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June 10, 2020

The Honorable Anne M. Burke, Chief Justice  
The Honorable. Thomas L. Kilbride  
The Honorable. Rita B. Garman  
The Honorable. Lloyd A. Karmeier  
The Honorable. Mary Jane Theis  
The Honorable. P. Scott Neville, Jr.  
The Honorable. Michael J. Burke

Illinois Supreme Court  
200 E. Capitol  
Springfield, Illinois 62701

*Submitted by email:* [abowne@illinoiscourts.gov](mailto:abowne@illinoiscourts.gov)

**RE: Proposed Amendment to, or Elimination of, Supreme Court Rule 23  
Comment and Request to Testify at Hearing<sup>1</sup>**

Dear Justices,

As a trial and appellate attorney over forty years, with hundreds of reported decisions, I write to repeat our decade-long request to eliminate the rule against citing decisions issued as Rule 23 Orders, or -U Decisions.

Beginning in 2010, we (for myself, and for the Center for Open Government) have repeatedly written to ask this Honorable Court to amend Supreme Court Rule 23 to require the publication of all decisions issued as Rule 23 “Orders”, and to allow their citation as persuasive authority in other cases.

Following our 2010 letter to your honors, the court amended Rule 23 to require the public posting of what were previously referred to as “unpublished” or “-U” Orders.

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<sup>1</sup> While I would prefer to testify at the public hearing, my appearance that day would likely have to be remote, due to the scheduled birth of our second grandchild that day.

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Respectfully, it is time to follow the lead of federal courts and most of the other State courts, and either eliminate or amend the Rule to permit citation of the thoughtful opinions of Justices of the Illinois Appellate Court for whatever persuasive authority they may have.

**Recommendation:** This Court should amend Supreme Court Rule 23, to allow the citation of Rule 23 Orders (still often colloquially mis-referred to as “unpublished”) issued by the Illinois Appellate Court; indeed, preferably to allow the citation of *any* court whose written decision is believed to be relevant to assist the presiding court in reaching the correct and appropriate result. In light of the prevailing movement in courts across the nation, the further development of technology, and the general web posting of these opinions, it is time for the Court to amend rule 23 and allow the citation of what are commonly referred to as “unpublished opinions” for whatever persuasive authority they have.

**2010 Letter from the Center For Open Government:** In 2010, we wrote to you, outlining the reasons the Court should amend Rule 23 to require the posting and allow citation of unpublished opinions. This Court saw the wisdom in part of that proposal and began prospectively posting/publishing those previously restricted opinions. This was an important step towards allowing attorneys, judges, and other decision makers to utilize every piece of precedential, probative, and guiding information available to best assist parties and judges in reaching correct decisions. Indeed this decision was to the benefit of both the public and the courts at every level.

Our 2010 COG letter provided several reasons for this Court to reconsider Rule 23(a) and allow the posting and, mainly, ability to cite unpublished opinions; emphasizing three main points: the advent of digitized opinions rendering the initial concern over unpublished opinions moot, the trend of both federal and state courts to allowing unpublished opinions to be cited, and the inherent value of these opinions relative to the non-existent risk of allowing their citation. These points still remain completely valid.

We wrote you again in 2016, restating our view that there should be no “unciteable” decisions.

**Respectfully, it is now time to allow these valuable tools to be cited for whatever persuasive authority they have.**

**Ten years later, there are at least four additional reasons to jettison the DO-NOT-CITE prohibition.**

**First, each of these Rule 23 Orders is important** for its being the (hopefully) thoughtful applications of the law by a panel of three justices to a parties’ dispute, even if it simply follows a well-worn path. The fact that the path is repeatedly still recognized is itself something to be considered by future litigants and judges.

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The mere fact that the author/panel chooses to label it as Rule23 “unciteable” should not control, and for a host of reasons. In our common law tradition, the true significance and persuasive viability of an author judge’s decision is determined by subsequent caselaw briefs, arguments and decisions. Cases abound in which a judicial author’s evaluation has turned out to be terribly wrong,<sup>2</sup> or unenvisioned at the time rendered.<sup>3</sup>

Countenancing a judicial author’s desire to have a decision outside the radar for subsequent cases invites judges to give shorter shrift or protect themselves from scrutiny for their work.

And the trend is decidedly towards universal permission to cite. In the ensuing years additional State supreme courts have amended their rules to allow the citation of unpublished opinions; 2) the value of unpublished opinions when compared to other citable materials; 3) and the widening technology gap that favors those who have access to, and can afford to take full advantage of, legal search engines.

**The Trend Towards Permitting Unpublished Opinions Has Continued Since 2010.**  
**The vast majority of courts, all federal and most States now permit the citation of “unpublished” opinions.**

Since the passage of FRAP 32.1 opened parties in federal appellate courts to the benefits of unpublished opinions, States have been steadily following this pattern by eliminating or weakening the prohibition of citations to unpublished opinions. Our 2010 COG letter identified 15 states that had begun allowing the citation of unpublished opinions, or weakened the restriction on these types of opinions<sup>4</sup>. Since then, California<sup>5</sup>, Michigan<sup>6</sup>, Minnesota<sup>7</sup>, New Mexico<sup>8</sup>, North Carolina<sup>9</sup>, Tennessee<sup>10</sup>, Utah<sup>11</sup>, and Washington<sup>12</sup> have joined this view, and

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<sup>2</sup> *E.g.*, Mr. Justice Taney’s *Dredd Scott* decision

<sup>3</sup> *E.g. Beulah Crane v. Commissioner*, 331 U.S. 1 (1947) , in which footnote 37’s comment that if the entity was structured in a way that no partner had personal liability, that all of the limited partners would have a tax basis for taking depreciation, disproportionate to their actual investment, thus launching the limited partnerships which “laid the foundation stone of most tax shelters.”

<sup>4</sup> Alaska, Arkansas, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Ohio, Texas, Utah, Vermont, West Virginia, and Wisconsin. *See* attached letter and chart.

<sup>5</sup> May be cited as relevant. Cal. R. Ct. 8.1115(b)

<sup>6</sup> May be cited but not as precedent. Mich. Ct. R. 7.215(c)(1)

<sup>7</sup> May be cited as persuasive but not precedential. *Skyline Village Park Ass'n v. Skyline Village L.P.*, 786 N.W.2d 304, 309 (Minn. App. 2010).

