may be prepared to acquiesce in decisions that run contrary to their own preferences, and to vote with the majority, as long as the decision remains unpublished, but can be driven to dissent if the majority insists upon publication.”).

101. See e.g., *Id.* (collecting prior research); Brian P. Brooks, *Publishing Unpublished Opinions*, 5 GREEN BAG 259, 260-63 (2002); Foa, *supra* note 63, at 315-40 (citing a six-month study of Seventh Circuit cases which revealed that fifteen percent of unpublished cases were substantively significant and met the publication standards); Robert A. Mead, “Unpublished” Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals, 93 LAW LIBR. J. 589, 602-03 (2001) (examining publication rates by subject matter in the Eighth and Tenth Circuits over a six-month period and finding great disparity in publication rates, especially in areas where the government is a litigant); Merritt & Brudney, *supra* note 63, at 120 (2001) (finding that unpublished decisions have an effect on the substance of the law and that unpublished decisions are not simply routine application of the law but rather contain, “a noticeable number of reversals, dissents, or concurrences,” and “significant associations between case outcome and judicial characteristics”); Wald, *supra* note 98, at 1374 (noting a six-month study of D.C. Circuit cases found forty percent of unpublished cases arguably met the publication standards and noting she believed that percentage to be much higher in 1995). See also Hindberks & Leben, *supra* note 72 (collecting numerous unpublished Kansas appellate cases that are plainly law-making).

102. Justice John Paul Stevens, Remarks at the Illinois State Bar Association’s Centennial Dinner, Springfield, Illinois (Jan. 22, 1977), *quoted in* Brief Amicus Curiae of the Chicago Council of Lawyers, *Browder v. Dept. of Corrections*, 434 U.S. 257 (1978) (No. 76-5325), 1977 WL 189280 at *37.

103. Jeffrey Cole & Elaine E. Bucko, *A Life Well Lived: An Interview with Justice John Paul Stevens*, 32 NO. 3 LITIGATION 8, 67 (2006).

104. John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 128 (2006) (warning of the substantial incentive for judges to “bury [their] departures from or narrowing of precedent” by rendering unpublished opinions).

ized the potential for harm to the system by careless or overuse of the procedural shortcuts. Judge John R. Brown, then-Chief Judge of the Fifth Circuit, sought to justify the court's adoption of a limited publication and precedent rule, but in so doing he warned that its use should be sparing and careful:

[T]he Court, by the adoption of the [precedent-limiting] Rule, affirms that it must be carefully and selectively employed The Court recognizes that it must—the word is must—never apply the Rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues. This means that while Rule 21 should make a real contribution toward the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used The Court itself must be vigilant. We believe we are sensitive now to the factors which would make application of the Rule wrong or unwise or inappropriate. It is the Court's purpose to heed them and in our own survival assure survival of the system we cherish.¹⁰⁵

Judge Brown's fears have come to pass.¹⁰⁶ A system that both permits and structurally encourages such strategic decision-making based on factors not relevant to the case at bar has lost its justice-seeking focus.

Second, failure to regard each decision as precedent allows for unwitting departures from, or needless delay in establishing, settled law. The departures result in a failure to treat similarly situated parties similarly—a denial of basic equality. In *U.S. v. Rivera-Sanchez*, the Ninth Circuit was confronted with no less than twenty unpublished circuit opinions blatantly divided on a single, simple issue.¹⁰⁷ Yet because none of the unpublished decisions were viewed as precedent, each could be ignored in favor of what-

105. *N.L.R.B. v. Amalgamated Clothing Workers of Am., AFL-CIO Local 990*, 430 F.2d 966, 972-73 (5th Cir. 1970).

106. See David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685, 687-88 (2009) (claiming the current use of unpublished opinions is neither sparing nor carefully limited); see also, Jeffrey Cole & Elaine E. Bucklo, *supra* note 103 (quoting Justice Stevens as saying, "Well, I tend to vote to grant more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.").

