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NOTES

UNREPORTED DECISIONS IN THE UNITED STATES COURTS OF APPEALS

It is a maxim among these lawyers, that whatever hath been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of *precedents*, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of directing accordingly.¹

The geometric increase in the number of cases before the United States courts of appeals during the past decade has necessitated the development of methods for increasing judicial efficiency.² In 1972, the Judicial Conference of the United States, acting on the recommendation of the Board of the Federal Judicial Center, requested each circuit court to develop a plan for publication of opinions.³ In response to this request, each circuit has developed procedures for disposing without published opinion of cases that present no significant precedent and are not of general public interest.⁴ These procedures result in a significant body of decisions not easily accessible to the public or the bar.⁵

¹ J. SWIFT, *GULLIVER'S TRAVELS* 283 (Mod. Lib. ed. 1950) (emphasis in original).

² Caseloads for all the circuit courts totaled 3,899 in 1960 and 6,548 in 1966. Shafroth, *Survey of the United States Courts of Appeals*, 42 F.R.D. 243, 263 (1967). By 1975, the caseloads totaled 10,125. J. Spaniol, Report on the Operation of Circuit Opinion Publication Plans 2 (Dec. 31, 1975) (Memorandum to the Subcommittee on Federal Jurisdiction of the Judicial Conference of the United States) (on file at the *Cornell Law Review*) [hereinafter cited as 1975 Publication Plans Report].

³ *Hearings Before the Commission on Revision of the Federal Court Appellate System*, vol. 1, at 520 (1974) (statement of Sprecher, J.) [hereinafter cited as *Hearings*]. The recommendations of the Judicial Conference were based on a time study of the judges of the Third Circuit showing that the appellate judges spend 48% of their time preparing opinions. *Id.* at 519. See also 1975 Publication Plans Report, *supra* note 2, at 1.

⁴ See 1ST CIR. R. 14; 2D CIR. R. 0.23; 3d Cir. Plan for Publication of Opinions, reprinted in 1975 Publication Plans Report, *supra* note 2, at app. C; 4TH CIR. R. 18; 5TH CIR. R. 21; 6TH CIR. R. 11; 7TH CIR. R. 35; 8TH CIR. R. 14; 9TH CIR. R. 21; 10TH CIR. R. 17; D.C. CIR. R. 13(c).

⁵ Written but unpublished opinions are available from the clerks of the various courts of appeals on the same basis and at the same cost as other slip decisions. In the first 11 months of 1975, the number of cases disposed of by each of the circuits without published opinion was: 1st Cir., 203; 2d Cir., 322; 3d Cir., 417; 4th Cir., 839; 5th Cir., 876; 6th Cir., 563; 7th Cir., 365; 8th Cir., 191; 9th Cir., 1,389; 10th Cir., 433; D.C. Cir., 186. The total

In developing rules for unreported decisions, the circuits have disagreed over two basic questions. First, should a written disposition be made of every case?⁶ Second, should precedential value be accorded unreported decisions; that is, may counsel in subsequent cases cite unreported opinions to the courts that issued them or to lower courts within the same circuit or courts of other circuits?⁷ Unreported appellate decisions raise significant problems. Reported appellate decisions bind district courts within that circuit, and act as persuasive authority to sister circuits and district courts in other circuits; unreported decisions generally do not.⁸ In addition, inconsistent decisions by different panels within a circuit, or conflicts among or between circuits, may go undetected and unresolved.

I

TO REPORT OR NOT TO REPORT: A SURVEY OF THE CIRCUITS

The circuits' rules for disposing of cases without reported decision differ in procedure and degree of specificity. Although they do not admit of easy categorization, it is possible to identify common and divergent characteristics.

The Fifth Circuit implemented the most radical approach in promulgating its Local Rule 21.⁹ Under this rule, the Fifth Circuit can affirm or enforce a judgment or order without opinion if it finds:

for all circuits was 5,784. 1975 Publication Plans Report, *supra* note 2, at app. A. For the first 11 months of 1976 the figures were: 1st Cir., 103; 2d Cir., 511; 3d Cir., 597; 4th Cir., 586; 5th Cir., 902; 6th Cir., 636; 7th Cir., 385; 8th Cir., 152; 9th Cir., 1,401; 10th Cir., 954; D.C. Cir., 224. The total for all circuits was 6,451. J. Spaniol, Operation of Circuit Opinion Publication Plans During the Eleven-month Period Ending November 30, 1976, at app. A (Dec. 23, 1976) (Memorandum to the Subcommittee on Federal Jurisdiction of the Judicial Conference of the United States) (on file at the *Cornell Law Review*) [hereinafter cited as 1976 Publication Plans Report].

⁶ Compare 4TH CIR. R. 18 with 2D CIR. R. 0.23. See also 1976 Publication Plans Report, *supra* note 5, at app. A; 1975 Publication Plans Report, *supra* note 2, at app. A.

⁷ Compare 7TH CIR. R. 35(b)(2)(iv) and 9TH CIR. R. 21(c) with 10TH CIR. R. 17(c).

⁸ Although unreported district court decisions constitute a substantial body of federal law, they do not present many of the problems raised by unreported appellate decisions. Unreported district court decisions do not constitute binding authority. Moreover, no court prohibits the citation of unreported district court decisions.

⁹ 5TH CIR. R. 21 (promulgated July 1, 1970). These procedures have been adopted by the Eighth Circuit and incorporated into the Tenth Circuit's approach. See text accompanying notes 32-34 *infra*.

(1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value¹⁰

As a result, the circuit court can decide many of its cases without issuing any opinion whatsoever. The rule's most distinguishing characteristic is that the *ratio decidendi* is not made known even to the parties themselves. Not only is no opinion reported, none is even authored. This may explain why the court in *NLRB v. Amalgamated Clothing Workers Local 990*¹¹ offered a more explicit rationalization of its rule than has any other circuit.¹² Ironically, that decision admits:

Opinions . . . serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual, or both, which lead the Court to one rather than another result, gives strength to the system, and reduces . . . the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second . . . is that the very discursive statement of these articulated reasons is the thing out of which law—and particularly Judge-made law—grows.¹³

¹⁰ 5TH CIR. R. 21. This rule requires the court to find that one of the four enumerated criteria have been met *and* that an opinion would have no precedential value. In such cases the court's opinion reads in total: "AFFIRMED [or ENFORCED]. See Local Rule 21." *Id.*

¹¹ 430 F.2d 966 (5th Cir. 1970).