<sup>8</sup> May not be cited as precedent. NM R S CT Rule 23-112

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now allow some form of citation to unpublished decisions. The State totals now appear to be that 27 States permit citation, 14 (including Illinois) arguably prohibit it, and 10 have a variety of “hybrid” rules displaying sui generis purposes, *See: Wood, Lauren S., Comment: Out Of Cite, Out Of Mind: Navigating the Labyrinth that is State Appellate Courts’ Unpublished Opinion Practices*, 45 U.Balt.L.Rev. 561 (Summer 2016).

**The Application of Illinois Rule 23 is uneven at best.** Despite Rule 23’s clear restriction on usage to just the parties of the prior decision (essentially making the decisions citeable only where they provide either collateral estoppel or res judicata), the Appellate court panels are uneven at best in applying the rule.

Some panels permit their citation as persuasive authority, others prohibit their citation entirely. This uncertainty chills the assertion of legitimate arguments for no good reason. Being threatened with sanctions for citing the Rule 23 decision of a panel is an absurd situation, which I personally have experienced both sides of; having explained that while I disagreed with my opponent’s position, the rule should not be applied to punish my opponent for citing the ruling.

And practitioner attorneys variously ignore or employ it, as suits the occasion. Many practitioners (including me) cite first-impression Rule 23 Orders, protectively with a footnote recognizing the technical violation, but questioning its validity. As a longtime rejector of the rule, even when it existed in the federal courts, I challenged it in my Ninth Circuit arguments, and admonished the Seventh Circuit against using it as a penalty against my opponent’s citation of an unpublished opinion.

Our own Appellate Court justices have dialogued over its merits and application. *See, e.g.* the dialogue in *Byrne v. Hayes Beer Distrib. Co.*, 2018 IL App (1st) 172612, 122 N.E.3d 753, in which the Circuit Court relied on a -U Order, between Justice Hyman<sup>13</sup> (noting that there is no

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<sup>9</sup> Allowable as persuasive and precedential in certain instances, and requires a 28(g) hearing if being cited as precedent. N.C. R. App. P. App. R. 30

<sup>10</sup> May be cited pursuant to statutory guidelines. TN R A CT Rule 12(a)

<sup>11</sup> May be cited as persuasive. UT R USDCT CIV DUCivR 7-2

<sup>12</sup> May not be cited for precedent. GR 14.1(b)

<sup>13</sup> [\*P22] The court cited *Carletto v. Quantum Foods, Inc.*, No. 1-05-3163, 365 Ill. App. 3d 1089, 927 N.E.2d 328, 339 Ill. Dec. 787 (2006) (unpublished order under [\*\*\*9] Illinois Supreme Court Rule 23), in finding that Byrne's claim was not preempted by section 301. And both parties cite *Carletto* before us. Illinois Supreme Court Rule 23 states that an unpublished order "is not precedential and may not be cited by any party except to support contentions of double jeopardy, res judicata, collateral estoppel or law of the case." Ill. S. Ct. R. 23(e)(1) (eff. April 1, 2018); *see also Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 17, 961 N.E.2d 475, 356 Ill. Dec. 379 (citation to unpublished order "strictly prohibited"). The rule places no similar limitations on the trial court. Some divisions of the appellate court have criticized trial courts for citing Rule 23 orders (*see, e.g., People v. Schambow*, 305 Ill. App. 3d 763, 766, 714 N.E.2d 83, 239 Ill. Dec. 525 (1999)), yet nothing in the rule expressly prohibits a trial court or the appellate

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prohibition on the *court's* citing to unpublished orders) and Justice Mason's concurrence<sup>14</sup>, expressing support for the "bright line" prohibition. In turn, in *In re Marriage of Sanchez*, 2020 IL App (5<sup>th</sup>) 190216-U, where the respondent-appellant cited a -U order as the only "reported" discussion of the issue, the Appellate Court ominously "cautioned" the respondent on any future reliance on rule 23 decisions.<sup>15</sup>

We have also experienced "first impression" decisions being issued as Rule 23 Orders. In one case<sup>16</sup>, in which we were not involved, we learned of the decision only inadvertently, were informed that we actually had to move to intervene (by luck alone, we were within the time before the decision was no longer reviewable) to request publication of a decision, which was granted, and the case has been repeatedly cited since then, in some versions actually showing me as a counsel for plaintiffs in that case.

In another case of first impression<sup>17</sup>, our opponent who won the appeal, asked to have the decision published as an opinion, because we were on identical opposing sides of the same first-impression issue dealing with a different school and appellate district, in which our opposing counsel wanted to cite the decision in their favor in the other case. We advised the panel that,

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court from adopting the reasoning of an unpublished order. Irrespective of the propriety of the trial court relying on *Carletto*, the court's analysis was sound, and our analysis would be much the same.

<sup>14</sup> At ¶¶ 44-50: [¶50] While the continued viability of the proscription against citation of Rule 23 orders has been questioned given that all of our decisions are available on the worldwide web, our supreme court has recently declined to amend the rule to abolish the distinction between precedential opinions, on the one hand, and nonprecedential Rule 23 orders, which may not be cited except as provided under the rule, and we should honor that decision by enforcing the rule as written.

<sup>15</sup> [¶30] With respect to respondent citing *In re Marriage of Capelle*, 2018 IL App (5th) 180011-U, we agree with petitioner that an order entered under Supreme Court Rule 23(b) may not be cited by any party except in support of limited contentions not applicable in this case. Ill. S. Ct. R. 23(b) (eff. Apr. 1, 2018). In her brief, respondent acknowledged that no cases were found on the issue raised in this appeal and that she cited an unpublished decision since it contained a discussion of the issue. Nothing in Rule 23 expressly prohibits [\*\*18] the appellate court from adopting the reasoning of an unpublished order. *Byrne v. Hayes Beer Distributing Co.*, 2018 IL App (1st) 172612, ¶ 22, 428 Ill. Dec. 492, 122 N.E.3d 753. In this matter, the unpublished decision was cited for this court's consideration of the reasoning contained in the unpublished decision had no bearing on our analysis. We caution respondent on any future reliance on Rule 23 decisions, but we do not elect to strike those portions of respondent's brief supported by the Rule 23 decision.

<sup>16</sup> *Dell v. City of Streator*, 193 Ill.App.3d 810 (3d Dist. 1990).

