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RESTRICTIONS ON PUBLICATION AND CITATION OF JUDICIAL OPINIONS: A REASSESSMENT

Robert J. Martineau *

In response to the "crisis of volume," state and federal appellate courts have been restricting the opinions they write to those opinions which will: (1) establish a new rule of law or expand, alter, or modify an existing rule; (2) involve a legal issue of continuing public interest; (3) criticize existing law; or (4) resolve a conflict of authority. All other opinions are limited to brief statements of the reasons for the decision, go unpublished, and generally carry a prohibition against their being cited as precedent. Recently, critics have alleged a number of faults with this practice, including the supposed loss of judicial accountability, the difficulties of appellate review, the problems of predicting precedential value, the inequalities of parties' access to unpublished opinions, and the illusory nature of the claims of judicial and litigant economy. In this Article, Professor Martineau demonstrates that these criticisms are based on false premises and ignore the realities of legal research and the appellate decision making process. Professor Martineau writes that limited publication and citation rules are an essential way to respond to increasing caseloads, so long as: (1) they are crafted and administered to ensure that the criteria for publication are maintained with several checks on judges' discretion not to publish and (2) the prohibitions against citing unpublished opinions be enforced strictly through good example, sanctions, and structural mechanisms intended to make the opinions available less readily to people other than the immediate parties.

INTRODUCTION

The phrase "crisis of volume" is a trite but nonetheless accurate description of the principal cause of the problems confronting the appellate justice system in the United States. Responses to the crisis have ranged from new structures,

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such as establishing intermediate appellate courts, to new equipment, such as providing judges and law clerks with word processors and computer terminals. The appellate courts themselves also have made major changes in how they function. Some of the most common and most controversial changes concern judicial opinions. In some cases judges do not write an opinion. If they do write one, then they make it shorter than a full opinion and designate it as "not for publication." An unpublished opinion usually carries a prohibition against its being cited as precedent.

Although a few commentators have criticized the restrictions on publication and citation from the beginning, in the past decade commentators have been nearly unanimous in calling for their repeal, arguing that they are both fundamentally flawed in concept and unworkable in practice.¹

The purpose of this Article is to analyze the validity of publication and citation restrictions in light of the criticisms of them and the increased numbers of unpublished opinions included in computer databases. Part I reviews the reasons given originally for the adoption of the restrictions: the time and expense involved in preparing, publishing, and researching full opinions. Part II summarizes and critiques the principal criticisms of the restrictions: the supposed loss of judicial accountability, the difficulties of appellate review, the problems of predicting precedential value, inequalities of access to unpublished opinions, and the illusory claims of judicial and litigant economy. This Article demonstrates that the criticisms are based on false premises and ignore the realities of legal research and the appellate decision making process. It argues that eliminating the restrictions would create problems far worse than those attributed to their existence. Finally, Part III identifies problems that exist with the restrictions, examines their causes, and proposes remedies that will enhance rather than weaken their effectiveness. This Article concludes that although there are several weaknesses in the administration of rules restricting citation and publication of judicial opinions, the rules should not be eliminated. Rather, several changes should be made to provide for improved administration of the rules.

1. See *infra* note 39 for a compilation of the articles participating in the debate.

I. THE DEVELOPMENT OF RESTRICTIONS ON THE PUBLICATION AND CITATION OF OPINIONS

A. Early Commentary

Although restrictions on the publication and citation of judicial opinions did not become widespread until the last two decades, calls for a reduction in the number of opinions added to the body of common-law precedent are nothing new. Faced with roughly thirty volumes of reported decisions in 1777, England's Lord Coke warned judges not to report all decisions.² Similar concerns about the growing wealth of case law appeared on this side of the Atlantic Ocean as early as 1915.³ It was not until the early 1970s, however, that judges, scholars, and attorneys in the United States embarked on a serious effort to reduce the growing body of reported case law facing the bar and the bench.

Initial discussion of curtailing publication stemmed from a concern for maintaining a manageable body of law in light of the growing number of cases heard by appellate courts. The Judicial Conference of the United States first took note of the problem in 1964, recommending that federal courts authorize

2. 2 Coke's Rep. iii-iv (1777).

3. See Maurice A. Young, *The Unofficially Reported Case as Authority*, 1 OHIO ST. L.J. 135, 136-37 (1935) (tracing the history and use in Ohio of both officially and unofficially reported cases and noting that in 1915 attorneys complained of unequal access to the latter). For other early literature addressing the proliferation of published or unpublished opinions, see also James M. Flavin, *Decisions and Opinions for Publication*, 12 SYRACUSE L. REV. 137 (1960) (calling for limited publication of the memoranda decisions of New York's Appellate Division); *Opinions of Courts: Should Number Published Be Reduced?*, 34 A.B.A. J. 668 (1948) (summarizing a committee report to the Eleventh Annual Judicial Conference for the United States Court of Appeals for the Third Circuit, which recommended a reduction of the number of published opinions and enumerated guiding principles on which to base the publication decision); Maurice Saeta, *What Price Written Opinions!*, 9 CAL. ST. B.J. 222, 222 (1934) (observing the growing number of opinions produced yearly and noting that "in an 'era of plenty' of written opinions there is a 'want' of good opinions [as] [y]ou cannot have quality with mass production"); *id.* at 223 (calling for procedural reform); Glenn R. Winters, *Reducing the Volume of Published Opinions*, 20 FLA. L.J. 250, 251 (1946) (commenting on the possibility of discontinuing publication of opinions "involving no new point of law"); *id.* at 252-53 (addressing who would make the publication decision); *id.* at 253 (questioning whether opinions, as public property, can be suppressed through judicial mandate).

“the publication of only those opinions which are of general precedential value.”⁴

B. The 1973 Advisory Council for Appellate Justice Report

Little happened until 1973, when the Advisory Council for Appellate Justice issued a report urging appellate courts to adopt publication rules to reduce the number of published appellate opinions.⁵ In proposing limited publication, the Advisory Council report identifies several principal concerns. Limited publication could “help redress the balance between what must be produced and assimilated and the resources available for production and assimilation.”⁶ In contrast, the continuation of unlimited publication threatened to “crush[] [the common law of the United States] by its own weight if the rate of publication [was] not abated.”⁷

1. *Benefits of Limited Publication*—The report identifies the benefits to be gained from limited publication: saving the judge and the appellate court bench the time spent preparing a polished, published opinion;⁸ saving the lawyer the time spent researching opinions;⁹ reducing the logistical burden and expense of maintaining a law library;¹⁰ reducing the burden on publishing companies to supply the increasing number of opinions at affordable rates;¹¹ and reducing the burden on the entire system of creating new devices to point the bar and the bench to the opinions constituting precedent.¹²

4. 1964 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 [hereinafter 1964 REPORT] (reporting a resolution approved by the Conference).

5. COMMITTEE ON USE OF APPELLATE COURT ENERGIES, ADVISORY COUNCIL FOR APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 1 (1973) [hereinafter COMMITTEE ON APPELLATE COURT ENERGIES]. The Council had 31 members, 18 of whom were federal and state judges. *See id.* at inside front cover. Some of the most prominent were Roger Traynor, Griffin Bell, Walter Schaefer, Shirley Hufstедler, and Carl McGowan. *Id.* The Federal Judicial Center and the National Center for State Courts jointly sponsored the Council. *Id.* at preface.

6. *Id.* at 6.

7. *Id.*

8. *Id.* at 6-7.

9. *Id.* at 7.

10. *Id.* at 8.

11. *Id.*

12. *Id.*

2. *Purposes of Judicial Opinions*—After distinguishing as two separate inquiries whether an opinion should be written and whether an opinion should be published,¹³ the report lists three purposes for judicial opinions. First, an opinion permits the parties and their attorneys to see that the judges have considered their arguments and have provided a reasoned justification for the decision.¹⁴ Second, the process of writing an opinion can force judges to clarify their thinking. “[T]hinking is disciplined by the process of written expression,” because “[t]he reduction of ideas to paper” allows for the exposure and correction of error.¹⁵ Third, certain judicial opinions “provide the stuff of the law.”¹⁶ They facilitate the “understanding of legal doctrine”¹⁷ and its applicability to current conditions by providing a look at the court’s reasoning, and they teach people in society what actions conform to the law.¹⁸ They help not only the litigants, but also other citizens, public officials, and lawyers, and thus should be disseminated widely.¹⁹

Not all opinions, however, serve this third purpose. Only those that do clarify or expand the law, as opposed to those that only settle disputes, deserve publication.²⁰ A written opinion not designed for publication would require less refinement, polish, and time spent by the writing judge,²¹ yet could still serve the first two purposes of an opinion.