¹² Announcing the rule under which almost 25% of its cases are decided, the court justified it as "another response of this Court to the ever-growing explosive increase in the amount of its judicial business" (*id.* at 968), specifically, "an increase of 168% for appeals in the period 1961-1969" (*id.* at 970). To deal with this increasing caseload, the court felt the need "to exercise imaginative, inventive resourcefulness in fashioning new methods . . . to enable [it] to at least stay abreast of this flood tide." *Id.* Although the Fifth Circuit rule provides only for disposition without opinion of cases that are "affirmed" or "enforced," the court has also reversed the lower courts without opinion in certain circumstances. *See, e.g.,* Hall v. United States, 524 F.2d 238 (5th Cir. 1975); Dasher v. Housing Authority, 524 F.2d 238 (5th Cir. 1975), *vacating and remanding* 64 F.R.D. 720 (N.D. Ga. 1974). Such actions *supra* clearly violate the express terms of Local Rule 21. *See* note 10 and accompanying text *supra*. In addition, the *Dasher* case raises the problem of unreported reversals of previously reported opinions. Since only the lower court's initial disposition is freely available, future litigants wishing to cite that case will be unaware of the grounds on which it was overruled.

¹³ 430 F.2d at 972.

The court also cautioned "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."¹⁴

The approach of the Ninth Circuit—the nation's second busiest¹⁵—contrasts with the approach of the Fifth Circuit—the nation's busiest.¹⁶ The Ninth Circuit's rule provides three classifications for written dispositions by the court: "Opinions," "Memoranda," and "Orders."¹⁷ An opinion is "[a] written reasoned disposition of a case which is intended for publication."¹⁸ A memorandum is "[a] written reasoned disposition of a case which is *not* intended for publication."¹⁹ All other dispositions are orders.²⁰ A case does not qualify for disposition by published opinion unless it:

- (1) Establishes, alters, modifies or clarifies a rule of law, or
- (2) Calls attention to a rule of law which appears to have been generally overlooked, or
- (3) Criticizes existing law, or
- (4) Involves a legal or factual issue of unique interest or substantial public importance, or
- (5) Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency, or
- (6) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be reported²¹

In addition, the rule (a) provides a mechanism for requesting pub-

¹⁴ *Id.*

¹⁵ The Ninth Circuit recorded 2,293 dispositions during the first 11 months of 1975 and 2,395 dispositions during the same period of 1976. 1976 Publication Plans Report, *supra* note 5, at app. B (9th Cir.); 1975 Publication Plans Report, *supra* note 2, at app. B (9th Cir.).

¹⁶ The Fifth Circuit recorded 2,884 dispositions in the first 11 months of 1975 and 2,909 in the first 11 months of 1976. Of these, 692 and 590 respectively were without opinion pursuant to Local Rule 21. The court also decided 215 cases in 1975 and 337 in 1976 by written opinions that were not published, even though its rules do not specifically provide for such disposition. 1976 Publication Plans Report, *supra* note 5, at app. B (5th Cir.); 1975 Publication Plans Report, *supra* note 2, at app. B (5th Cir.).

¹⁷ 9TH CIR. R. 21(a).

¹⁸ *Id.*

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* No dispositions by order were recorded in the first 11 months of 1975 or 1976. 1976 Publication Plans Report, *supra* note 5, at app. B (9th Cir.); 1975 Publication Plans Report, *supra* note 2, at app. B (9th Cir.).

²¹ 9TH CIR. R. 21(b).

lication of a previously unreported decision;²² (b) enables a majority of judges on a panel to designate for publication a previously unpublished disposition;²³ and (c) suggests that the determination as to publication be made at the first conference following oral argument.²⁴ Such explicit guidelines encourage uniformity among different panels of a circuit in their determinations regarding publication.

The Ninth Circuit's language creates a presumption against publication—a case must meet the articulated criteria to qualify for publication. The language of the Fifth Circuit, by contrast, favors publication—a case must meet one of the specified tests of Local Rule 21 to qualify for disposition without written opinion, and almost all written opinions are published.²⁵ The percentage of cases decided but not reported bears out these conflicting presumptions.²⁶

The First Circuit's approach displays an attitude more philosophical than functional: "Our test, broadly phrased, is whether the district courts, future litigants, or we ourselves would be likely to benefit from the opportunity to read or cite the opinion . . ." ²⁷ The Third,²⁸ Fourth,²⁹ Sixth,³⁰ and Seventh³¹ Circuits have also

²² *Id.* R. 21(f):

Request for Publication. Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication. Such a request will not be entertained unless received within 60 days of the issuance of this court's disposition.

²³ *Id.* R. 21(d):

Designation for Publication. A disposition other than an opinion may be specially designated for publication by a majority of the judges acting and when so published may be used for any purpose for which an opinion may be used. Such a designation should be indicated at the end of the disposition when filed with the Clerk by the addition of the words "For Publication" on a separate line.

²⁴ *Id.* R. 21(e).

²⁵ See notes 9-14, 16, and accompanying text *supra*.

²⁶ In 1975 the Fifth Circuit decided 2,884 cases, 30% of which were not reported. That same year, the Ninth Circuit decided 2,293 cases, 61% of those unreported. 1975 Publication Plans Report, *supra* note 2, at app. A. In 1976, the Fifth Circuit decided 2,909 cases, 32% of them unreported. The Ninth Circuit figures for that year are 2,395 and 58% respectively. 1976 Publication Plans Report, *supra* note 5, at app. A.

²⁷ 1ST CIR. R. app. B. See also 1ST CIR. R. 14, which indicates that absence of a full written opinion means "no new points of law, making the decision of general precedential value, are believed to be involved."

²⁸ The Third Circuit's *Plan for Publication of Opinions* has not been adopted as part of its local rules. The plan creates a presumption that signed opinions shall be published and that per curiam opinions shall not. The decision on publication is made by a majority of the panel hearing the case. The plan states that "there should be publication only where the case has precedential [*sic*] or institutional value." 1975 Publication Plans Report, *supra* note 2, at app. C.

developed procedures for designating certain opinions as "not for publication." The Eighth Circuit has adopted verbatim the Fifth

²⁹ 4TH CIR. R. 18 adopts criteria almost identical to those of the Ninth Circuit. This rule, like the Ninth Circuit rule, presumes nonpublication unless one of six standards is met:

- (i) It establishes, alters, modifies, clarifies, or explains a rule of law within this circuit; or
- (ii) It involves a legal issue of continuing public interest; or
- (iii) It criticizes existing law; or
- (iv) It contains a historical review of a legal rule that is not duplicative; or
- (v) It resolves a conflict between panels of this court, or creates a conflict with a decision in another circuit; or
- (vi) It is in a case in which there is a published opinion below.