<sup>17</sup> *Hughes v. Ricker*, 2013 IL App (1<sup>st</sup>) 113419-U

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while we viewed the case as an unfortunate ill-thought product of a panel that had not permitted oral argument, we nonetheless supported the motion to publish, in our unalterable view that decisions of an appellate court panel should be usable for whatever their logic is worth.

**Another problem with Rule 23 lies in its granting the status of a decision to its authors.** This poses two problems actually. First, leaving a decision's evaluation to its author is less credible than simply leaving it to posterity and other jurists. Second, there has always been a suspicion that some judges have used Rule 23 on occasion to avoid public criticism of a decision whose correctness might be less certain.

**The Purposes of Enacting Rule 23 have long ago become obsolete .**

As stated in the 2010 letter, unpublished opinions were originally *disfavored* in the interest of maintaining a level playing field among parties, and dealing with an overwhelming problem of housing vast volumes of decisions in book-form. The digitization of case law effectively reversed this and given an advantage to parties with sophisticated search and sort access, and the means to pay for extensive research on, legal databases like WestLaw and Lexis<sup>18</sup>. That initially provided those with access to unpublished opinions an uneven ability to locate unpublished case decisions. But the now vastly greater inexpensive internet access by Google and other search engines over the internet have substantially eliminated the reasons for reducing the citable authority decisions.

**Unpublished Opinions Generally Offer Persuasive and Informative Value No Less Than the Host of "Lesser" Materials that are Already "Citeable".**

Indeed, we think that while materials are arguably cited as either persuasive or controlling authority, all court opinions are ultimately judged, as they should be, by their persuasiveness (since even controlling authorities often diminish in their subsequent persuasiveness, and are overruled).

Thus, the value of any court communication lies in its opining in a way that others may regard as correct or persuasive, because they communicate concepts well; often resonate with truth and the human experience..

Accordingly, attorneys and courts throughout our nation and history have cited to a host of things that are not formal published opinions, *precisely because they illustrate points so well, or connect with us in a way that compels (hopefully) us to agree, or not. Indeed some of the most persuasive arguments rest on such lesser authorities.*

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<sup>18</sup> Dru Stevenson & Nicholas J. Wagoner, Bargaining in the Shadow of Big Data, 67 Fla. L. Rev. 1337, 1384 (2015)

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Indeed, the courts have variously resorted to citing Sesame Street aphorisms of Miss Piggy, popular music lyrics<sup>19</sup> film clips and quotes, from *It's a Great Life*, to *Ghostbusters*<sup>20</sup> to *Casablanca*, among other pieces of film and television<sup>21</sup>, -- all have been, and still are, routinely cited for the purpose of giving credibility to legal arguments and decisions, precisely because they communicate concepts and experiences so well.

Even at the U.S. Supreme Court level, Justices routinely cite such seemingly lesser authorities. From Bob Dylan lyrics; (cited in Justice Scalia's opinion in *City of Ontario, Cal. v. Quon*, 560 U.S. 746 (2010), addressing the issue of the reasonable expectation of privacy for city employees in regards to electronic messages) Scalia concurred in the opinion, but dissented to Part III-A of the majority opinion:

"The Court's implication, ante, at 2629, that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin' is a feeble excuse for disregard of duty."(*City of Ontario, Cal. v. Quon*, 560 U.S. 746, 768 (2010).)<sup>22</sup>

or Chief Justice Roberts dissenting opinion in *Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269 (2008),<sup>23</sup>:

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<sup>19</sup> *United States v. Murphy*, 406 F.3d 857, 859-n.1 (7th Cir. 2005). Using lyrics from rap artist Ludacris to correct a misspelling of the word 'hoe' (farm tool) to 'ho' (derogatory slang). See also *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 504 n.1 (9th Cir. 2015), using lyrics from singer Macklemore to make a point about the vitriolic nature of online commenting.

<sup>20</sup> *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 675 (N.Y. App. Div. 1st Dept. 1991)

<sup>21</sup> See generally, *Zorzit v. Comptroller*, 123 A.3d 627, 629 (Md. Spec. App. 2015), television show *The Wire* used in the opinion.

<sup>22</sup> The majority opinion said that in order to determine whether Fourth Amendment privacy protection comes into place in employment situations, the court should review "the operational realities of the workplace." Scalia said that this analysis was unsupported and in this case unnecessary - the search conducted by the government employee was reasonable, therefore there was no need to do a Fourth Amendment analysis.

<sup>23</sup> In this case, assignees of payphone operators were seeking payment from phone carriers. The payphone operators contracted with the assignees to handle the collection. The issue in this case was whether the assignees had standing to bring claims against carriers. The majority held that the assignees did have standing, even when the assignee had agreed to pass the proceeds to the assignor. The dissent said the assignees did not have standing, as they have no benefit from the amount collected.

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“The absence of any right to the substantive recovery means that respondents cannot benefit from the judgment they seek and thus lack Article III standing. “When you got nothing, you got nothing to lose.” Bob Dylan, Like A Rolling Stone, on Highway 61 Revisited (Columbia Records 1965).” (*Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 301 (2008))<sup>24</sup>

to Justice Kagan’s citation of comic books<sup>25</sup> in *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, at 2415 (2015)<sup>26</sup>:

“What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly. Cf. S. Lee and S. Ditko, *Amazing Fantasy No. 15: “Spider-Man,”* p. 13 (1962) (“[I]n this world, with great power there must also come—great responsibility”). Finding many reasons for staying the *stare decisis* course and no “special justification” for departing from it, we decline Kimble’s invitation to overrule *Brulotte*.”

Similarly, our sister-State Supreme Courts have also routinely cited popular culture comments (see attachment), persuasive because they resonate and ring true; or just reaffirm the view that the courts do experience life in the real world—all of which add to the system’s respect.

In any event, while we have no problem with the continued separation of decisions into “Opinions” and “Orders”, all are now published (in the sense that they are accessible and searchable) and should be “citeable” as well, for whatever persuasive authority they may have. The true accuracy and strength of a decision’s thought process is never really determined by the author, but by those who follow.

Viewed in this light, if Superman, Spiderman and Miss Piggy and Kermit, can serve as an informative or illustrative citation, then so should the learned reasoning of Illinois Appellate Court Justices.

**Posting of other essentially unfindable decisions.** Finally, we suggest that the court give serious thought as well to causing the posting of (i) all pre-2010 appellate orders, and for

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<sup>24</sup> And see also Liptak, Adam, “Dylan Citings in Court”, New York Times February 23, 2016, <http://nyti.ms/20PXcC1>

<sup>25</sup> *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2415 (2015).