3. *Proposals*—The report recommends that the courts adopt rules under which courts would: (1) continue to write an opinion in every case; (2) establish standards for publication and procedures to determine whether an opinion should be published; and (3) prohibit citation of unpublished opinions. The report proposes several criteria for the rules. First, to ensure consistency within a judicial system, the highest court of each jurisdiction should promulgate rules governing publication and citation rather than let each court design its own plan.²² Second, “to avoid wasted effort,” a

13. *Id.* at 2–3.

14. *Id.* at 2.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 2–3.

19. *Id.*

20. *See id.* at 15–17.

21. *See id.* at 5.

22. *See id.* at 9.

tentative decision regarding publication should be made at the earliest possible point, such as at a conference on the case either before it is assigned or at the time of assignment.²³ An early decision maximizes the time saved by the judge, but the decision must be only tentative so that publication would not be precluded were the opinion writing process to demonstrate that publication would be prudent.²⁴ Third, an opinion should be published only if a majority of the judges participating in the decision agrees that the opinion meets the publication standards set forth in the rules.²⁵ Further, a concurring opinion should be published only if it accompanies a published majority opinion.²⁶ In contrast, a dissenting opinion should be published only if the dissenter or dissenters find that it meets the standards for publication on its own merits, regardless of the status of the majority opinion.²⁷ When an entire opinion does not warrant publication, the court should publish those portions of it that do meet the standards.²⁸

The report proposes that an opinion be published if it does any one of the following: (1) "lays down a new rule of law, or alters or modifies an existing rule";²⁹ (2) "involves a legal issue of continuing public interest," as opposed to "general public interest . . . of a fleeting nature";³⁰ (3) "criticizes existing law," especially when it calls for change by a higher court or the legislature;³¹ or (4) resolves a conflict of authority and "rationaliz[es] apparent divergencies in the way an existing rule has been applied."³²

The report further recommends that unpublished opinions not be cited as precedent by a court or in material presented to a court.³³ Allowing the citation of unpublished opinions would give lawyers or others having special knowledge of those opinions an unfair advantage to use or withhold that

23. *Id.* at 11.

24. *Id.* at 12.

25. *Id.* at 10.

26. *Id.*

27. *Id.* at 10-11.

28. *Id.* at 13-14.

29. *Id.* at 15. The Advisory Council specifically rejected using the term "case of first impression" because that term was too narrow. *Id.*

30. *Id.* at 16 (emphasis omitted).

31. *Id.*

32. *Id.* at 17.

33. *Id.* at 18.

knowledge.³⁴ It also would thwart the intended goal of judicial economy because citation would require the bar and bench to examine unpublished opinions.³⁵ Allowing citation by litigants also would encourage judges to craft their unpublished opinions more carefully, thus increasing the time judges spend preparing them.³⁶

C. Responses to the Advisory Council's Report

Every federal court of appeals³⁷ and a majority of state appellate courts³⁸ responded to the Advisory Council report by adopting rules that restrict publication and citation of unpublished opinions. Although the rules differ in procedure and degree of specificity, they typically have several common characteristics that follow the report's recommendations. First, most of the adopted rules provide that a majority of the deciding panel make a tentative publication decision as early in the decision making process as possible. Second, in general, if there is a dissenting opinion, both it and the majority opinion are published. Third, most rules outline

34. *Id.* at 19.

35. *See id.*

36. *Id.*

37. For a detailed analysis and comparison of the federal circuit plans, see DONNA STIENSTRA, *FEDERAL JUDICIAL CTR., UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 8-9* (1985). For a summary of the basic characteristics of these plans, see *infra* text accompanying note 39. The plans vary with regard to the availability of unpublished opinions and whether they can be cited. *Id.*

38. *See* Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 *LAW LIBR. J.* 21, 22 (1991) (surveying state plans). At least 35 states have a rule or statute governing the publication of opinions. *See id.* at 22-49. Most of them include or are accompanied by a no-citation corollary. *See id.*

Ohio has a limited publication rule which differs from every other state. Under it, an opinion of an Ohio court of appeals is published only if so designated by the majority of the panel hearing the case and by the Ohio Supreme Court's reporter of decisions. *Id.* at 41. The Ohio Supreme Court reporter, "not a judge[,] but a bureaucrat," can veto the panel's decision to publish. William M. Richman & William L. Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 *OHIO ST. L.J.* 313, 327 (1985) (characterizing the rule as "bizarre"). Only a very small percentage of opinions by the courts of appeals in Ohio are published. *See id.* at 316 & n.24, 326. Unpublished opinions, however, may be cited. *See id.* at 333. As a result, a legal publisher does publish the "unpublished" opinions. *Id.* at 332-33. This whole system has been severely criticized, but with no effect. *See, e.g., id.* at 326, 327, 329.

specific criteria on which judges should rely in making the publication decision: principally whether the opinion makes new law, criticizes existing law, or involves a matter of great public interest. Finally, most rules forbid citation to unpublished opinions except for the limited purposes of establishing *res judicata*, collateral estoppel, or law of the case.³⁹

39. For discussion and evaluation of the different plans adopted by individual states and circuits, see generally the literature cited *infra* Part III and the following: Harry L. Anstead, *Selective Publication: An Alternative to the PCA?*, 34 U. FLA. L. REV. 189 (1982) (comparing the selective publication practice of the federal courts and several states to Florida's use of the "per curiam, affirmed" decision and urging adoption of a scheme mixing elements of the two practices); Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1 (1989) (evaluating and explaining differences in several state court plans); Leah F. Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 LAW LIBR. J. 362 (1974) (summarizing the response of state appellate courts and federal circuit courts of appeal to the push for nonpublication); James N. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224 (1975) (evaluating the undesirable side effects of limited publication and citation under the United States Court of Appeals for the Ninth Circuit's Rule 21 and recommending improvements); David M. Gunn, *"Unpublished Opinions Shall Not Be Cited as Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L.J. 115 (1992) (examining the scope of Texas state courts' Rule 90, specifically the provision prohibiting citation of unpublished opinions as authority); Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155 (1992) (analyzing current restrictions on publication in Kansas state and federal courts, and recommending a change that would allow citation of unpublished decisions); Peter J. Honigsberg & James A. Dikel, *Unfairness in Access to and Citation of Unpublished Federal Court Decisions*, 18 GOLDEN GATE U. L. REV. 277 (1988) (summarizing the history of and arguments supporting and opposing limited publication and citation in the federal courts, discussing discrepancies in access to unpublished opinions, and concluding that all decisions should be published, whether designated by the court as precedential or nonprecedential); Taylor Mattis, *Precedential Value of Decisions of the Court of Appeals of the State of New Mexico*, 22 N.M. L. REV. 535 (1992) (discussing the court structure and the workings of *stare decisis* within New Mexico's courts of appeal); Gilbert S. Merritt, *Judges on Judging: The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1392-94 (1990) (providing an overview of the limited publication system and concluding that the argument that judicial accountability is lessened through nonpublication is "overstated"); Jenny Mockenhaupt, *Assessing the Nonpublication Practice of the Minnesota Court of Appeals*, 19 WM. MITCHELL L. REV. 787 (1993) (analyzing limited publication and citation in Minnesota and proposing a stricter rule against the citation of unpublished opinions); John E. Mueller, *Unpublished Opinion Study*, ST. CT. J., Summer 1977, at 23 (summarizing a report explaining and evaluating nonpublication in California's Courts of Appeal); David W. Neubauer, *Published Opinions Versus Summary Affirmations: Criminal Appeals in Louisiana*, 10 JUST. SYS. J. 173 (1985) (reporting which of the various types of Louisiana criminal appeals are most and least likely to be decided by a written opinion); David Newbern & Douglas L. Wilson, *Rule 21: Unprecedented and the Disappearing Court*, 32 ARK. L. REV. 37 (1978) (reporting the results of a survey of lawyers participating in Arkansas cases not designated for publication about their