Id. The Fourth Circuit rule does not include any of the procedural detail incorporated in 9TH CIR. R. 21. *See* text accompanying notes 22-24 *supra*.

³⁰ 6TH CIR. R. 11 merely acknowledges that certain decisions will be "designated as not for publication." It specifies no criteria for the determination on publication. In 1975 only 26 opinions were not published. 1975 Publication Plans Report, *supra* note 2, at app. B (6th Cir.).

³¹ 7TH CIR. R. 35 is among the most specific. It divides decisions into "opinions" and "orders." Opinions are published, orders are not. The rule even indicates how opinions and orders are to be printed and to whom they are to be circulated.

(1) Published opinions:

Shall be filed in signed or per curiam form in appeals which

- (i) Establish a new or change an existing rule of law;
- (ii) Involve an issue of continuing public interest;
- (iii) Criticize or question existing law;
- (iv) Constitute a significant and non-duplicative contribution to legal literature
 - (A) by a historical review of law;
 - (B) by describing legislative history; or
 - (C) by resolving or creating a conflict in the law; or
- (v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

- (i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which
 - (A) are frivolous or
 - (B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where
 - (aa) a controlling statute or decision determines the appeal;
 - (bb) issues are factual only and judgment appealed from is supported by evidence;
 - (cc) order appealed from is nonappealable or this court lacks jurisdiction or appellant lacks standing to sue; or
- (ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which
 - (A) are not frivolous but
 - (B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

Circuit's rule.³² The Tenth Circuit has followed the Fifth Circuit's summary affirmance or enforcement procedure,³³ but also allows for written opinions which, although available to the parties, will not be published.³⁴ The District of Columbia Circuit's rule is the most cryptic. It permits the court to "dispense with opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate."³⁵ Alone among the circuits, the Second Circuit writes no unreported opinions.³⁶ Its rules, however, allow for "disposition . . . in open court or by summary order."³⁷

Affirmance without order, as per the rules of the Fifth and Eighth Circuits,³⁸ should be abolished. In a survey of the bar, conducted at the court's request, attorneys of the Seventh Circuit indicated their concern that some form of opinion be written in every case.³⁹ A brief explanation of an appellate court's action—be it an

Id. R. 35(c). The Seventh Circuit also specifies means of printing and scope of distribution of published and unpublished dispositions. *Id.* R. 35(b).

³² 8TH CIR. R. 14. The Fifth Circuit rule is set out in the text accompanying note 10 *supra*.

³³ 10TH CIR. R. 17(b).

³⁴ *Id.* R. 17(d):

Situations where publication shall occur include (1) conflicts with decisions of the Tenth Circuit or other federal appellate courts; the interpretation of decisions of the highest court of a state or the Supreme Court of the United States; (2) new federal constitutional or statutory issues; and (3) diversity cases in which a new or unique proposition of law is expounded.

Id. R. 17(e):

Situations where publication should not occur include (1) cases where the outcome depends on facts and presents no legal issues not previously decided by the Tenth Circuit or by the Supreme Court of the United States; and (2) diversity cases where the outcome depends on established state law.

The rule also provides that where the lower court or agency decision is published, the appellate decision shall also be published. If the appellate decision would not ordinarily meet the criteria for publication, "only the dispositive judgment or order of the court" shall be published. *Id.* R. 17(f).

³⁵ D.C. CIR. R. 13(c). In practice, the D.C. Circuit has decided about 25% of its cases without published opinion, 35% of these by unpublished memoranda and 65% by order. See 1976 Publication Plans Report, *supra* note 5, at app. B (D.C. Cir.); 1975 Publication Plans Report, *supra* note 2, at app. B (D.C. Cir.).

³⁶ See 1976 Publication Plans Report, *supra* note 5, at app. A; 1975 Publication Plans Report, *supra* note 2, at app. A.

³⁷ 2ND CIR. R. 0.23. This rule—unique among the circuits—requires unanimity of the panel in favor of such disposition, and requires a determination that "each judge of the panel believes that no jurisprudential purpose would be served by a written opinion." *Id.*

³⁸ 5TH CIR. R. 21; 8TH CIR. R. 14. See notes 9-14, 32, and accompanying text *supra*.

³⁹ See *Hearings*, vol. 1, *supra* note 3, at 465-69; *Report of the Chicago Bar Association Committee on Appellate Court Congestion*, 56 CHI. B. REC. 16, 20-21 (1974).

indication of reliance on the lower court opinion or an indication that an earlier decision of that same court is considered dispositive of the issues presented—would serve two worthy goals. On review to the Supreme Court, it would indicate the underlying rationale of the decision below.⁴⁰ In addition, it would assure the litigants—and particularly the losing litigants—that their case has been given the consideration it deserves. Brief explanations of the decisions in all cases would require little additional judicial effort. If the appeal turns on issues of fact, and the circuit court finds that the verdict is based on sufficient evidence or that the findings of the lower court are not clearly erroneous, the circuit court can say so, without examining the case in detail. If the appeal is frivolous, a notation to that effect by the circuit court may discourage future litigants in similar situations from seeking review and cluttering already crowded dockets.

II

PRECEDENTIAL VALUE: POLICIES AND PRACTICES

All circuit courts addressing the issue accord unreported decisions something less than the full precedential weight of reported opinions. Several circuits have either specifically indicated or clearly implied that unreported opinions are not precedent and may not be cited by or to the courts of that circuit.⁴¹ The Fourth Circuit disfavors, but does not ban, the citation of unpublished opinions.⁴² The Seventh Circuit requires a litigant to appear before the court and have an unreported decision certified for publication before it can be cited.⁴³ The Tenth Circuit sanctions the citation of unreported cases with the proviso that a copy of any unreported decision cited must be served on opposing counsel.⁴⁴ Four circuits are silent on the precedential value of, and counsel's ability to cite, unreported decisions.⁴⁵ These practices raise several problems.

⁴⁰ See *Taylor v. McKeithen*, 407 U.S. 191, 193-94 (1972).