<sup>26</sup> In this case, Marvel Entertainment had purchased a patent from Stephen Kimble for the Spider Man toy. The patent was near its end, and Marvel wanted to stop paying patent royalties pursuant to *Brulotte v. Thys Co.*, 379 U.S. 29. Kimble asked the court to override *Brulotte*, but the court held that, due to *stare decisis*, *Brulotte* was upheld, thus a patent holder cannot charge royalties past the expiration of the patent term.



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that matter, also (ii) all previously issued decisions of the Court of Claims, which remain, somewhat troubling, essentially neither findable nor searchable.

I am available and would welcome the opportunity to discuss or testify regarding this proposal at your request.

Very Truly Yours,  
*/s/Clint Krislov*

Clinton A. Krislov

CAK  
Attachments

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**An Incomplete Compendium of Aphorisms and other Popular culture citations:**

“In other words, faced with a decision to go forward or have the case dismissed with prejudice, the Plaintiffs choose to have the case dismissed *without* prejudice. I am reminded of the character in Joseph Heller's novel *Catch-22* who, challenged with Emiliano Zapata's famous aphorism—it is better to die on your feet than live on your knees—replied that it is better to live on your feet than die on your knees. Though fictional characters may be able to reject two unpleasant options in favor of a third of their own invention, in the real world litigants may be stuck with their catch-22.” *Valdes v. MCH Mariner's Cove, LLC*, CV 7019-VCG, 2013 WL 3421927, at \*2 (Del. Ch. July 9, 2013) citing Joseph Heller, *Catch-22*, at 248 (1994).<sup>27</sup>

“Variations among individual notions of right or wrong led to Selden's well-known aphorism: Equity is a roguish thing. For Law we have to measure ...; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity...” *LG Elecs., Inc. v. InterDigital Commun., Inc.*, 98 A.3d 135, 141 (Del. Ch. 2014) *aff'd*, 114 A.3d 1246 (Del. 2015) citing *Bond v. Hopkins*, 1 Sch. & Lef. 413, 428 (1802).<sup>28</sup>

“The notion that non-verbal cues are a vital tool for fully understanding a person's statements has deep cultural roots... This axiom has been absorbed by, commented upon, and assimilated by popular culture as well. For example, in the popular television sitcom “Seinfeld,” Kramer says, “Ninety-four percent of our communication is nonverbal, Jerry.” Seinfeld (NBC television broadcast, Jan. 29, 1998). *People v. Saiz*, 32 P.3d 441, 454 (Colo. 2001).<sup>29</sup>

“A review of the Minnesota cases holding an item to be an improvement to real property shows that, in virtually every case, the item in question permanently altered the real property in some substantive manner. Stated otherwise, the improvement was integral to the building or structure on the property. As appellants aptly note, to reach the correct result here, we need only play the old Sesame Street game ‘One of These Things is Not Like the Others.’” *See Sesame Street: Episode 1* (Children's Television Workshop Nov. 10, 1969). *Olson v. Warm Products, Inc.*, A12-2226, 2013 WL 3779323, at \*12 (Minn. App. July 22, 2013), review denied (Oct. 15, 2013).<sup>30</sup>

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<sup>27</sup> The Plaintiff's sued defendant to enforce a lease agreement and later followed to follow through with court action. The defendant moved to dismiss with prejudice, and the plaintiffs asked the court to dismiss without prejudice. The court ruled for the defendant's motion.

<sup>28</sup> Plaintiff's sued to enforce nondisclosure agreement, the court held that the arbitration clause was binding, and that both parties must follow that clause.

<sup>29</sup> Defendant was convicted of second degree murder, and exclusion of certain evidence was not an abuse of the court's discretion.

<sup>30</sup> Plaintiff's suit for products liability had shown issue of material fact, and summary judgement was improper.

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“On appeal, Morrison has argued that the trial court erred by not addressing whether Crown's stated motives were pretextual... Indeed, Morrison has put the proverbial horse before the cart, and this Court disregards his arguments to that extent.” *Morrison v. Crown Div. of Transpro, Inc.*, 99CA0011, 2000 WL 799104, at \*4 (Ohio App. 9th Dist. June 21, 2000).<sup>31</sup>

“The old adage that ‘the squeaky wheel gets the grease’ perhaps offers the simplest explanation for the Court's disposition of these related entire controversy appeals.” *Olds v. Donnelly*, 696 A.2d 633, 646 (N.J. 1997).<sup>32</sup>

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<sup>31</sup> Plaintiff's suit for intentional infliction of emotional distress was properly dismissed because he failed to meet the burden of proof.

<sup>32</sup> Plaintiff filed legal malpractice claim against his attorney in a medical malpractice suit, but because the attorney defendant had been substituted in for the original attorney, the court ruled there was not duty of care.



2016

# Out of Cite, Out of Mind: Navigating the Labyrinth That is State Appellate Courts' Unpublished Opinion Practices

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# OUT OF CITE, OUT OF MIND: NAVIGATING THE LABYRINTH THAT IS STATE APPELLATE COURTS' UNPUBLISHED OPINION PRACTICES

Lauren S. Wood\*

“The first rule of [unpublished opinions] is: You do not talk about [unpublished opinions]. The second rule of [unpublished opinions] is: You do not talk about [unpublished opinions].”<sup>1</sup>

## I. INTRODUCTION

Imagine that you are an attorney, litigating an appellate case with an atypical fact pattern. You are familiar with the law; however, its application to your client’s circumstances is entirely unclear. After endless hours of research, you finally find it: a factually apposite case with a favorable outcome. Elated, you grab your legal pad to scribble down the case citation. But then you see it—that dreaded text at the top of the opinion: “NOT SELECTED FOR PUBLICATION.” This is an unpublished opinion. Perturbed and exhausted, your mind starts racing: “What’s that rule again? Can I use this? I think that one attorney cited one in his brief with no problem. Or no, was that somewhere else?”

The ambiguity and confusion surrounding the usage of unpublished opinions<sup>2</sup> is pervasive throughout state appellate courts, especially with more states each year amending their own practices.<sup>3</sup> Where

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\* J.D. Candidate, May 2016, University of Baltimore School of Law. A special thank you to Associate Dean Amy E. Sloan, Professor Colin Starger, and the *University of Baltimore Law Review* staff, all of whom were instrumental to the publication of this Comment.