107. 222 F.2d 1057, 1063 (9th Cir. 2000). Of the twenty decisions identified in *Rivera-Sanchez*, eleven decisions ruled in favor of one procedure, six in favor of another, and three remanded to force the district courts to take a position on the proper process. *Rivera-Sanchez*, 1057 U.S. at 1063.

ever the ruling panel assigned to that case found appropriate.¹⁰⁸ Failure to recognize the inherent precedential value of these decisions allowed these litigants to be treated differently, prevented a single law of the circuit to emerge, and caused confusion among lawyers and litigants about what to expect from the court on this issue. Similarly, in *Family Fare, Inc. v. NLRB*, the Sixth Circuit so blatantly departed from the published standard regarding an issue of law that both parties acknowledged the departure from precedent.¹⁰⁹ Yet, the court issued its decision as unpublished, apparently willing to allow its new rule to govern the instant case but not to govern cases in the future.¹¹⁰ This type of unequal treatment of litigants resulting from as systematic disregard for precedent is not a new occurrence. Its deleterious effects were noted in a series of criminal appeals in the early years of the non-precedential unpublished opinion experiment.¹¹¹ A series of criminal appeals found considerable inconsistency over both the legal standard ("founded suspicion" or "probable cause") and the standard of review ("de novo" or "abuse of discretion") to be applied.¹¹² This inconsistency between panels and between published and unpublished opinions undermine the critical goal of "uniform . . . application of the law."¹¹³

Third, failure to see the precedential value of each of the federal courts' decisions allows for splits in the law, yielding different outcomes depending on the circuit in which the action is brought. If equality or fairness are touchstones of justice, such splits are fundamentally unjust. Though the Court denied certiorari in *Smith v. United States*, Justices Blackmun, O'Connor, and Souter warned, "[n]onpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned

108. This muddle was exacerbated by the then-current local rule that forbade counsel from even mentioning unpublished decisions. 9th Cir. R. 36-3. Following the passage of Federal Rule of Appellate Procedure 32.1, counsel are at least permitted to tell the court that its panels are deviating from one another, though nothing compels the panels to stop doing it because no precedential value needs to be accorded to any of these decisions. See FED. R. APP. P. 32.1.

109. See Petition for Writ of Certiorari, *Family Fare*, 551 U.S. 1133 (No. 06-1536) at *4-7.

110. *Family Fare, Inc.*, 205 F. App'x 403.

111. James N. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224, 1225-26 (1975).

112. Gardner, *supra* note 111, at 1225-26.

113. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 38 (1976).

as is a published opinion.”¹¹⁴ Similarly, in *St. Louis Southwestern Ry. Co. v. Bhd. of Ry. Airline and Steamship Clerks, Freight Handlers, Express & Station Emp.*, two Justices noted this threat to uniformity and dissented from denial of certiorari because Fifth Circuit unpublished decision created a split between the circuits on an “important question of federal law” that “could easily result in the same collective-bargaining contract, or identical ones, being interpreted in different ways in different circuits.”¹¹⁵ To treat some decisions as precedent and others not, interferes with the proper review process.

Fourth, justice is undermined when precedent is abandoned in unpublished opinions because such wrongful decisions are shielded from proper higher court review, which allows uncertainties or discrepancies in the substantive law to linger. An unpublished opinion is supposed to signal that a case is a routine, non-controversial application of settled law, but that is not always the case.¹¹⁶ A decision rendered by unpublished opinion has also likely received less judicial attention and has a less well-developed record and opinion, which also discourages Supreme Court review. In cases like *United States v. Edge Broad. Co.*, and *County of Los Angeles v. Kling*, Justices of the Supreme Court have expressed surprise and dismay at the circuit courts’ practice of deciding issues of first impression or other close cases by unpublished opinion.¹¹⁷ Justice Marshall, in *County of Los Angeles v. Kling*, called the practice “plainly wrong” and noted that such summary process is done “without the discipline and accountability that the preparation of opinions requires.”¹¹⁸

114. 502 U.S. 1017, 1019-20, n.* (1991) (*Mem.*). See also *Waller v. United States*, 504 U.S. 962, 964-65 (1992) (White, J. and O’Connor, J., dissenting) (*Mem.*). See also *Hyman v. Rickman*, 446 U.S. 989, 990-92 (1980) (Blackmun, J., dissenting) (*Mem.*) (dissenting from denial of certiorari on the grounds that the unpublished circuit opinion was in conflict with other circuits on the issue of right to appointed counsel).

115. 484 U.S. 907 (1987) (*Mem.*) (Brennan, J., dissenting).

116. See *Merritt & Brudney*, *supra* note 63, at 120.

117. *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 n.3 (1993) (“We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion.”); *County of Los Angeles v. Kling*, 474 U.S. 936, 937-39 (1985) (Marshall J., dissenting) (“The brevity of analysis in the Court of Appeals’ unpublished, noncitable opinion, however, does not justify the Court’s summary reversal . . . For, like a court of appeals that issues an opinion that may not be printed or cited, this Court then engages in decision-making without the discipline and accountability that the preparation of opinions requires.”).