⁴¹ 1ST CIR. R. 14; 2ND CIR. R. 0.23; 6TH CIR. R. 11; 7TH CIR. R. 35(b)(2)(iv); 9TH CIR. R. 21(c).

⁴² 4TH CIR. R. 18(d).

⁴³ 7TH CIR. R. 35(b)(2)(iv).

⁴⁴ 10TH CIR. R. 17(c). The Tenth Circuit has attributed the success of its rule to the policy of permitting citation of unreported cases. 1976 Publication Plans Report, *supra* note 5, at app. D (10th Cir.).

⁴⁵ The Third, Fifth, Eighth, and District of Columbia Circuits have not promulgated rules on these issues.

A. *Unreported Cases Establishing or Clarifying the Law*

Citation of unreported decisions becomes essential when the opinions establish or clarify the law in the circuit. A series of Fourth Circuit cases exemplifies the problem. In *Jones v. Superintendent*,⁴⁶ that court conceded that

any decision is by definition a precedent, and . . . we cannot deny litigants and the bar the right to urge upon us what we have previously done. But because memorandum decisions are not prepared with the assistance of the bar, we think it reasonable to refuse to treat them as precedent within the meaning of the rule of stare decisis. We prefer that they not be cited to us for an additional reason: since they are unpublished and generally unavailable to the bar, access to them is unequal and depends upon chance rather than research. For this reason, also, we will not ourselves in published opinions cite or refer to memorandum decisions.⁴⁷

Although this policy allows counsel and the district courts to cite unpublished cases, it has not clarified the extent to which litigants may rely on unreported circuit court holdings as precedent.⁴⁸ For example, in March 1971, the Eastern District of Virginia decided *Marston v. Oliver*⁴⁹ (*Marston I*), holding that accused indigent misdemeanants are constitutionally entitled to counsel. In June 1972, the United States Supreme Court reached the same conclusion in *Argersinger v. Hamlin*.⁵⁰ The Fourth Circuit affirmed *Marston I* the following November in an unreported decision (*Marston II*),⁵¹ giving retroactive effect to the holding of *Argersinger*. In De-

⁴⁶ 465 F.2d 1091 (4th Cir. 1972).

⁴⁷ *Id.* at 1094.

⁴⁸ See, e.g., *Curley v. Bryan*, 362 F. Supp. 48 (D.S.C. 1973). In *Curley* the district court was faced with an issue which had been recently decided by the Fourth Circuit in an unpublished memorandum decision (*Gatling v. Midgett*, No. 70-14,863 (4th Cir. June 9, 1971)). The district court, in its published opinion, quotes and relies on the *Gatling* decision. In so doing, the court added this footnote:

The court cites *Gatling* . . . with some trepidation. In [*Jones*] the court [of appeals] held that memorandum decisions need not be afforded precedential value But this court is aware of no other decision of the Fourth Circuit which is as much on all fours with the instant case as *Gatling*, and to this court's knowledge the principle of estoppel enunciated in *Gatling* has not been subsequently overturned by any reported decision.

362 F. Supp. at 52 n.2.

⁴⁹ 324 F. Supp. 691 (E.D. Va. 1971), *rev'd*, 485 F.2d 705 (4th Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

⁵⁰ 407 U.S. 25 (1972).

⁵¹ No. 71-1329 (4th Cir. Nov. 7, 1972).

ember 1972, the same district judge who had decided *Marston I* had before him *Herndon v. Superintendent*.⁵² That case also involved an accused misdemeanant's right to counsel, but since the trial of *Herndon* occurred before *Argersinger* was handed down, the case centered on whether *Argersinger* applied retroactively. Although the Fourth Circuit had answered the retroactivity question affirmatively in *Marston II*, the respondent in *Herndon* argued that "*Marston [II]* . . . was promulgated in a memorandum decision of the Court [of Appeals] and thus carries little precedential weight."⁵³ The court responded:

[This] contention gains some support from the Court of Appeals' own language in [*Jones*]. . . . Nevertheless, this Court is duty bound to follow the rules enunciated by its appellate court. Absent contrary holdings in the Court of Appeals' published decisions, this Court will continue to give the appropriate weight to the memorandum decisions of the Court of Appeals, regardless of form. To do otherwise would place the Court in the untenable position of looking to the format of the decision rather than to the ultimate fact that the decision is signed by three learned judges of the Court.⁵⁴

The matter did not rest there, however, because in October 1973 the same issue arose before the Western District of Virginia in *Mays v. Harris*.⁵⁵ The court also relied on the unreported *Marston II* decision:

The court is fully aware that our Court of Appeals has indicated that memorandum decisions . . . are of limited precedential value [quoting *Jones*]. . . . Nevertheless, this court feels obligated to adhere to the principle enunciated in *Marston [II]*. . . . [I]t is the only available indicator of the Fourth Circuit's position on [this] question Additionally, the problem of inequality is eliminated because both parties were made aware of the *Marston [II]* decision. See *Herndon v. Superintendent*⁵⁶

Thus, the *Mays* court based its decision, at least in part, on the fact that publication of the *Herndon* district court opinion had advertised the Fourth Circuit's unpublished *Marston II* decision. Ironi-

⁵² 351 F. Supp. 1356 (E.D. Va. 1972).

⁵³ *Id.* at 1358.

⁵⁴ *Id.*

⁵⁵ 369 F. Supp. 1348 (W.D. Va. 1972), *rev'd on other grounds*, 523 F.2d 1258 (4th Cir. 1975).

⁵⁶ *Id.* at 1350-51 n.1 (citation omitted).

cally, eight days after the *Mays* decision the Fourth Circuit published an opinion reversing *Marston I*, apparently on rehearing.⁵⁷ True to its own policy, the court did not mention the 1972 unreported decision in the same case.