general views on non-publication and the advisability of not publishing opinions in attorneys' specific cases, and suggesting that courts find a different response to their problems than the negative mechanism of limited publication and citation); Hon. Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986) (defending the Federal Circuit's plan of limited publication and prohibition against citing unpublished opinions); Max N. Osborn, *Publication of Opinions by the Texas Board of Appeals*, 47 TEX. B.J. 655 (1984) (reporting a statistical analysis of the effect of Texas Supreme Court's Rule 452 on the publication of opinions by the state's courts of appeal); George C. Pratt, *Summary Orders in the Second Circuit Under Rule 0.23*, 51 BROOK. L. REV. 479 (1985) (critiquing the use of Second Circuit Court of Appeals Rule 0.23, which allows unpublished and uncitable summary orders, and outlining arguments for and against continued application of the rule); Edwin R. Render, *On Unpublished Opinions*, 73 KY. L.J. 145 (1984-85) (arguing that Kentucky should do away with its current rule prohibiting the citation of unpublished courts of appeal decisions); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989) (analyzing the advantages that particular classes of litigants secure through courts' usage of limited publication-citation rules); Robert A. Seligson & John S. Warnlof, *The Use of Unreported Cases in California*, 24 HASTINGS L.J. 37 (1972) (discussing the limitations on publication imposed by California Rule of Court 976 and advocating limited use of Rule 976 decisions); Hon. Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405 (1994) (arguing from the perspective of a federal appellate judge in favor of restrictions on publication and citation imposed by federal courts of appeal); Philip Shuchman & Alan Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?*, 29 EMORY L.J. 195 (1980) (explaining the limits on publication mandated by the Fifth Circuit Court of Appeals' Rule 21 and concluding that under the rule, judges did select unimportant appeals for nonpublication); Milton J. Silverman, *The Unwritten Law: The Unpublished Opinion in California*, 51 CAL. ST. B.J. 33 (1976) (opposing the limits on publication and citation imposed in California Rules of Court 976 and 977); George R. Smith, *The Selective Publication of Opinions: One Court's Experience*, 32 ARK. L. REV. 26 (1978) (evaluating favorably Arkansas Supreme Court Rule 21, which limits the publication of opinions and the citation of unpublished opinions); Donald R. Songer, *Criteria for Publication in the U.S. Courts of Appeals: Formal Rules versus Empirical Reality*, 73 JUDICATURE 307 (1990) (explaining the rationales behind limited publication and citation rules and noting that most empirical studies of the courts of appeals limit their scope to published opinions and ignore the importance of unpublished decisions); Herbert L. Stern, *The Enigma of Unpublished Opinions*, 64 A.B.A. J. 1245 (1978) (criticizing the arguments supporting limits on publication and citation and concluding that it is impossible to deny precedential value to the decision of a higher court); David L. Walther, *The Noncitation Rule and the Concept of Stare Decisis*, 61 MARQ. L. REV. 581 (1978) (criticizing Wisconsin Rule of Appellate Practice 809.23, which governs publication and citation in Wisconsin); Wisconsin State Bar Comm'n on Admin. of Justice and the Judiciary, *Final Report on Unpublished Opinions*, 57 WIS. B. BULL., Aug. 1984, at 40 [hereinafter *Wisconsin Bar Report*] (recommending continued use of Wisconsin's limited publication and citation rules); Pamela Foa, Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977) (rejecting the underlying assumptions of limited publication plans and arguing against the suppression of unpublished opinions as mandated by the Seventh Circuit Court of Appeals' Rule 35); Robert H. Plaskov, Note, *Written Opinions in the Modern Legal System: Publish and Perish*, 41 ALB. L. REV. 813 (1977) (evaluating New York's experiments with its system of publication).

II. THE PRINCIPAL CRITICISMS AND A CRITIQUE OF EACH

Just as there are features common to most restrictions on publication and citation, a consensus exists on the criticisms of them. Set out below are the five principal criticisms, each followed by a critique.

A. Judicial Accountability

1. *The Criticism*—First and foremost, critics argue that restrictions on publication and citation deal a crushing blow to judicial accountability and thus foster judicial irresponsibility. Courts, critics maintain, are more apt to issue arbitrary rulings “if their past [decisions] cannot be cited to them to guide and restrict their future action.”⁴⁰ Courts can use unpublished opinions to address “troublesome cases presenting issues the court does not wish to address in public” or to decide a case contrary to existing precedent without also changing the path and direction of the current law.⁴¹ One commentator links limited publication and citation rules with the success of tyranny.⁴² Tyranny flourishes when the law is unwritten, because then the law is known to few and is unreviewable by the masses.⁴³ Written law, on the other hand, allows for a check of the government and gives the citizens a method to review the government’s application of the law.⁴⁴ For these reasons, this commentator argues that publication of opinions, not a limited publication system, better maintains an ordered system of civil liberties.⁴⁵

40. William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807, 809.

41. 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, 581 (1981).

42. Silverman, *supra* note 39, at 33.

43. *Id.* at 33–34.

44. *See id.* at 34 (“[W]ritten law created the potential for self correction.”). According to Silverman, “the justification for non-publication must be measured against the compelling relationship which written law has to the preservation of essential freedoms.” *Id.* Measured in this light, Silverman concludes that the non-publication arguments must fail. *Id.* at 40.

45. *See id.*

2. *The Critique*—Are the critics correct in arguing that an appellate court is more likely to be irresponsible by ignoring binding precedent, hiding controversial rulings, or acting arbitrarily because some of its opinions are not published and cannot be cited to it? Theoretically these practices may be achievable, but practically, several reasons make this assertion untenable. First is the desire of almost every judge to do the right thing.⁴⁶ Second are the constraints imposed upon the appellate court by the appellate process itself. In most instances, an appellate decision is a collegial one reached by three judges, at least two of whom must agree on the result. If one disagrees and writes a dissenting opinion, then both the majority and dissenting opinions qualify for publication under most adopted rules.⁴⁷ In addition, other members of the same court usually keep abreast of the decisions of panels on which they do not sit, so one panel is unlikely to do something irresponsible without other members of the court knowing about it. Further, the decision ordinarily is subject to additional review, either by the entire court through an en banc procedure, or by a higher court, or both. One of the most effective ways for a litigant to obtain further review is to show that the present decision is inconsistent with prior decisions. This can be done best if the appellate court provides a written statement of reasons⁴⁸ supporting its decision, and thus a statement should be prepared in every case. The present system, under which many cases are decided by order without a written statement of reasons,⁴⁹ has a much greater potential for judicial irresponsibility.

46. Perhaps the best expression of the judge's desire to do the right thing came from Judge Albert Tate, Jr. He commented that judges are motivated by three principal drives. "First and foremost, . . . is [the] motivat[ion] to achieve the humanly fair or socially useful result, subject to the limitations of judicial review and the demands of consistency with legal doctrine . . ." Hon. Albert Tate, Jr., *Federal Appellate Advocacy in the 1980's*, 5 AM. J. TRIAL ADVOC. 63, 65 (1981). Second is the "concern[] that the opinion is technically sound and fairly applies relevant . . . authority." *Id.* Third is the concern about how the rationale of the opinion will be applied in the future. *Id.*

47. See *supra* text accompanying note 39.

48. The designation "statement of reasons" is used to indicate that a court need not file a formal opinion in every case, but need only give a written rationale of its decision. Whether the statement of reasons should be a formal opinion and be published is a separate issue. See *supra* text accompanying note 13.