1. *Adapted from* FIGHT CLUB (Fox 2000 Pictures & Regency Enterprises 1999).

2. The term “unpublished” is technically a misnomer, as most of these types of opinions are now posted either in online databases such as LexisNexis and Westlaw, or on the state court’s website. For the purpose of this Comment, the significance of a court disposing of an opinion as unpublished or unreported is rooted in “the precedential status and citation restriction imposed” by the respective state jurisdiction. Dean A. Morande, *Publication Plans in the United States Courts of Appeals: The Unattainable Paradigm*, 31 FLA. ST. U. L. REV. 751, 754 (2004).

3. See, e.g., *infra* Appendix – Table 3 (Ariz.) (citation policy amended Jan. 1, 2015); *infra* Appendix – Table 4 (N.H.) (citation policy amended Jan. 1, 2016); *infra* Appendix – Table 3 (Mich.) (citation policy amended May 1, 2016).

some jurisdictions flatly prohibit citation to unpublished opinions,<sup>4</sup> others value them no differently than their published counterparts.<sup>5</sup> Even murkier are the jurisdictions that govern the use of unpublished opinions through conflicting formal and informal rules. The maze of clashing policies throughout state appellate courts has fostered uncertainty and arbitrariness in the administration of the law. The result is public distrust of the judiciary, lost precedent, and unintended language emerging as precedential law.

This Comment exposes the critical need for state jurisdictions to adopt a uniform law governing the citation and access to unpublished opinions. It provides, both textually and in chart form,<sup>6</sup> a comprehensive update regarding state appellate courts' citation policies—a task that has not been undertaken in over a decade.<sup>7</sup> Based on the collected data, this Comment goes on to examine state appellate courts' nationwide trend toward citability and dissect the variability-based issues between and among state jurisdictions.

Part II of this Comment outlines the development of selective publication plans in the United States and the early controversies sparked by its doctrine. Parts III–IV classify the fifty states and the District of Columbia into categories based on their citation rule and reveal the considerable degree of variation perpetuating state appellate courts. Next, Part V provides an overview of the conflicting philosophies embraced by state courts concerning usage of and reliance on unpublished opinions.

Part VI of this Comment demonstrates the discordant citation policies' damaging effects, focusing on their harmful impact on the integrity of the judicial system. Finally, Part VII proposes a rule for state appellate courts to uniformly adopt, establishing a compromise between commentators' conflicting philosophies by affording persuasive value to all unpublished dispositions. The proposed rule also requires state courts to make all unpublished opinions online-accessible. Ultimately, this Comment will seek to encourage nationwide uniformity in treatment of unpublished opinions and

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4. See *infra* Appendix – Table 5.

5. See *infra* Appendix – Table 2.

6. *Infra* Appendix.

7. See generally Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 481–86 & n.47–98 (2003), for the most recent fifty-state survey. Barnett's "Battlefield Report" served to update the findings of Melissa M. Serfass and Jessie L. Cranford, the "[p]ioneers in the task." *Id.* at 477–78; Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001).

extinction of the arcane practice of no-citation rules, thereby promoting transparency and accountability throughout the judicial system.

## II. THE ORIGIN OF UNPUBLISHED OPINIONS AND CITATION RESTRICTIONS

Historically, the publication of judicial opinions was ubiquitous throughout the English common law system for centuries.<sup>8</sup> The first books to report court opinions emerged in 1292 as unofficial manuscript law reports called Year Books.<sup>9</sup> The Year Books, composed of transcribed notes by the Courts of England, were an early attempt to assemble the law into a logical structure.<sup>10</sup> Over time, publishers replaced the Year Books with nominative case reporters—essentially compilations of notes discussing judicial decisions taken by lawyers, judges, and the compiler himself.<sup>11</sup> These reports were highly valuable for establishing precedent, described by one commentator as “crucial components for building a science of the law.”<sup>12</sup> Yet, they were also somewhat unreliable due to their tendency to “contradict[] each other in describing the [court’s] reasoning, and even the names, of particular cases.”<sup>13</sup>

### A. The American Case Publication System

Following the American Revolution, the newly established nation began developing common law separate and distinct from the laws of England through early official reporters of its own.<sup>14</sup> Although they were more objectively written than the nominative case reporters to precede them, the reports still lacked organization and efficiency.<sup>15</sup>

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8. Suzanne O. Snowden, “*That’s My Holding and I’m Not Sticking to It!*” *Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 WASH. U. L. REV. 1253, 1258 (2001), [http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1425&context=law\\_lawreview](http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1425&context=law_lawreview).

9. *Id.* (citing Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 17 (1987)).

10. J. Jason Boyeskie, Comment, *A Matter of Opinion: Federal Rule of Appellate Procedure 32.1 and Citation to Unpublished Opinions*, 60 ARK. L. REV. 955, 957 (2008).

11. Snowden, *supra* note 8, at 1259.

12. Berring, *supra* note 9, at 18.

13. *Hart v. Massanari*, 266 F.3d 1155, 1166 (9th Cir. 2001).

14. Berring, *supra* note 9, at 19.

15. Snowden, *supra* note 8, at 1259.

The legal reporting system was forever altered in 1882, when John B. West formed the West Publishing Company.<sup>16</sup> The West Company was significant in that it standardized court reporting in a way that had never been done before.<sup>17</sup> Its reporters quickly covered every jurisdiction in the U.S., and “for the first time, lawyers were able to easily and accurately cross-reference cases and legal concepts.”<sup>18</sup>

Subsequently, in the twentieth century, the amount of cases decided per year soared.<sup>19</sup> The result was “almost unmanageable proportions” of American case law—most of which contributing nothing to the development of the law and simply restating what had been said a hundred times before.<sup>20</sup> In light of this ballooning growth, the federal and state judiciaries began exploring ways to limit the publication of opinions.<sup>21</sup>

### *B. The Advent of Nonpublication Doctrine*

In 1964, the Judicial Conference of the United States passed a resolution directing federal courts to only issue opinions for cases where the opinion holds precedential value.<sup>22</sup> Over the next ten years, a number of states followed suit, crafting their own criteria for

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16. *Id.*

17. Berring, *supra* note 9, at 21.

The significance of standardization operated on several levels. The first simply was accuracy . . . . The West Company established a system for receiving copies of opinions from every jurisdiction. It prided itself on gathering decisions and verifying the text with the judge who wrote them. Secondly, West established a uniform format for reporting. All West reporters were designed according to the same formula. West produced a sterile court reporting system that guaranteed reliability through similarity.