In *Mohr v. Jordan*,⁵⁸ the district court cited and relied upon three separate unreported Fourth Circuit decisions,⁵⁹ each holding that the time a defendant spends in jail awaiting trial must be credited against the sentence imposed. After noting the *Jones* decision, the court stated:

[H]ere there are three separate Memorandum Decisions in three different cases, and each of the seven active Judges of the Fourth Circuit has participated in one or more of these decisions Accordingly, this Court concludes that the law is established in this Circuit that a prisoner is constitutionally entitled to credit against his sentence for time spent in jail awaiting trial.⁶⁰

When this same issue arose again in *Durkin v. Davis*,⁶¹ the district court was able to cite not three, but four unreported decisions, because in the interim the Fourth Circuit had affirmed *Mohr* in an unreported decision.⁶² The *Davis* court paraphrased the language of the district court in *Mohr* and decided the case on the basis of the unreported decisions.⁶³

B. *Difficulty of Appeal*

Decisions rendered under Fifth Circuit Rule 21, Eighth Circuit Rule 14, and by order under District of Columbia Circuit Rule 13(c) do not create citation problems—there are no opinions to

⁵⁷ *Marston v. Oliver*, 485 F.2d 705 (4th Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

⁵⁸ 370 F. Supp. 1149 (D. Md. 1974).

⁵⁹ *Id.* at 1154. The court cited *Sypolt v. Coiner*, No. 73-1339 (4th Cir. June 27, 1973), *Steele v. North Carolina*, 475 F.2d 1401 (4th Cir. 1973) (No. 72-2076), and *Meadows v. Coiner*, 475 F.2d 1400 (4th Cir. 1973) (No. 73-1106).

⁶⁰ 370 F. Supp. at 1154.

⁶¹ 390 F. Supp. 249 (E.D. Va. 1975), *rev'd on other grounds*, 538 F.2d 1037 (4th Cir. 1976).

⁶² No. 74-1496 (4th Cir. June 10, 1974).

⁶³ 390 F. Supp. at 254. Not all district courts within the Fourth Circuit agree as to the weight to be accorded unreported decisions under *Jones*. See, for example, *Anthony v. Luther*, 383 F. Supp. 827 (W.D.N.C. 1974), where the court easily distinguished an unreported decision (*Stubbs v. Turner*, No. 66-11,425 (4th Cir. May 26, 1967)), but noted that the circuit court had "insistently advised" against citing memorandum decisions. 383 F. Supp. at 827. The extent of the problem of precedential value is impossible to determine because, in addition to the Fourth Circuit, only the Tenth Circuit opens the courthouse door far enough to permit counsel to bring unreported decisions before the bench.

cite. Under these rules, judges write no opinions for unreported cases.⁶⁴ The decisions do, however, create problems on appeal, as exemplified by *Taylor v. McKeithen*.⁶⁵ The Fifth Circuit had reversed, without opinion, a district court decision invalidating the 1970 Louisiana reapportionment. After granting plaintiff's petition for certiorari, the Supreme Court vacated and remanded "[b]ecause this record does not fully inform us of the precise nature of the litigation and because we have not had the benefit of the insight of the Court of Appeals."⁶⁶ The Court added in a footnote:

We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances. . . . But here the lower court summarily reversed without any opinion on a point that had been considered at length by the District Judge.⁶⁷

Justice Rehnquist dissented, arguing that the courts of appeals have statutorily conferred powers to develop their own rules⁶⁸ and, in a given case, to issue a short opinion, or no opinion at all.⁶⁹ The majority, he chided, "calls upon the Fifth Circuit to write an *amicus curiae* opinion to aid us."⁷⁰ To show that lower court opinions, although helpful, are not essential,⁷¹ Justice Rehnquist cited *Lego v. Twomey*,⁷² which affirmed an unreported Seventh Circuit decision.⁷³ *Lego* is clearly distinguishable, however, because the circuit court had written an unpublished opinion which could have helped explain the lower court's action to the Supreme Court.⁷⁴

⁶⁴ See notes 9-14, 32, 35, and accompanying text *supra*.

⁶⁵ 407 U.S. 191 (1972).

⁶⁶ *Id.* at 194.

⁶⁷ *Id.* at 194 n.4. Given the nature of the issue involved, the Fifth Circuit may have ignored its own admonitions on the abuse of Local Rule 21. See text accompanying note 14 *supra*.

⁶⁸ 28 U.S.C. § 2071 (1970).

⁶⁹ 407 U.S. at 195.

⁷⁰ *Id.* at 196.

⁷¹ *Id.* at 195.

⁷² 404 U.S. 477 (1972).

⁷³ United States *ex rel.* *Lego v. Pate*, No. 69-18,813 (7th Cir. Oct. 8, 1970).

⁷⁴ Moreover, *Lego* was an affirmance by the court of appeals, whereas *Taylor* was a reversal. Indeed, the Court in *Taylor* indicated that wider latitude should be accorded the lower court on the question of writing opinions where an affirmance is involved. See 407 U.S. at 194 n.4.

C. Undetected and Unresolved Conflicts

Another danger in barring citation of unreported decisions is that inconsistent results among panels within the same circuit will not be discovered. Similarly, unreported cases within one circuit may create an undetected conflict with another circuit. The unavailability of unreported decisions can lead to a situation where resolving these conflicts becomes impossible because of the "no citation" rule.

The problem of internal inconsistencies came to the attention of the Fourth Circuit in *Jones v. Superintendent*.⁷⁵ The court stated: "[A]lthough unmentioned, it should be clearly understood by the bench and bar that any prior memorandum decision in conflict with a subsequently published opinion is to be considered overruled."⁷⁶ But when a decision is unreported, the law in question is supposedly so well settled that it needs no further explanation. How then can a court reverse itself on a point previously thought settled without even examining the prior rationale?

In *Matise v. American Foreign Steamship Co.*,⁷⁷ the Ninth Circuit construed a federal statute restricting the withholding of seamen's wages.⁷⁸ It found that "the case law has, for at least two decades, provided full notice . . . that only those deductions from wages that are allowed by statute are lawful."⁷⁹ Two months earlier the law which had been clear "for at least two decades" caused great difficulty for another panel of the Ninth Circuit in *Gearin v. Weyerhaeuser Line*.⁸⁰ That court found that the test for a shipowner avoiding the statutory double-wage penalty was whether the "failure to pay [was] 'arbitrary, willful or unreasonable.'"⁸¹ Not only did the Ninth Circuit's no-citation rule prohibit the *Matise* court from discussing the *Gearin* opinion,⁸² but the *Matise* court may not

⁷⁵ 465 F.2d 1091 (4th Cir. 1972). See notes 46-47 and accompanying text *supra*.

⁷⁶ 465 F.2d at 1094. This provides no remedy for conflicts between unreported decisions, or between a prior reported decision and a subsequent unreported one.

⁷⁷ 488 F.2d 469 (9th Cir. 1974), *rev'd on other grounds*, 423 U.S. 150 (1975). See also Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975).