49. From June 30, 1992 to June 30, 1993, of the 25,567 decisions on the merits filed by the U.S. Courts of Appeals, 3301 were by order without a reasoned explanation. Gwendolyn Coleman, Technical Information Specialist, Statistics Division, Analysis and Reports Branch, Administrative Office of U.S. Courts (Nov. 30, 1993) (unpublished data, on file with the *University of Michigan Journal of Law Reform*). An additional 60 opinions were delivered orally, of which 55 were issued by the United States Court of Appeals for the Sixth Circuit. *Id.*

Also supporting the proposition that restrictions on publication do not result in increased judicial irresponsibility are empirical studies which examine the operation of the restrictions in appellate courts and the experience with trial courts. Only two in-depth studies, one in California⁵⁰ and the other in Wisconsin,⁵¹ have attempted to determine empirically whether appellate courts actually make controversial or potentially unpopular decisions and then hide them by either not writing an opinion or by writing an opinion but designating it as not for publication, hiding behind limited publication and citation rules.⁵² Both studies came to the same conclusion: the courts used the rules in good faith and seldom used them to render improper decisions.⁵³

Even more significantly, the federal and state trial court systems both operate without a mandatory opinion writing and publication requirement. Judges rarely write opinions in cases disposed of at trial, and only a small fraction of those opinions are published, and then only at the initiative of the trial judge.⁵⁴ Nobody has suggested, however, that the lack of published trial court opinions encourages irresponsible behavior by trial judges.

Not quite as relevant, but nonetheless significant, is the English experience. While only a very small percentage of the opinions of the English Court of Appeal—England's intermediate appellate court—are published because most are delivered orally from the bench, and only published opinions

50. Mueller, *supra* note 39.

51. *Wisconsin Bar Report*, *supra* note 39.

52. The other studies cited in *supra* note 39 almost always focus on a particular area of substantive law and attempt to show inconsistency between some published and unpublished opinions. Cf., e.g., Robel, *supra* note 39 (examining a survey of government lawyers). These studies, however, prove only that in the eyes of some scholars the decisions of a court are not perfectly consistent. Law reviews, for example, consist almost entirely of articles routinely drawing the same type of conclusion from an analysis of only published opinions. Thus, there is no basis for suggesting that limited publication and citation rules are the cause of the supposed inconsistency.

53. See Mueller, *supra* note 39, at 23 ("There was no basis to conclude that large numbers of significant decisions are being 'buried' in unpublished opinions."); *Wisconsin Bar Report*, *supra* note 39, at 41 (finding that "the Court of Appeals Publication Committee has been faithful to the non-publication guidelines" and that "the criteria applied by the Court of Appeals was effective in keeping out cases which shouldn't be published").

54. J. MYRON JACOBSTEIN & ROY M. MERSKY, *FUNDAMENTALS OF LEGAL RESEARCH* 22, 45 (5th ed. 1990).

can be cited,⁵⁵ it has never been argued that their limited publication rule has resulted in judicial irresponsibility.⁵⁶

If an appellate court writes a statement of reasons which goes unpublished, the decision is not necessarily secret and hidden from public attention. The losing party still may use the written statement of reasons to appeal to a higher court or to complain to the legislature, the news media, or interest groups; the party, or more likely its attorney, even may write a law review article about it. If the case is of public interest, the news media will publicize the decision. A case involving a controversial crime or issue such as obscenity, abortion rights, gay rights, sex or race discrimination, or an election dispute will receive attention regardless of whether the opinion is published. In any event, the limited publication rules usually do call for the publication of an opinion in these types of cases.⁵⁷

For those who wish to study a court's decisions in a particular area, whether concerning the substantive law, procedure, the parties involved, or on any other basis, the researcher may review and critique the court's own records, the briefs submitted, the trial court record, and the court's statement of reasons. Researchers regularly do this with the United States Supreme Court's denial of certiorari petitions, which rarely are accompanied by opinions except in dissent, as well as with appellate court actions on which no opinion is written, such as disposition of interlocutory appeals.⁵⁸ Neither the California nor the Wisconsin study suggested that the lack of published opinions supporting these decisions has led to judicial irresponsibility.

55. ROBERT J. MARTINEAU, *APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS* 104-07, 150 (1990) (describing the English reporting system and giving statistics on the percentages of opinions reported and unreported, and the number of appeals terminated on the merits). In 1986, only 39% of the 884 opinions of the English Court of Appeal were reported. *Id.* at 107, 150.

56. *But cf.* Burton M. Atkins, *Selection, Reporting and the Communication of Legal Rights in England*, 76 *JUDICATURE* 58, 67 (1992) (noting that "outcomes of published and unpublished decisions [in England] differ substantially" and offering sociological and statistical explanations for this finding, but falling short of criticizing the courts).

57. *E.g.*, COMMITTEE ON APPELLATE COURT ENERGIES, *supra* note 5, at 16 (recommending publication of cases "involv[ing] a legal issue of continuing public interest"); *see also supra* note 39 and accompanying text.

58. *E.g.*, Michael Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 *GEO. WASH. L. REV.* 1165, 1199-1200 (1990) (studying the denial of interlocutory appeals under 28 U.S.C. § 1292(b)).

Perhaps the weakest part of the judicial accountability criticism is that it demonstrates a lack of understanding about the relationship between the real reasons for a judicial decision and the reasons given in the opinion supporting that decision. As I have explained in a recent article,⁵⁹ there is no necessary relationship between the two. The written statement of reasons merely seeks to legitimize the court's decision by making it appear consistent with prior opinions and the facts as shown by the record.⁶⁰ If a court is intent upon acting irresponsibly, it can do so with a published opinion just as well as without one. The leeways of precedent and the fuzziness of the record almost always enable a court to make any decision appear reasonable.⁶¹ Consequently, the protection against irresponsibility comes not from the published opinion, but from the other constraints upon the appellate process, particularly the parties' ability to examine and dispute the required written statement of reasons.

Fear of judicial irresponsibility is a legitimate concern. American appellate systems, however, have many built-in protections to prevent against this irresponsibility without mandatory publication of opinions. Accordingly, this fear of irresponsibility does not justify mandatory publication.

B. Review by a Higher Court

1. *The Criticism*—Critics contend that review by a higher level is hampered by limited access to all opinions.⁶² They argue that the law announced in published cases and the results reached in unpublished decisions may differ.⁶³ The potential for perceptions of judicial impropriety also increases, because litigants may conclude that the opinion was not published because the court lacked sufficient reasons to support a coherent rationale.⁶⁴ Further, judges can use

59. Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1 (1993).

60. *Id.* at 27.

61. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 62-91 (1960) for an explanation of how precedent can be avoided.

62. *E.g.*, Reynolds & Richman, *supra* note 40, at 809.

63. *See, e.g.*, Render, *supra* note 39, at 158-60.

64. *Id.* at 158.

unpublished opinions to hide embarrassing information about litigants, to send messages to government agencies on how the agencies should act in the future without disapproving of past actions, or to save lawyers from embarrassment by not revealing that an attorney's improper or negligent conduct was the basis for the decision—none of which furthers a responsible judiciary.⁶⁵ Judges even can use unpublished opinions to rely on the rationale of a past unpublished opinion, without disclosing the source of its reasoning.⁶⁶ “If ‘[s]unlight is said to be the best of disinfectants,’ then limited publication may permit sores to fester.”⁶⁷

2. *The Critique*—The criticism that restrictions on publication and citation interfere with review by a higher court, like the criticism that they encourage judicial irresponsibility,⁶⁸ ignores the constraints upon judges inherent in the appellate process and misunderstands the appellate process itself. If an intermediate appellate court does in fact decide a case with an unpublished statement of reasons contrary to the published case law, the losing party is in a perfect position to seek review in a higher court by pointing out the discrepancy. Even if the losing party cannot cite unpublished decisions of cases not following the published case law, that party's appeal is not weakened. It is the inconsistency of the lower court's unpublished opinion with prior *published* opinions that is important. As long as the litigant can cite published cases that contradict the lower court's decision in his case, the fact that there are also other cases in which the court did not follow binding precedent is irrelevant to the party's chances for obtaining appellate review.

In any event, the statements of reasons in those unpublished, inconsistent cases are unlikely to be of much help because they will seldom, if ever, show a conscious disregard of the published case law. At most, unpublished opinions will show lack of awareness of the accepted published law, but that unawareness is best attributed not to the deciding courts' schemes but to the failure of counsel to bring it to the courts' attention. If appellate judges really are intent upon

65. See Paul Marcotte, *Unpublished But Influential: With Technology, Opinions Not in the Law Books Can Be Misused*, A.B.A. J., Jan. 1991, at 26.