118. *Kling*, 474 U.S. at 937-39 (Marshall, J., dissenting) (internal citations omitted).

Fifth, abandoning precedent, even for practical reasons, undermines the people's faith in judges and the judicial system. This harkens back to the issue of public perceptions of precedent as critical to equality, fairness, and justice. The judiciary is increasingly viewed as powerful and unaccountable,¹¹⁹ and calls for judicial oversight, impeachment, and transparency seem to be on the rise. One reason for this, we propose, is that the judiciary (or at least that portion in favor of precedent-free opinions) has viewed precedent as a tool for consciously shaping the law rather than an inherent part of how the law functions.¹²⁰ For an appellate court to make law that governs only that single instance and that they intend no one to rely upon in the future is contrary to the public's sense of justice. This perception is important for both public trust as well as to serve as example for, and backstop to, the actions of other government entities:

Appellate justice should be a model for the government's dealings with citizens. Appellate courts are the most dignified and receptive authorities to which individuals can turn. . . . If these courts do not deal justly with litigants, we cannot expect agencies or bureaucracies of lesser sensitivity to legal rights to do so. It is therefore important that justice on appeal be visible to all.¹²¹

If we believe that our courts are guardians of fairness and protection against all others (individuals, organizations, and even the other two branches of government), then they must operate in a principled fashion and not in a manner that can yield different outcomes for what appear to be idiosyncratic reasons or no reason at all.

By denying the precedential value of so many court decisions, we are making our legal system less effective, less consonant with public perception of justice, and, ultimately, less just. Loosing our

119. See, e.g., Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 901 (2007) (two national surveys indicate that nearly one third of Americans polled believe the Supreme Court "has too much power."); Lance Eric Neff, *Keys to the Kingdom: Interpretive Power and Societal Influence During Two Ages*, 7 FLA. COASTAL L. REV. 697, 701, n.19 (noting that the judiciary is commonly perceived as being "too powerful" and relatively unaccountable).

120. See *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001) (stating the role of the courts is to develop a coherent law and finding in the federal circuit courts the power and authority to achieve discretionary review akin to the Supreme Court's discretionary review).

121. CARRINGTON, *supra* note 113, at v.

courts from the dictates of precedent and rewriting precedent as a concept to be bestowed on opinions whose outcomes the court approves of has eroded our ability to create a just process or reach just outcomes. It harms individuals but it also harms the public and the legal system as a whole.

IV. CONCLUSION

We firmly believe that precedent is the cornerstone of justice and that abandonment of precedent threatens to undermine both the perception and reality of justice in our legal system. Judge Richard S. Arnold expressed this belief with extraordinary courage and eloquence:

It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.¹²²

We agree. It is said that hard cases, if we allow them to, make bad law.¹²³ We have allowed for too long the hard case of volume

122. *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000), *vacated* 235 F.3d 1054 (2000) (*en banc*). See also *Re Rules of U.S. Court of Appeals for Tenth Circuit*, 955 F.2d at 38 (Halloway, J., dissenting):

It may be suggested that in the rush of our business, we must prepare orders and judgments which are not written in the form of polished discourses which we wish to serve as citable opinions. This is the most untenable of the notions suggested for the no-citation rule. In light of our caseload, we are obviously driven to entering orders which are not the literary models that we would like to produce as opinions. Nevertheless, the basic purpose for stating reasons within an opinion or order should never be forgotten—that the decision must be able to withstand the scrutiny of analysis, against the record evidence, as to its soundness under the Constitution and the statutory and decisional law we must follow, and as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination.

Id.

123. *Winterbottom v. Wright*, 10 M&W 109 (1842) (“This is one of those unfortunate cases in which . . . it is, no doubt, a hardship upon the plaintiff to be without a remedy, but

pressures on the judiciary to make bad law in the form of non-precedential decision-making. The idea that a common law court can issue a non-precedential decision has never been justified jurisprudentially, creates significant harms to litigants and the legal system, and tears the justice-seeking mechanism of precedent from the heart of the common law endeavor. The bench and bar should reaffirm our commitment to justice and our willingness to accord precedential value to every decision of our courts.

by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law.”).