⁷⁸ 46 U.S.C. § 596 (1970).

⁷⁹ 488 F.2d at 473. Finding the deductions not statutorily permitted, the court reversed the district court and held the shipowner liable for the statutory double-wage penalty. *Id.*

⁸⁰ No. 71-3026 (9th Cir. Jan. 21, 1974), *cert. denied*, 419 U.S. 884 (1974).

⁸¹ *Id.*, slip op. at 5 (quoting *McCrea v. United States*, 294 U.S. 23, 30 (1935)) (quoted in Gardner, *supra* note 77, at 1225).

⁸² 9TH CIR. R. 21(c) prohibits citation of unreported cases. The Supreme Court avoided the problem presented by the conflicting *Gearin* and *Matise* opinions, finding that no deduction from wages had been made in the *Matise* case. 423 U.S. at 156-60.

even have been aware of the *Gearin* decision.⁸³

Conflicts may also develop between two unreported decisions without the courts or the bar becoming aware of them. Since, under these circumstances, neither case is precedent, courts might later "resolve" the problem. The courts of appeals, however, would still benefit from having the reasoning of both opinions. This problem has troubled judges of the Seventh Circuit. In testimony before the Commission on the Revision of the Federal Court Appellate System,⁸⁴ Judge Robert Sprecher encouraged the circuits to compile an "intracourt index of unpublished opinions"⁸⁵ so that each circuit would be internally consistent. Such an index might be made available to judges in order to avoid duplicative research, but Judge Sprecher opposed using cases located through such an index as precedent.⁸⁶ This creates a dilemma. Without an index, undetected intracircuit conflicts may go unresolved. But if the circuits develop indexes to which only they can refer, they will be creating a secret body of law which judges can apply, modify, or ignore as they see fit.⁸⁷

D. *Due Process and Equal Protection*

Does a rule prohibiting citation of prior decisions to the court affront the Constitution's due process requirement?⁸⁸ The Fourth Circuit briefly considered this issue in *Jones v. Superintendent*.⁸⁹ In the same paragraph the court dismissed any due process infirmity

⁸³ The possibility that an unpublished decision will conflict with an earlier published decision, although less likely, is equally troublesome. In such a situation the parties to the later case can seek review en banc or appeal to the Supreme Court. Should they fail to do so, however, the existence of the conflict may be lost. A future litigant, seeking to overturn the earlier published decision, will be unable to summon the later unpublished opinion to his aid. Compare *United States v. Holland*, 510 F.2d 453 (9th Cir. 1975) (founded suspicion for investigatory stop treated as question of law), with *United States v. Alvarez-Garcia*, No. 74-2789 (9th Cir. Jan. 28, 1975) (founded suspicion treated as finding of fact), and *United States v. Johnson*, No. 74-2552 (9th Cir. Mar. 12, 1975) (confusion as to whether founded suspicion should be reviewed as finding of law or finding of fact).

⁸⁴ The Commission was created by the Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807, as amended by Act of Sept. 19, 1974, Pub. L. No. 93-420, 88 Stat. 1153 (codified at 28 U.S.C. § 41 (Supp. V 1975)).

⁸⁵ *Hearings*, vol. 1, *supra* note 3, at 536.

⁸⁶ *Id.* at 536-39.

⁸⁷ The Tenth Circuit prepares such an index. It makes the index available to anyone because the circuit permits citation of unreported opinions. See 1976 Publication Plans Report, *supra* note 5, at app. D (10th Cir.).

⁸⁸ U.S. CONST. amend. V.

⁸⁹ 465 F.2d 1091 (4th Cir. 1972). *Jones* is discussed in the text accompanying notes 46-47 *supra*.

in a rule according no precedential value to unreported decisions, and also found a *right* of unspecified origin to cite such cases to the court. The *Jones* court noted "that any decision is by definition a precedent, and . . . we *cannot* deny litigants and the bar the right to urge upon us what we have previously done."⁹⁰ Such a right can be derived only from the due process clause, but nowhere did the court explain how or why that clause requires citation of, but not reliance upon, unreported decisions.

*Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*⁹¹ involved a constitutional challenge to the Seventh Circuit's no-citation rule.⁹² Petitioners had attempted to cite an unreported decision⁹³ of the Seventh Circuit in the proceeding below.⁹⁴ The court struck the reference to the decision as required by Rule 35. The petitioners alleged that the rule constitutes an unlawful prior restraint on freedom of speech,⁹⁵ and "impinges upon the . . . right to petition the government for redress of grievances,"⁹⁶ carrying "serious consequences for the fair and equal administration of justice."⁹⁷ Anticipating the argument that judicial efficiency justifies a no-citation rule, petitioners quoted *Stanley v. Illinois*:⁹⁸

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.⁹⁹

⁹⁰ 465 F.2d at 1094 (emphasis added).

⁹¹ 429 U.S. 917 (1976) (denial of motion for leave to file petition for writs of mandamus and prohibition).

⁹² 7TH CIR. R. 35(b)(2)(iv).

⁹³ *Valentino v. Lynch*, No. 73-1089 (7th Cir. June 8, 1973). Plaintiffs moved to convene a three-judge court pursuant to 28 U.S.C. § 2281 (1970), and attempted to cite the unreported decision in support of this motion.

⁹⁴ *Do-Right Auto Sales v. Flaum*, No. 76-1022 (7th Cir. June 8, 1976). The initial case, *Do-Right Auto Sales v. Howlett*, No. 75 C 2421 (N.D. Ill. Dec. 19, 1975), challenged the constitutionality of ILL. REV. STAT. ch. 95 1/2, § 5-501(a)(5)-(6) (Supp. 1977). That statute permits the Illinois Secretary of State to revoke auto dealer certificates without a hearing.

⁹⁵ Petitioners' Brief in Support of Motion for Leave to File Petition for Writs of Mandamus and Prohibition at 8, *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976) [hereinafter cited as Petitioners' Brief].

⁹⁶ *Id.* at 8-9.

⁹⁷ *Id.* at 9.

⁹⁸ 405 U.S. 645 (1972).

⁹⁹ Petitioners' Brief, *supra* note 95, at 9 (quoting *Stauley v. Illinois*, 405 U.S. at 656). *Cf. Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (mandatory preference for men as administrators of estates unconstitutionally arbitrary legislative choice).