66. *Id.*

67. Reynolds & Richman, *supra* note 41, at 581 (quoting LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 92 (1914)) (alteration in original) (footnote omitted).

68. See *supra* Part II.A.

deciding a case contrary to binding precedent, they are more likely to do so by reading the precedent so narrowly or construing the facts in such a way as to make the precedent inapplicable to the present case. If the assumption is that judges are dishonest, it does not follow that they are foolish enough not to cover their tracks.

C. Predicting Precedential Value

1. *The Criticism*—The third common criticism of restricted publication and citation rules attacks the very foundation on which the restrictions are based. Though standards have been adopted to aid judges in determining whether to publish, critics often question the ability of judges to decide conclusively what is or is not of precedential value. In the first place, the rules' attempt to limit the scope of the term "precedent" at all is a doubtful endeavor. In the common law system, all decisions are precedent, regardless of whether they are published.⁶⁹ To deny that they are precedent is to deny that they exist, an impossibility.⁷⁰ An unpublished, uncitable decision cannot fit with the definition of *stare decisis* and the purpose of the common law, regardless of its compliance with a set of standardized guidelines to determine its precedential value.⁷¹ This is because "all decisions make law, or at least contribute to the process, for each shows [prospective litigants] how courts actually resolve disputes."⁷²

Additionally, it is debatable whether judges actually can predict precedential value, especially when that prediction is made early in the decision making process. "An early decision not to publish entails significant costs, . . . for value inheres in the actual writing of the opinion."⁷³ An early decision not to publish may affect not only the form in which the final decision is rendered, but also the actual reasoning or result.⁷⁴

69. See Foa, *supra* note 39, at 310-13.

70. See *id.* at 310 ("Laws which cannot function as reasons for actions . . . are not really laws at all, for they cannot affect the future decision-making of the citizenry.")

71. *Id.* at 310-13.

72. Reynolds & Richman, *supra* note 41, at 579.

73. *Id.* at 581.

74. *Id.*

If that occurs, the judicial process may suffer.⁷⁵ Furthermore, what is determined to be nonprecedential now may be of value to future litigants. Limited publication and citation rules require judges to determine in advance the rule of law that will emerge from a case, and then to determine the effect of their decisions on the development of the law.⁷⁶ Because our common law system emphasizes the importance of facts in each case, judges hardly can hope to predict the facts of future disputes. They cannot know today what will be crucial to litigants of tomorrow, even when they follow the standards designed to aid them in this determination. There is no such thing as the "mere application of a rule, for every case constitutes a needed reaffirmation and/or extension, at least temporarily, of the rule."⁷⁷

Some commentators even have argued that the rules' precedential criteria are flawed. Numerous studies have demonstrated that opinions that were precedential have not been published.⁷⁸

Moreover, the fact that an opinion raises no new issue of law does not necessarily diminish the decision's importance. Rather, "the frequency with which issues arise is some measure of their importance."⁷⁹ It is not always the new question that requires attention, but sometimes the old one.⁸⁰ Change results in our system of law not only because a "new" issue of law arises, but also because an old issue recurs repeatedly. A well established rule might need to be changed.⁸¹ Limiting the precedent available in a certain area hurts those litigants who wish to use that precedent to establish change. The accumulation of decisions in an area allows litigants to

75. *Id.*

76. Foa, *supra* note 39, at 312-13.

77. *Id.* at 312.

78. *E.g.*, Foa, *supra* note 39 (evaluating the precedential value of opinions unpublished by the United States Court of Appeals for the Seventh Circuit); Render, *supra* note 39, at 155-62 (discussing unpublished but otherwise precedential decisions by the Kentucky Court of Appeals); Robel, *supra* note 39, at 950-52 (analyzing a series of unpublished yet useful opinions by the United States Court of Appeals for the Ninth Circuit concerning the pleading requirements for RICO violations).

79. Silverman, *supra* note 39, at 34.

80. *Id.*

81. *Id.* at 34-35. Silverman cites *Miranda v. Arizona*, 384 U.S. 436 (1966) as an example of a decision overruling a well-established rule. Silverman, *supra* note 39, at 35. I would also include *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and *Baker v. Carr*, 369 U.S. 186 (1962).

assess the stability of a doctrine with greater confidence and helps them "flesh out a precedent . . . [to] make it more understandable."⁸² "[T]he sweep of a group of cases makes it easier to understand the principles involved."⁸³

2. *The Critique*—The criticism that restricted publication and citation rules fly in the face of *stare decisis* and thus are inconsistent with the fundamental principle of the common-law system ignores the historical development and present operation of the system of reporting opinions in England, where our common-law system and the principles of precedent and *stare decisis* developed. The English opinion-reporting system has never published and does not today publish every opinion of English appellate courts, even though the total number of opinions issued each year in the English Court of Appeal and House of Lords is little more than 1000.⁸⁴ In fact, these courts always have published only a very small percentage of their opinions, limited to those for which a barrister prepares a summary of the opinion.⁸⁵ This system was a necessary product of the practice of English courts to render most opinions orally rather than in writing.⁸⁶ It was not until 1951 that transcripts of the oral opinions were produced and placed in England's Supreme Court library in the Royal Courts of Justice.⁸⁷ Today this library is the only place in which the actual opinions can be found, other than on computer databases.⁸⁸ An official transcript will not be cited in the courts, however, because it does not meet the two requisites for citation: the transcript is not a summary prepared by a barrister and it is not published somewhere, whether in a report or a newspaper.⁸⁹ There is no official report,⁹⁰ only reports published under the auspices of a committee comprised of the bar (barristers), the Law Society (solicitors), and private publishers.⁹¹ Moreover, the texts of

82. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1190 (1978).

83. *Id.*

84. See MARTINEAU, *supra* note 55, at 150. For a further description of the English reporting system, see *id.* at 104–07.

85. *Id.* at 104–07.

86. *Id.* at 106–07.

87. *Id.* at 105–06.

88. *Id.*

89. *Id.*

90. *Id.* at 104.

91. *Id.* at 105.

the opinions included in the computer databases cannot be cited. The American rules limiting publication and citation are, in fact, far closer to the English system than the policies of unlimited publication and citation advocated by the critics of the American rules.

The criticism based on the unpredictability of a case's precedential value also is misplaced, although for a different reason. Essentially this criticism is premised on an extreme version of legal realism holding that all precedent is fact based and that because the facts of every case are different, every case is a unique precedent and thus should be published. This argument not only overstates legal realism,⁹² but if carried to its logical conclusion would destroy the underlying principle of *stare decisis*, that similar cases should be decided similarly. If all cases are different because their facts are different, there can be no precedent. The doctrine of *stare decisis* assumes that some opinions do make law that is valid *beyond* the narrow facts of the individual case. Limited publication and citation rules reflect this assumption and seek to publish only those opinions that can fairly be said to make law. There is no reason why in most cases the judges faced with deciding a case cannot determine early whether their decision will make law worthy of writing an opinion. As to citation rules, to prove that an area of law requires change, litigants need not necessarily cite recent published opinions, but only trial and appellate court decisions which the proponents of change assert reflect an outmoded legal principle.

D. Equality of Access

1. *The Criticism*—Critics of restricted publication and citation also raise the issue of unfairness. They argue that although the citation restrictions were designed to prevent certain litigants from gaining an advantage over those with less access to unpublished opinions, that advantage still

92. For a more complete statement of legal realism, see KARL N. LLEWELLYN, *THE BRAMBLE BUSH* (1960). See *supra* text accompanying notes 59–61 for a discussion of how judges can avoid precedent without having to withhold publication of an errant decision.

exists.⁹³ The restrictions reduce, “but do not eliminate[the] effective use of unpublished opinions.”⁹⁴ Experienced litigants can use “arguments, exact language, and hypotheticals” of an unpublished opinion without ever revealing to the bench or the other side the source of this material.⁹⁵ If the question is really fairness, critics argue, the proper solution is not to prohibit citation, but to require litigants to acknowledge the source of their reasoning and conclusions so that the other side stands on an equal footing before the bench.⁹⁶

2. *The Critique*—The supposed benefits of having access to unpublished opinions that may not be cited are marginal at best. For the benefits to be substantial, the unpublished arguments, language, or hypotheticals must be so appealing that the court will be more likely to adopt the position of the party advancing the borrowed argument than that of his opponent. There is little merit in this contention. Far more persuasive would be to cite the court itself as the source of the argument, language, or hypothetical because a court is always most concerned with its own precedent. Without citation, the unpublished material has no more persuasive force than if its proponent were its creator. Essentially the only difference is between the court thinking that the court agrees with the party rather than the court agreeing with its own unattributed prior reasoning. In either event, the court will arrive at the same result.