*Id.*

18. Charles J. Stiegler, *The Precedential Effect of Unpublished Judicial Opinions Under Louisiana Law*, 59 LOY. L. REV. 535, 539 (2013).

19. Snowden, *supra* note 8, at 1261.

20. Stiegler, *supra* note 18, at 539 (quoting Francis R. Auman, *American Law Reports: Yesterday and Today*, 4 OHIO ST. U. L.J. 331, 331 (1938)).

21. *Id.* at 540–41.

22. CHIEF JUSTICE EARL WARREN, ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964), <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1964-03.pdf> [hereinafter 1964 JUDICIAL COUNCIL REPORT].



determining when a court opinion warranted publication.<sup>23</sup> Each state formulated its own unique rules, contrasting in degrees of specificity and stringency, as well as in posture.<sup>24</sup> Notably, however, no state addressed the *significance* of designating an opinion for nonpublication—that is, whether it can be cited in briefs for precedential value.<sup>25</sup> While the topic sparked contention, it was also easily avoidable for the time being, because of the difficulty in tracking down unpublished opinions.<sup>26</sup>

Many jurisdictions, however, soon realized that the matter could only be dodged for so long. The first no-citation rule was enacted by Arkansas in 1974.<sup>27</sup> After debating the issue at length, California's constitutional revision commission initially chose to omit a no-citation rule from their limited publication plan due to fears that it would constitute a "prohibition on enlightenment."<sup>28</sup> However, after attorneys began deliberately searching court files and "ambush[ing] opponents" with untried, anomalous decisions, California added a controversial rule prohibiting citation to unpublished opinions in 1977.<sup>29</sup>

While some critics asserted that no-citation rules ensured equity and efficiency,<sup>30</sup> others believed that the restrictions functioned as

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23. FED. JUDICIAL CTR., STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 24–28 (1973), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/appellate/id/33> [hereinafter 1973 FED. JUDICIAL CTR. REPORT]. The early states to adopt limited publication plans were, respectively, New York (1964), Georgia (1971), Washington (1972), California (1973), and New Jersey (1973). *See id.*
  24. *See, e.g.,* Eva S. Goodwin, *Partial Publication: A Proposal for a Change in the "Packaging" of California Court of Appeal Opinions to Provide More Useful Information for the Consumer*, 19 SANTA CLARA L. REV. 53, 57–58 (1979), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2172&context=lawreview> (discussing California's 1972 rule revision, changing CAL. R. CT. 976 (enacted 1964) from a rule favoring publication "to its present more restrictive form . . . reflect[ing] a bias against publication").
  25. *See* 1973 FED. JUDICIAL CTR. REPORT, *supra* note 23. Three federal appellate circuit courts, however, did choose to tackle this issue, all enacting non-citation provisions. *Id.* at 37–38.
  26. *See* Stiegler, *supra* note 18, at 541.
  27. Brian T. Damman, Note, *Guess My Weight: What Degree of Disparity is Currently Recognized Between Published and Unpublished Opinions, and Does Equal Access to Each Form Justify Equal Authority For All?*, 59 DRAKE L. REV. 887, 891 (2011) (citing *Weatherford v. State*, 101 S.W.3d 227, 231–32 (Ark. 2003)).
  28. Kenneth J. Schmier et al., *Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?*, 7 J.L. & SOC. CHALLENGES 233, 239 (2005).
  29. *Id.* at 239–40.
  30. *See, e.g.,* 1973 FED. JUDICIAL CTR. REPORT, *supra* note 23, at 19 (outlining reasons for requiring non-citation rules).

dissolutions of judicial accountability.<sup>31</sup> In opposition of no-citation rules, Justice Robert S. Thompson contended:

An imperfectly reasoned and generally result-oriented opinion may be buried in a non-publication grave. A panel may avoid public heat or appointing authority disapprobation by interring an opinion of real precedential [sic] value. More frequently, a panel may make a mistake . . . and fail to publish an opinion.<sup>32</sup>

Nonetheless, by the early 1980s, the controversy surrounding unpublished opinions dwindled, since most courts at the time were still publishing the vast majority of their decisions.<sup>33</sup> However, in the matter of a decade, a marked spike in the number of unpublished opinions quickly revived the debate.<sup>34</sup> The federal court of appeals' rate of unpublished opinions swelled from 11.2% in 1981 to a staggering 68.4% in 1990.<sup>35</sup> By 2000, that number rose even higher, where 79.8% of all federal court of appeals opinions were marked unpublished.<sup>36</sup>

This spike bolstered academics' suspicion of no-citation rules, since an inordinate amount of cases appeared to be completely insulated from the principles of stare decisis<sup>37</sup>:

Because of no-citation rules, even when the facts and issues in a prior unpublished decision mirrored the facts and issues in an attorney's current case, the attorney was prohibited from bringing the unpublished opinion to the court's attention. This prohibition . . . led to inconsistent and seemingly arbitrary decision-making in the federal courts, and thereby violated one of the foundational principles of the American legal system: stare decisis, which ensures that like cases will be treated alike.<sup>38</sup>

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31. Schmier, *supra* note 28, at 240–41.

32. *Id.*

33. See Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185, 192 (2007).

34. *Id.* at 192–94.

35. *Id.* at 193 (“Table #1: The Dramatic Increase in Federal Court of Appeals Unpublished Opinions”).

36. *Id.*

37. *Id.* at 194 (stating that no-citation rules “created a ‘secret’ body of unpublished law”) (footnote omitted).

38. *Id.*

### C. The *Anastasoff*-*Massanari* Debate

Supporters and opponents alike were stunned when the Eighth Circuit held unpublished opinions to be unconstitutional in the landmark case, *Anastasoff v. United States*.<sup>39</sup> Judge Arnold, writing for the court, contended that the use of unpublished opinions amounted to the courts “usurping lawmaking authority,” because they could arbitrarily determine what cases and controversies would, or would not, bind a court as precedential authority.<sup>40</sup> Although the opinion was vacated on rehearing en banc less than four months later,<sup>41</sup> its sentiments lingered, triggering a “nationwide reexamination of non-precedent practice.”<sup>42</sup>

Judge Alex Kozinski of the Ninth Circuit wasted no time in joining the debate by reaching the diametrically opposite conclusion to that of Judge Arnold, just one year later, in *Hart v. Massanari*.<sup>43</sup> Many state courts subsequently jumped on the *Massanari* bandwagon, explicitly rejecting the analysis of Arnold whilst singing the praises of Kozinski.<sup>44</sup> In the aftermath of *Anastasoff* and *Massanari*, the “depth of feeling” elicited from judges and practitioners alike when talking about the citation of unpublished opinions, whether they were Team Arnold or Team Kozinski, was comparable to the passion elicited when “talk[ing] . . . about sex or religion.”<sup>45</sup>

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39. 223 F.3d 898, 899–900 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054, 1056 (8th Cir. 2000).