Identifying the rights sacrificed in the name of speed and efficiency, petitioners mixed equal protection and due process claims.¹⁰⁰ The Seventh Circuit responded:

In the last analysis [petitioners'] case against the rule is grounded in the doctrine of *stare decisis* which . . . is a judicially-created policy; it is not enshrined in the Constitution. Courts do modify and overrule their prior decisions. By definition, therefore, courts do have authority to determine whether a given decision has value as a precedent for future cases, and, correspondingly, whether it should be published to the world.¹⁰¹

Although courts retain the power to overrule or modify their prior decisions, why should they have the power to determine whether such decisions should be available to other courts?

On November 1, 1976, the Supreme Court denied petitioners' motion for leave to file a petition for writs of mandamus and prohibition.¹⁰² It therefore remains necessary to question whether a no-citation rule may deny litigants due process of law.¹⁰³

Justice Cardozo defined the rights protected by the due process clause as those "of the very essence of a scheme of ordered

¹⁰⁰ The petitioners cited *Grayned v. City of Rockford*, 408 U.S. 104 (1972), and *Bouie v. City of Columbia*, 378 U.S. 476 (1964), for the proposition that availability and utilization of prior written decisions are "essential to the stability of law." Petitioners' Brief, *supra* note 95, at 9-10. Alleging a denial of equal protection, petitioners apparently relied on erratic enforcement of the rule by citing *Love v. Howlett*, No. 75 C 1829 (N.D. Ill. June 13, 1975), in which the court allowed the plaintiffs to cite the unreported *Valentino* decision, and a three-judge court was convened.

¹⁰¹ Respondents' Brief in Opposition to Petitioners' Motion for Leave to File a Petition for Writs of Mandamus and Prohibition at 25, *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976) [hereinafter cited as Respondents' Brief]. Respondents also argued that no continuing case or controversy existed because petitioners had been granted a hearing before license revocation; the lack of a hearing had been the basis of their initial claim. *Id.* at 10.

¹⁰² *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976). This denial should not reflect on the validity of petitioners' attack on the Seventh Circuit rule. First, it is questionable whether a continuing case or controversy existed. See note 101 *supra*. Second, the Seventh Circuit rule was amended effective July 1, 1976, to permit any person to request that a previously unpublished order be certified as a published opinion, with citation permitted. See 7TH CIR. R. 35. Third, the three-judge court statute—the basis of petitioners' initial claim—was repealed effective August 12, 1976. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119. This would not have rendered petitioners' claim moot, but it might have affected the question of whether the claim was substantial enough to warrant the Supreme Court's consideration.

¹⁰³ The Supreme Court may reach this issue in *United States ex rel. Browder v. Director*, 534 F.2d 331 (7th Cir. 1976) (mem.), cert. granted *sub nom.* *Browder v. Director*, 429 U.S. 1072 (1977). Petitioner in *Browder* challenges *inter alia* the authority of the Seventh Circuit to decide cases without reported opinion pursuant to its Local Rule 35. Petition for Writ of Certiorari at 22-26.

liberty,"¹⁰⁴ the abridgement of which would violate "a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"¹⁰⁵ Further, the due process clause protects rights not explicitly enumerated by the Constitution if they meet this definition.¹⁰⁶ While respondents' point in *Do-Right*—that the issue involved the constitutional status of *stare decisis*—seems well taken, a cursory dismissal of *stare decisis* as "not enshrined in the Constitution" will not suffice.

Although courts do not blindly adhere to earlier decisions,¹⁰⁷ they do not casually modify and overrule them; courts carefully consider the reasoning and underlying policies of prior decisions.¹⁰⁸ On one of the few occasions that the Supreme Court considered the status of *stare decisis*, Justice Frankfurter stated:

We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. . . . [S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable¹⁰⁹

To allow judicial sleight-of-hand to create a body of law exempt from the doctrine would assault a rudimentary underpinning of our legal system. *Stare decisis* is fundamental to our "scheme of ordered liberty":

¹⁰⁴ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

¹⁰⁵ *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

¹⁰⁶ See *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁰⁷ See *In re Estate of Eckart*, 39 N.Y.2d 493, 498-99, 348 N.E.2d 905, 908, 384 N.Y.S.2d 429, 431-32 (1976); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951); *Baker v. Lorillard*, 4 N.Y. 257, 261 (1850). Cf. *Flood v. Kuhn*, 407 U.S. 258 (1972) (Court refused to overrule long-standing baseball antitrust exemption, although might have decided differently if issue one of first impression).

¹⁰⁸ See *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962); *Smith v. Allwright*, 321 U.S. 649, 665-66 (1944). See also Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949). In *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976), Chief Judge Breitel noted: "At the root of [*stare decisis*] must be a humbling assumption, often true, that no particular court as it is then constituted possesses a wisdom surpassing that of its predecessors." *Id.* at 488, 348 N.E.2d at 901, 384 N.Y.S.2d at 425.

¹⁰⁹ *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). A desire for stability in the law encouraged reliance on decided cases as early as Bracton and the Yearbooks of the fourteenth century. See Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924) (citing 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY iii (1909)). See also D. CHAMBERLAIN, *THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT* 19 (1885).

“From the very nature of law and its function in society, the elements of certainty, stability, equality, and knowability are necessary to its success, but reason and the power to advance justice must always be its chief essentials; and the principal cause for standing by precedent is not to be found in the inherent probable virtue of a judicial decision, it ‘is to be drawn from a consideration of the nature and object of law itself, considered as a system or a science.’ ”

The nub of the matter is that *stare decisis* does not spring full-grown from a “precedent” but from precedents which reflect principle and doctrine rationally evolved. . . . [T]here is potential for jurisprudential scandal in a court which decides one way one day and another way the next¹¹⁰

Furthermore, if due process requires notice and opportunity to be heard before judgment,¹¹¹ the opportunity to present “every available defense”¹¹² must include the chance to cite unreported decisions.

E. *The No-Citation Rule Rejected*

The consequences of the no-citation rule are simple. Counsel cannot bring to the courts’ attention relevant unpublished decisions; the courts may not request either briefs or argument on the applicability of earlier unpublished decisions. Furthermore, appellate courts cannot even cite their own earlier unpublished decisions.