To the extent that some persons gain an advantage from being able to afford access to unpublished opinions while others cannot, unlimited citation is not the only alternative. Others are to publish all opinions or to prevent access to unpublished opinions. The former would, of course, eliminate all of the advantages of limited publication. The latter is discussed in the next section.

E. Judicial and Litigant Economy

1. *The Criticism*—Finally, advocates of unlimited publication and citation attack the concept of restricted publication

93. See Reynolds & Richman, *supra* note 82, at 1195.

94. *Id.*

95. *Id.* at 1196.

96. See *id.* at 1199.

and citation at its base. They question whether or not the restrictions actually bring about the judicial and litigant economy predicted by their supporters.⁹⁷ Empirical assessments have examined the federal circuits' caseloads, publication standards, time lapses between oral argument and opinion, and total productivity. Unfortunately, all of these have been relatively inconclusive. The critics argue that these data do not demonstrate conclusively that restricted publication rules increase judicial productivity.⁹⁸

Critics also contend that the reports of the staggering number of opinions are exaggerated. Some argue that there is no indication that the "present trend" of opinion proliferation will continue.⁹⁹ Further, they argue that even if the current boom should continue, technologies such as microfiche, microfilm, computer databases, and CD-ROM storage could alleviate space and storage dilemmas at a reasonable cost.¹⁰⁰ One critic argues that with the advent of LEXIS and Westlaw, the justification for restricting publication loses strength.¹⁰¹ She contends that with the availability of the computer data banks, there should be no reason for limited publication.¹⁰² She further predicts that the competition between electronic database services soon will lead to on-line access to all opinions, resulting in a system of universal publication.¹⁰³

The critics also dispute the argument that nonpublication saves time. Were cases published more frequently, judges would have more available precedent to work with, and the work required to decide cases would in fact decrease. "[M]erely

97. See *supra* Part I.

98. See, e.g., Reynolds & Richman, *supra* note 41, at 593-626; see also *supra* note 39 (listing articles assessing the effect of limited publication and citation rules in different jurisdictions).

99. E.g., Silverman, *supra* note 39, at 38. But see *supra* note 3 and accompanying text for the contention that observers have lamented the proliferation of opinions for the last 60 years.

100. Silverman, *supra* note 39, at 38.

101. SUSAN W. BRENNER, PRECEDENT INFLATION 267-69 (1992). In a different piece, Brenner notes that the availability of cases on-line weakens the arguments based on limited space availability and the cost of maintaining libraries. Susan W. Brenner, *Of Publication and Precedent: An Inquiry Into the Ethnomethodology of Case Reporting in the American Legal System*, 39 DEPAUL L. REV. 461, 534-40 (1990). In addition, she argues that the searching and finding techniques available in computer-aided research weaken the argument that finding the relevant cases available in the mass of precedent will be next to impossible. *Id.*

102. BRENNER, *supra* note 101, at 264.

103. *Id.*

cumulative opinions [should not] threaten the cohesiveness of the common law."¹⁰⁴ Instead, "they should, if anything, make research and discernment of principle easier, since there will be more cases elaborating a principle, and some of those cases will be more recent as well."¹⁰⁵

Proposals for change have not been lacking either in number or in variety. Some commentators have argued for a complete repeal of publication and citation restrictions.¹⁰⁶ Others have proposed compromise along a middle ground. One proposal is to permit citation of unpublished opinions as persuasive but not binding authority.¹⁰⁷ This would put unpublished opinions on at least an equal footing with other nonprecedential matters currently citable to the court such as sociological data, treatises, and law review articles.¹⁰⁸ A court then could follow the unpublished opinion if the court found the reasoning persuasive enough when applied to the facts of the case at hand.¹⁰⁹ Under this scheme, the proper use of unpublished opinions is not set out by a bright line rule, but "depends on the wisdom and integrity of judges."¹¹⁰ Other commentators believe that a solution exists in partial publication, which permits the publication and citation of a *portion* of an opinion, leaving unpublished the portions that do not satisfy the criteria for publication.¹¹¹ Partial publication would reduce the length of published opinions, yet permit the publication of portions of more opinions, thus increasing access and judicial accountability.¹¹² "A partial publication rule would result in fewer published pages with

104. Reynolds & Richman, *supra* note 82, at 1191.

105. *Id.*

106. *E.g.*, Richard L. Neumeier, *Unpublished Opinions: Their Threat to the Appellate System*, BRIEF, Spring 1988, at 22, 40 (arguing that cases or statutes that prohibit the citation of unpublished cases are "unwise [and] probably unconstitutional"); *see also* Hinderks & Leben, *supra* note 39, at 219 (urging the adoption of rules that permit citation of unpublished opinions if the citing litigant provides copies of the decision to the court and opposing parties); Honigsberg & Dikel, *supra* note 39, at 299 (concluding that a litigant should have the opportunity to convince the court of the importance of a non-precedential decision to her case).

107. George M. Weaver, *The Precedential Value of Unpublished Opinions*, 39 MERCER L. REV. 477, 492 (1988).

108. *See id.* at 490-91.

109. *See id.* at 491.

110. *Id.* at 493.

111. *E.g.*, Eva S. Goodwin, *Partial Publication: A Proposal For Change in the "Packaging" of California Court of Appeal Opinions To Provide More Useful Information to the Consumer*, 19 SANTA CLARA L. REV. 53, 66-74 (1979).

112. *Id.* at 67.

more precedentially useful 'meat' on each page than the present 'all or nothing' rule."¹¹³ Most advocates of restricted publication and citation, meanwhile, have stood firm or proposed slight changes that they believe would make the rules work more effectively.¹¹⁴

2. *The Critique*—Those who argue that writing a short memorandum for use solely by the parties involves just as much time as writing a full opinion for publication simply do not understand the appellate opinion writing process. The only empirical study of how appellate judges spend their time shows that they devote approximately one half of their time to writing opinions, more than they spend on any other duties.¹¹⁵ Clearly, the ability of a court to cope with its

113. *Id.* at 72.

114. Most commentators advocating this position admit some adjustments may be needed and propose small changes in the operation of existing plans. These changes are minor, involving such features as: (1) whether the decision to publish should be made by a panel, the writing judge, an independent committee, or the entire bar within a jurisdiction, e.g., Robert P. Andreani, *Independent Panels to Choose Publishable Opinions: A Solution to the Problems of California's Selective Publication System*, 12 PAC. L.J. 727, 741-43 (1981) (suggesting that the publication decision be made by an independent panel composed of both legal scholars and practicing attorneys selected pursuant to standards set by the California Supreme Court and subject to review by that court); Gardner, *supra* note 39, at 1227 (advocating that the decision to publish should be in the hands of any federal judge within the circuit, or ideally, by any member of the bar); Joyce J. George, *Query: Is There a More Systematic Way to Manage Publication of Opinions*, 71 JUDICATURE 305, 359 (1988) (suggesting that the publication decision remain the responsibility of the writing judge); Mueller, *supra* note 39, at 23 (concluding that the number of opinions that should be published but are not would be reduced if judges would "actively participate in reaching a collegial decision respecting publication in every appeal"); (2) whether attorneys citing unpublished opinions in jurisdictions where citation is limited or prohibited should be sanctioned or be cited for ethics violations, see Gunn, *supra* note 39, at 141 (suggesting that both are feasible options to enforce the "shall not be cited as authority" language of Texas's limited publication plan); (3) whether the plan should include an option by which attorneys may request that a previously unpublished opinion be published, see Pratt, *supra* note 39, at 498 (noting a proposal in which a committee of the bar would recommend which summary orders of the United States Court of Appeals for the Second Circuit should be published as per curiam opinions); and (4) whether the jurisdiction should make an express statement as to whether it favors or disfavors limited publication, rather than leaving the message implicit in the adopted plan. See Mockenhaupt, *supra* note 39, at 807 (proposing that Minnesota eliminate its current rule, which allows citation to unpublished cases pending notice to opposing counsel 48 hours in advance, and instead add to its limited publication rule a presumption in favor of publication); Reynolds & Richman, *supra* note 41, at 626-30 (proposing a model rule that includes a presumption in favor of publication and indicating that empirical data shows that such a presumption does in fact raise publication rates). *But see* Mueller, *supra* note 39, at 23 (rejecting a presumption for or against publication).