40. Boyeskie, *supra* note 10, at 964–65.

41. *Anastasoff*, 235 F.3d at 1056.

42. Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 759 (2003) (citing *Anastasoff*, 223 F.3d at 900).

43. 266 F.3d 1155, 1180 (9th Cir. 2001) (“Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority.”).

44. *See, e.g.*, *Schaaf v. Kaufman*, 850 A.3d 655, 660 (Pa. Super. Ct. 2004) (“We have found no appellate court decision adopting *Anastasoff*'s reasoning. In fact, the trend is just the opposite. The leading criticism was iterated by Judge Alex Kozinski of the Ninth Circuit . . .”).

45. *See* Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1433, 1461–62 (2005) [hereinafter Schiltz, *Much Ado About Little*].

*D. Unpublished Opinions Today*

To the dissatisfaction of some, unpublished opinions have become an established component of judicial procedure.<sup>46</sup> Consequently, the modern discussion largely turns on how to properly integrate unpublished opinions into the judicial system so as to “preserve the legitimacy of the . . . courts.”<sup>47</sup>

In an attempt to address this issue, the federal courts adopted Federal Rule of Appellate Procedure (FRAP) 32.1, which prevents courts from restricting citation of unpublished federal opinions issued after January 1, 2007.<sup>48</sup> This rule is undoubtedly a step in the right direction; however, it still leaves many questions unanswered.<sup>49</sup> The rule is silent as to the precedential value, if any, of unpublished opinions, “add[ing] . . . uncertainty about [their] role . . . in the federal judicial system.”<sup>50</sup>

Moreover, Rule 32.1 merely settles the citation debate among the *federal* courts.<sup>51</sup> In marked contrast, state jurisdictions are largely<sup>52</sup> still fighting the good fight, operating under archaic rules at best,<sup>53</sup> and paradoxical or fuzzy rules at worst.<sup>54</sup> One explanation for the states’ lag may be that state jurisdictions’ laws regarding citation to unpublished opinions receive less national notice than their federal counterparts.<sup>55</sup> Nevertheless, many states’ citation policies have become nothing more than a practice in need of a theory.

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46. Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 899–900 (2008).

47. *Id.* at 900.

48. FED. R. APP. P. 32.1.

49. 16AA CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3978.10 (4th ed. 2008).

50. Sloan, *supra* note 46, at 900.

51. See FED. R. APP. P. 32.1(a) (“A court may not prohibit or restrict the citation of *federal* judicial opinions . . .”) (emphasis added).

52. A minority of state jurisdictions is blazing the trail in the unpublished opinion territory. See, e.g., ARK. SUP. CT. R. 5-2 (Editor’s Notes) (“Rule 5-2 has been completely rewritten to reflect the electronic publication of the official reports of appellate decisions . . . [and] eliminate[] the distinction between unpublished opinions. All opinions issued after July 1, 2009, are precedent and may be cited in any filing or argument in any court.”).

53. See, e.g., *Zimmer-Rubert v. Bd. of Educ.*, 179 Md. App. 589, 609 n.10, 947 A.2d 135, 147 n.10 (2008) (“It has been held that unreported cases are not acceptable authority.” (citing *Powers v. Hadden*, 30 Md. App. 577, 353 A.2d 641 (1976); *In re Blast*, 212 B.R. 499 (Bankr. D. Md. 1997))).

54. See, e.g., *infra* Appendix – Table 5 (Pa.).

55. See Barnett, *supra* note 7, at 477.

### III. CLASSIFYING THE STATES

The most alarming aspect of state jurisdictions' unpublished opinion laws is their utter lack of uniformity. Classifying states by their standpoint on citing unpublished opinions is a cumbersome task, to say the least, because many states have conflicting practices between their statutory law and case law.<sup>56</sup> Other states' rules merely exist in custom or are difficult to find.<sup>57</sup> Nevertheless, doing so reveals the "schizophrenic"<sup>58</sup> grandeur of unpublished opinion law in the United States. State appellate courts' varying practices chiefly fall into one of five categories:<sup>59</sup> (1) states that publish *all* opinions or do not have a law governing unpublished opinions' citation; (2) states that allow citation of unpublished opinions as binding precedent; (3) states that allow citation of unpublished opinions for persuasive value; (4) hybrid states; and (5) no-citation states—meaning the states completely bar citation to unpublished opinions, except in respect to *res judicata*, *collateral estoppel*, and other related principles.

#### *A. States That Publish All Opinions*

This category is composed of four states: Arkansas,<sup>60</sup> Connecticut,<sup>61</sup> Mississippi,<sup>62</sup> and New York.<sup>63</sup>

#### *B. States That Allow Citation of Unpublished Opinions as Binding Precedent*

In this category, there are five states that selectively publish their appellate opinions, yet still afford them precedential value. Such states include: Delaware,<sup>64</sup> Louisiana,<sup>65</sup> Ohio,<sup>66</sup> Utah,<sup>67</sup> and West Virginia.<sup>68</sup>

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56. *Id.*

57. *Id.*

58. Solomon, *supra* note 33, at 202.

59. These categories were influenced by Stephen R. Barnett, Elizabeth J. Boalt Professor of Law Emeritus at University of California, Berkeley, who classified the states similarly in 2003. See Barnett, *supra* note 7, at 481. Categories are in order of declining citability. *Id.*