Recognizing that unreported opinions can help the courts cope with their dockets, the question remains whether courts should grant these decisions precedential value and permit their cita-

¹¹⁰ *People v. Hobson*, 39 N.Y.2d 479, 488, 348 N.E.2d 894, 900-01, 384 N.Y.S.2d 419, 425 (1976) (quoting Von Moschzisker, *supra* note 109, at 414) (citation omitted). Mr. Justice Douglas has also noted the fundamental nature of *stare decisis*:

[T]here will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon. *Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and to give stability to a society.

Douglas, *supra* note 108, at 736. See also Von Moschzisker, *supra* note 109, at 430, which notes: “This ancient custom of following precedents . . . when properly . . . applied . . . helps us to hold fast to our basic principles, to establish knowable rules of conduct, to administer even-handed justice, and to remain [*sic*] a uniformly consistent development of our legal system.”

¹¹¹ See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

¹¹² *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932) (emphasis added).

tion.¹¹³ An unreported decision may deal with a unique fact situation, more directly in point with a subsequent case than its reported predecessors.¹¹⁴ Under the appropriate standards, unreported decisions should make little or no new law, thereby minimizing surprise to an opponent. Although unreported opinions may not be prepared with the care or depth of analysis involved in preparing reported opinions, judges can take account of the shortcomings inherent in unreported decisions that are cited to them. Further, free citation of unreported decisions will allow litigants to bring to the courts' attention erroneous decisions not to report.¹¹⁵ In addition, courts will be able to request argument on points raised by unreported decisions, thus ensuring that their decisions are consistent with previously unreported cases. If inconsistencies exist, courts can choose to distinguish, overrule, or limit the prior unreported case. In short, free citation forces close consideration—and reconsideration—of *all* decisions. Unrestrictive rules best assure quality judicial decisions, reported and unreported.

CONCLUSION

The publication rules of the various circuits and the local rules on unpublished opinions have helped federal courts keep pace with ever-increasing caseloads.¹¹⁶ The question remains, however, whether this goal can be better served by a system which alleviates the problems raised herein.

There should be uniformity among the circuits' rules for deciding which cases should not be reported and what precedential value should be accorded unreported decisions. Although courts have recognized the value of experimentation,¹¹⁷ in this instance

¹¹³ The Advisory Committee on Procedures of the Judicial Council of the District of Columbia Circuit has concluded that policy considerations favor permitting litigants to cite unreported decisions. See Memorandum from John H. Pickering to the Judicial Council of the D.C. Circuit (Dec. 6, 1976), *reprinted in* 1976 Publication Plans Report, *supra* note 5, at app. D (D.C. Cir.).

¹¹⁴ See, e.g., *Curley v. Bryan*, 362 F. Supp. 48 (D.S.C. 1973), discussed in note 48 *supra*.

¹¹⁵ In theory—if not in fact—no court or attorney should ever need to cite an unreported case. Indeed, the need to cite such a case indicates that its impact extends beyond its facts, or that the fact pattern is a repeating one, and therefore, under the standards of any of the circuits, the case should have been reported.

¹¹⁶ In 1975, 29% of all cases docketed in the courts of appeals were decided by published opinion. See 1975 Publication Plans Report, *supra* note 2, at app. A. In 1976, the figure was 27%. See 1976 Publication Plans Report, *supra* note 5, at app. A. See also Hastings, *The Seventh Circuit Plan for Publication of Opinions—A Continuing Experiment*, 51 *IND. L.J.* 367 (1976).

¹¹⁷ To stay experimentation in things social and economic is a grave responsi-

long-term experimentation is not warranted. The various circuits have had between three and seven years' experience in developing standards and procedures related to unreported decisions.

Uniform rules would discourage "circuit shopping" by a litigant who wishes to cite an unreported decision in a given appeal. Uniformity would also avoid a conflict of rules problem between the circuits.¹¹⁸ Today, each circuit court can only promulgate rules for use within its own circuit, but cannot bind other circuits. It remains unclear which rule governs: the rule of the circuit that issued the opinion or the rule of the circuit to which it is cited.¹¹⁹ Uniform national standards can best resolve this problem. The Supreme Court has authority under the Rules Enabling Act¹²⁰ to "prescribe by general rules . . . the practice and procedure of the . . . courts of appeals."¹²¹ Within this power clearly lies the Supreme Court's authority to promulgate uniform rules regarding publication of opinions and citation of unreported decisions. The time has come for adoption of a uniform national policy.

To this author, the standards of the Ninth Circuit,¹²² the most explicit in indicating which cases are appropriate for disposition by unreported decisions, can best achieve the goals of uniformity and consistency of application. As to the citation of unreported decisions, the Tenth Circuit rule,¹²³ which freely permits such citation but minimizes surprise to opposing counsel, is preferable

bility. . . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments This Court has the power to prevent an experiment . . . because [of] the due process clause

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion, Brandeis, J.).

¹¹⁸ For example, the Seventh Circuit bars citation of unreported decisions and the Tenth Circuit permits it. Which rule governs when an attorney wishes to cite a Tenth Circuit opinion to the Seventh Circuit? Which rule governs the citation of a Seventh Circuit opinion to the Tenth Circuit?

¹¹⁹ *Rose v. Hodges*, 423 U.S. 19 (1975) (per curiam), represents the Supreme Court's first recognition of a circuit no-citation rule. In reaction to the majority's citation of two Sixth Circuit unreported decisions (*id.* at 21 n.3), Justice Brennan questioned whether the Supreme Court is not "called upon to respect" the circuit's no-citation rule. *Id.* at 23-24 n.2 (dissenting opinion). See Hastings, *supra* note 116, at 372-73. Justice Brennan premised his dissent on the theory that the majority's interpretation of the lower court opinion could not be read consistently with two earlier unreported decisions of the same Sixth Circuit. 423 U.S. at 23-24 n.2. There is, however, no reason to believe that the lower court was even aware of its earlier unreported decisions or the need to harmonize them with *Rose*.

¹²⁰ 28 U.S.C. § 2072 (1970).

¹²¹ *Id.*

¹²² 9TH CIR. R. 21(a). See notes 17-24 and accompanying text *supra*.

¹²³ 10TH CIR. R. 17(c). See note 44 and accompanying text *supra*.

to the Seventh Circuit's cumbersome procedure.¹²⁴ These standards would permit unreported decisions to aid significantly judicial efficiency without imperiling the rights of litigants or the doctrine of *stare decisis*.

David Dunn

¹²⁴ 7TH CIR. R. 35(b)(2)(iv). See note 43 and accompanying text *supra*.