115. See COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM,

caseload is determined in large part by how much time a judge must devote to a particular opinion. If that opinion is intended solely for the parties to the appeal and their attorneys, the judge can write in an almost shorthand fashion, with little space or time devoted to a recital of the procedural history or the facts. The statement of reasons can and should be limited to addressing the one or two main issues raised by the appellant and why, with a citation to only one or two cases, the appellant's argument is rejected. Only when the trial judge ignored obvious controlling authority should a reversal be by unpublished opinion. The judge need devote little time writing the unpublished statement of reasons, because they often can be written by a law clerk or staff attorney.

In contrast is the time and care that goes into a published opinion that makes new law, criticizes or rejects existing law, explains the court's decision in a highly controversial case, or applies existing law to facts substantially different from prior cases.¹¹⁶ This opinion becomes the object of study by the bar, judges, and scholars, who will dissect, analyze, and apply or distinguish the language of an opinion with the care given to few written works apart from the Bible and the works of Shakespeare. Judicial opinions, like the Bible, become the bases on which people arrange their lives and conduct their affairs. As time permits, these opinions should be written with the greatest of care and precision in language. Therefore, a brief statement of reasons by the court is appropriate only when the court is performing its limited "review-for-correctness function."¹¹⁷ The statement of reasons should inform the parties that their contentions have been considered, and provide a rational basis for the court's conclusion. A full opinion, on the other hand, is appropriate when the court performs its law development function. An opinion developing law demands far greater care and time than the review-for-correctness statement of reasons.¹¹⁸

STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 49-50 (1975) (summarizing a study conducted in 1971-1972 showing that Third Circuit judges devoted 48.2% of their time "to the writing and clearing of opinions").

116. For a description of one judge's approach to writing a full opinion, see FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 155-70 (1980). See generally RUGGERO J. ALDISERT, *OPINION WRITING* (1990) (presenting theory and practice of writing opinions).

117. ALDISERT, *supra* note 116, at 20-22.

118. *Id.*

Because review-for-correctness statements of reasons generally go unpublished, since judges rarely find error, the judges and their staffs can and do devote much less time to them. The savings in judicial time are, consequently, real and substantial. Were they not, appellate courts could not have had the dramatic increases in cases disposed of on the merits per judge that have occurred in the past thirty years.

The argument that the number of opinions is not increasing and that legal research would not be more difficult if all opinions were published also has little validity. The number of appeals decided on the merits by the federal courts of appeal rose from 3552 in 1964,¹¹⁹ when the U.S. Judicial Conference first called for limited publication, to 23,597 in 1992,¹²⁰ almost a sixfold increase. Just between 1985 and 1992, the number of appeals terminated on the merits by these courts increased from 16,369 to 23,597, an increase of over fifty percent in just seven years.¹²¹ The number increases each year, with no end in sight. In 1964, virtually all opinions were published because there were no limited publication rules.¹²² In 1992, only 29.7% of the opinions were published, but the total published was 6980,¹²³ still over twice as many as in 1964. Notwithstanding the three-fourths reduction in the percentage of opinions published by the courts of appeals, the growth in the number of pages published was so great that in October 1993, West Publishing Company (West) issued the first volume of the Federal Reporter, Third Series (F.3d) after completing 999 volumes of the Federal Reporter, Second Series (F.2d). Each of the more recent volumes of F.2d contains approximately 1500 pages, compared to 1000 when F.2d was first published in 1925. It took fifty years to issue the first 500 volumes of F.2d, but only eighteen years, 1975 to 1993, for the last 499. The number of opinions sent to West for publication each year by both state and federal courts increased from 27,336 in 1964

119. 1964 REPORT, *supra* note 4, at 204 tbl. B1.

120. *Judicial Business of the United States Courts*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1992 ANNUAL REPORT OF THE DIRECTOR 110 tbl. S3 [hereinafter 1992 ANNUAL REPORT].

121. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1985 ANNUAL REPORT 261-65 tbl. B5; 1992 ANNUAL REPORT, *supra* note 120, at tbl. S3.

122. *Cf.* text accompanying *supra* note 5.

123. 1992 ANNUAL REPORT, *supra* note 120, at tbl. S3.

to 66,500 in 1992,¹²⁴ even with the large number of unpublished opinions and dispositions issued without opinion. Significantly, the 1964 total of 27,336 opinions was approximately 200 less than in 1929, and only about 8000 more than in 1895.¹²⁵

The effect of limited publication rules can be seen by comparing the number of opinions published by West in its various reporters and the number included in its computer-based Westlaw system. In addition to the 66,500 opinions received for publication, approximately 33,500 additional opinions are included in Westlaw.¹²⁶ Essentially, 100,000 opinions are being added to the database each year. And these do not include all of the opinions being written, because some courts, including several federal courts of appeals, do not send their opinions to Westlaw or LEXIS.¹²⁷ If every opinion of every court were included, the total would probably exceed 150,000 per year. Those who argue that opinion proliferation is not a problem are ignoring or are unaware of the facts.

Another argument is that the inclusion of both published and unpublished opinions in the commercial computer based systems of LEXIS and Westlaw eliminates the rationale behind the limited publication and citation rules. This argument identifies the right culprit, but the wrong problem and the wrong solution. There is no doubt that computer based

124. Telephone Interview with Donna M. Bergsgaard, Manager, Reporter-Digest Department, West Publishing Company (Nov. 24 & 30, 1993) (unpublished data, on file with the *University of Michigan Journal of Law Reform*). Data on years prior to 1989 can be found in ALDISERT, *supra* note 116, at 1-2.

125. See ALDISERT, *supra* note 116, at 1-2 (calculations computed by the author).

126. Bergsgaard Interview, *supra* note 124.

127. West Publishing Company, for example, receives unpublished opinions for inclusion in Westlaw from eight United States courts of appeal (excluding the Second, Third, Fifth, and Eleventh Circuits) and only nine states. *Id.* The refusal of the Fifth Circuit to send unpublished opinions to Westlaw and LEXIS was confirmed by an official of the Fifth Circuit. Telephone Interview with Dawn Eiserloh, Opinion Clerk, United States Court of Appeals for the Fifth Circuit (Nov. 24, 1993). The refusal results from the Fifth Circuit's opinion distribution plan, which provides that unpublished opinions are to be placed in the court's library and sent only to the parties and to the court's printer, the latter only for inclusion in the table of unpublished opinions printed periodically in the Federal Reporter. Telephone Interview with Dawn Eiserloh, Opinion Clerk, United States Court of Appeals for the Fifth Circuit (Nov. 30, 1993). In the 1992 fiscal year, the Fifth Circuit filed 2094 unpublished opinions. 1992 ANNUAL REPORT, *supra* note 120, at tbl. S3 (total of all Fifth Circuit opinions accompanied by reasons given by the court for its decision calculated by the author).

systems have to a large degree destroyed the effectiveness of rules restricting publication. Judges know their "unpublished" opinions will be read by a far larger audience than merely the parties to the appeal. Thus, they may feel compelled to write for the larger audience, thereby negating one of the principal benefits of unpublished opinions: reduced writing time.¹²⁸ Even more importantly, those who engage in legal research—judges, attorneys, and scholars—must now search all opinions in the database, whether designated for publication or not, to ensure that they have not missed anything that might be useful. Research in the databases is not, however, free or even cheap, whether considering the cost of the researcher's time or the cost of access to the databases.

Whether done in books or computer databases, legal research takes time, and time is money. The more opinions available to research, the more time the research takes, and the greater the cost. The only solution to the computer database problem is not to abandon limited publication, but to keep out of the databases statements of reasons not designated for publication.

III. PROBLEMS AND SOLUTIONS

As demonstrated in Part II, the problems with restricted publication and citation do not justify eliminating or even weakening the restrictions. That is not to say, however, that the restrictions are not without problems. These problems stem from three primary causes: (1) the lack of a fail-safe system to ensure that all precedential opinions are published; (2) the failure to enforce strictly the rules restricting citation; and (3) the inclusion in computer databases of statements of reasons designated "not for publication."

As to the first, there is no question that some opinions that make law are still designated "not for publication." Whatever the reason—and there is no basis for suspecting that the decision is based on improper grounds—the rules should provide means to correct the error. One means should be preventive, avoiding the problem before it occurs. This can be

128. See text accompanying *supra* notes 35–36 and Part II.E.

done by establishing an internal review system within each court. An advisory publication panel of judges, staff attorneys, or both, would review each statement of reasons tentatively designated as "not for publication" to determine whether the statement meets any of the criteria for publication. Were the publication panel to conclude that it does, the authoring judge would be required to expand the statement to make it suitable for publication, primarily by adding facts sufficient to make the opinion understandable to those who are not parties to the appeal.

Another means should be remedial, correcting the problem after it occurs. The court's rules should provide that subsequent to issuance of the unpublished statement of reasons, any person, including the parties, who becomes aware of the statement, and who believes that the statement meets one of the criteria for publication, could petition the court or publication panel to order the statement published. If the original deciding panel or the advisory publication panel agreed, the statement could be published as an opinion, again after the addition of a statement of facts necessary to make the opinion understandable to outsiders. Because there is no fixed time in which nonparties will discover the statement of reasons or determine its significance, the rules should allow for an unlimited time to submit a petition for publication. This double system of checks on the initial publication decision should ensure the publication of virtually all opinions of precedential value.

The second and third problems, the lack of strict enforcement and the availability of unpublished opinions from computer databases, are related closely and the correction of one should eliminate the other. The best way to make restricted publication and citation rules work effectively is to enforce strictly the rules against both attorneys and the courts, primarily the latter. If a court relies on an unpublished opinion, even once, that court not only invites, but almost demands, that other judges on that court, lower courts, and attorneys practicing in the court's jurisdiction research the court's unpublished as well as its published opinions.¹²⁹ If

129. Perhaps the worst of all worlds was demonstrated by the recent case of *Hodges v. Delta Airlines*, 4 F.3d 350 (5th Cir. 1993). In that case the court held that it was bound by a previous unpublished opinion. *Id.* at 355 (citing *Baugh v. Trans World Airlines*, No. 90-2074 (5th Cir. Sept. 14, 1990)). The opinion expressed disagreement with the earlier decision, *id.*, and called for en banc review of the

lightning strikes once, the prudent judge or attorney must assume that it can and will strike again. The inevitable result is that the computer based research systems will include every opinion a court issues, unpublished and published. On the other hand, once the legal community learned that citing unpublished opinions to the court brings no advantage, and perhaps even brings disadvantage, the need to research them should cease and thus the research companies would lose the economic incentive to include unpublished opinions in their computer databases.

Although strict adherence to the no-citation rule would be the principal means to eliminate the unofficial publication of unpublished opinions, the courts could take additional steps to discourage the unofficial publication of the statements of reasons designated as "not for publication." One simple step would be to refrain from sending the statements to persons other than parties. Although a statement of reasons placed in the pleading file of a case is no doubt a public document and subject to being copied,¹³⁰ at the very least the court could refuse to send copies to nonparties, including Westlaw and LEXIS, and insist that anyone who wants a copy come to the court clerk's office to copy it, the same as for any other document on file with the court. Many courts, including four United States courts of appeals,¹³¹ now follow this practice, with the result that their unpublished opinions are not included in the computer databases. If every court followed the same practice, the problem of published "unpublished" opinions would be eliminated.

Another simple step, one perhaps even more useful, would be for the court not to place the unpublished statement of reasons in the case's pleading file or in its electronic counterpart, but to incorporate it in the letter from the clerk

issues, *id.* at 356, but still adhered to the decision. *Id.* at 355-56. The result was consistent, however, with Fifth Circuit Rule 47.5.3, which provides that unpublished opinions are precedent. *Id.* at 355.

130. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). The status of judicial opinions is reviewed in Francine Biscardi, *The Historical Development of the Law Concerning Judicial Report Publication*, 85 LAW LIBR. J. 531, 532-33 (1993) (showing that *Wheaton* created a private market for offering timely access to judicial rulings) and in L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 813-14 (1989) (analyzing the effects of West Publishing Company's success in maintaining its monopoly over pinpoint cites to its National Reporter system).

131. The circuits which do not allow their unpublished opinions to be placed online are the Second, Third, Fifth, and Eleventh. See *supra* note 127.

to the parties notifying the parties of the court's decision in the case. The letter would go on to state: "The Court has directed me to advise you that its reasons for its decision were" Because this letter would be placed in the correspondence file rather than the pleading file, it would not be part of the formal record in the case. This letter would be subject to inspection by others, but would not look like an opinion or be easily incorporated into a computer database.¹³²

CONCLUSION

Appellate judges were the principal initiators of the restrictions on publication and citation of opinions, enabling them to dispose of more cases more quickly while reducing the time and expense involved in researching opinions. To a large degree these rules have worked well, but recently they have been subjected to a drumbeat of criticism¹³³ and are seriously threatened by the inclusion of all unpublished opinions in computer databases marketed to the legal community.¹³⁴

132. The most recent development in the field of opinion publication has been the effort to abandon the traditional system of citation to the printed case reporters. Recently, the United States Court of Appeals for the Sixth Circuit has allowed, and the Louisiana Supreme Court has required, litigants to cite cases using a "public domain citation," which is limited to the case's name, case number, deciding court, and date. Ernest E. Svenson, *Alternative Citation Styles Gain Ground*, A.B.A. LITIG. NEWS, Aug. 1994, at 1, 6 (discussing arguments for public domain citation which are being considered by a number of groups across the country). This type of citation system is actually a non-citation system because it gives only the name and number of the case and not where the opinion can be found by the researcher. This necessarily would complicate research. The researcher first would have to find where the case is published or the computer database in which it is located, and then find or retrieve the text. A computer and a subscription to the service that includes the text of the court's opinions would, of course, be necessary to obtain the text electronically.

For some, case name and number citation is merely an inevitable step on the road to the information highway, when all information and texts will be available only electronically, and books and libraries will go the way of stone tablets and manuscripts handwritten by monks. For others, the new system is a way of defeating West Publishing Company's near monopoly on the publication of judicial opinions. Susan Hansen, *Fending Off the Future*, AM. LAW., Sept. 1994, at 74. To the author, there is no evidence that the traditional publication citation system is not still cheaper, quicker, and accessible to more researchers than the electronic non-citation system now advocated by some. Until that evidence is conclusive, the traditional system should be retained.

133. See *supra* note 39 and accompanying text.

134. See *supra* text following note 127.

This Article has attempted to demonstrate that most criticisms of the limited publication and citation rules are invalid. Rather, despite weaknesses in the courts' administration of the rules, the goals of the rules remain valid. Rather than eliminate the rules, several changes should be made in their administration. First, the rules should provide for an internal review of a decision not to publish. Second, they should permit anyone, party or nonparty, to petition the court to publish an unpublished statement of reasons. Third, courts should not put unpublished statements of reasons in the form of an opinion, but should incorporate them into a letter from the clerk to the parties. Fourth, and most importantly, each court should rigorously enforce its no-citation rule against itself, courts subject to their jurisdiction, and attorneys submitting briefs to either. A court's no-citation rule should apply not only to its own unpublished opinions but those of other courts. Enforcement could include the refusal to consider an unpublished opinion, the striking of a brief that includes the citation, or treating citation of an unpublished opinion as professional misconduct.

If these proposals are adopted, the goals originally sought to be gained by restrictions on publication can be achieved, to the benefit of both the courts and those who must rely on them to correct error and to develop the law.