60. See *infra* Appendix – Table 1 (Ark.).

61. See *infra* Appendix – Table 1 (Conn.).

62. See *infra* Appendix – Table 1 (Miss.).

63. See *infra* Appendix – Table 1 (N.Y.).

64. See *infra* Appendix – Table 2 (Del.).

65. See *infra* Appendix – Table 2 (La.).

66. See *infra* Appendix – Table 2 (Ohio).

*C. States That Allow Citation of Unpublished Opinions for Persuasive Value*

There are a growing number of states joining this category. Presently, eighteen states allow citation to unpublished opinions issued by their courts, but merely for the opinion's persuasive authority. These states include: Alaska,<sup>69</sup> Arizona,<sup>70</sup> Georgia,<sup>71</sup> Hawaii,<sup>72</sup> Iowa,<sup>73</sup> Kansas,<sup>74</sup> Kentucky,<sup>75</sup> Massachusetts,<sup>76</sup> Michigan,<sup>77</sup> Minnesota,<sup>78</sup> Nevada,<sup>79</sup> New Mexico,<sup>80</sup> North Carolina,<sup>81</sup> North Dakota,<sup>82</sup> Vermont,<sup>83</sup> Virginia,<sup>84</sup> Wisconsin,<sup>85</sup> and Wyoming.<sup>86</sup>

*D. Hybrid States*

This category accounts for the ten states whose citation policies exist in a sort of limbo "between allowing citation and forbidding it."<sup>87</sup> Some states' citation rules, for example, differ based on the appellate court, allowing citation in the highest court, but barring citation in the intermediate courts.<sup>88</sup> Other states' policies are so distinctive that they cannot be pigeonholed in any other category.<sup>89</sup>

This category also continues to grow, as more states continue to tweak their rules slightly in support of citability.<sup>90</sup> Such states include: Colorado,<sup>91</sup> Florida,<sup>92</sup> Indiana,<sup>93</sup> Nebraska,<sup>94</sup> New

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- 67. See *infra* Appendix – Table 2 (Utah).
  - 68. See *infra* Appendix – Table 2 (W. Va.).
  - 69. See *infra* Appendix – Table 3 (Alaska).
  - 70. See *infra* Appendix – Table 3 (Ariz.).
  - 71. See *infra* Appendix – Table 3 (Ga.).
  - 72. See *infra* Appendix – Table 3 (Haw.).
  - 73. See *infra* Appendix – Table 3 (Iowa).
  - 74. See *infra* Appendix – Table 3 (Kan.).
  - 75. See *infra* Appendix – Table 3 (Ky.).
  - 76. See *infra* Appendix – Table 3 (Mass.).
  - 77. See *infra* Appendix – Table 3 (Mich.).
  - 78. See *infra* Appendix – Table 3 (Minn.).
  - 79. See *infra* Appendix – Table 3 (Nev.).
  - 80. See *infra* Appendix – Table 3 (N.M.).
  - 81. See *infra* Appendix – Table 3 (N.C.).
  - 82. See *infra* Appendix – Table 3 (N.D.).
  - 83. See *infra* Appendix – Table 3 (Vt.).
  - 84. See *infra* Appendix – Table 3 (Va.).
  - 85. See *infra* Appendix – Table 3 (Wis.).
  - 86. See *infra* Appendix – Table 3 (Wyo.).
  - 87. See Barnett, *supra* note 7, at 483.
  - 88. See, e.g., *infra* Appendix – Table 4 (Tenn.).
  - 89. See *infra* Appendix – Table 4 (Or.).
  - 90. See discussion *infra* Part IV.
  - 91. See *infra* Appendix – Table 4 (Colo.).

Hampshire,<sup>95</sup> Oklahoma,<sup>96</sup> Oregon,<sup>97</sup> New Jersey,<sup>98</sup> Tennessee,<sup>99</sup> and Texas.<sup>100</sup>

### *E. No-Citation States*

Fourteen jurisdictions—thirteen states plus the District of Columbia—prohibit the citation of unpublished opinions entirely. The current no-citation state jurisdictions include: Alabama,<sup>101</sup> California,<sup>102</sup> D.C.,<sup>103</sup> Idaho,<sup>104</sup> Illinois,<sup>105</sup> Maine,<sup>106</sup> Maryland,<sup>107</sup> Missouri,<sup>108</sup> Montana,<sup>109</sup> Pennsylvania,<sup>110</sup> Rhode Island,<sup>111</sup> South Carolina,<sup>112</sup> South Dakota,<sup>113</sup> and Washington.<sup>114</sup>

## IV. EXAMINING THE CLASSIFICATIONS

Breaking down the state jurisdictions into classifications exposes the considerable degree of variation that exists among the states' practices governing unpublished opinions. Even a brief scan of the states' rules outlined in the Appendix, *infra*, quickly reveals the immense incongruities that exist, even among states within the same classification.

For instance, although both Kentucky and New Mexico, in a broad sense, allow citation to unpublished opinions for their persuasive value, each state rule has its own particularized nuances. Where a

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- 92. See *infra* Appendix – Table 4 (Fla.).
  - 93. See *infra* Appendix – Table 4 (Ind.).
  - 94. See *infra* Appendix – Table 4 (Neb.).
  - 95. See *infra* Appendix – Table 4 (N.H.).
  - 96. See *infra* Appendix – Table 4 (Okla.).
  - 97. See *infra* Appendix – Table 4 (Or.).
  - 98. See *infra* Appendix – Table 4 (N.J.).
  - 99. See *infra* Appendix – Table 4 (Tenn.).
  - 100. See *infra* Appendix – Table 4 (Tex.).
  - 101. See *infra* Appendix – Table 5 (Ala.).
  - 102. See *infra* Appendix – Table 5 (Cal.).
  - 103. See *infra* Appendix – Table 5 (D.C.).
  - 104. See *infra* Appendix – Table 5 (Idaho).
  - 105. See *infra* Appendix – Table 5 (Ill.).
  - 106. See *infra* Appendix – Table 5 (Me.).
  - 107. See *infra* Appendix – Table 5 (Md.).
  - 108. See *infra* Appendix – Table 5 (Mo.).
  - 109. See *infra* Appendix – Table 5 (Mont.).
  - 110. See *infra* Appendix – Table 5 (Pa.).
  - 111. See *infra* Appendix – Table 5 (R.I.).
  - 112. See *infra* Appendix – Table 5 (S.C.).
  - 113. See *infra* Appendix – Table 5 (S.D.).
  - 114. See *infra* Appendix – Table 5 (Wash.).

practitioner in New Mexico can cite any unpublished opinion for persuasive value, so long as he or she subjectively concludes that it contains persuasive language,<sup>115</sup> a practitioner in Kentucky<sup>116</sup> ought to proceed with more caution. The Supreme Court of Kentucky has made clear that the allowance of citation to unpublished opinions for persuasiveness is the *exception*, not the rule, providing that “[a]s a general rule, we are not greatly influenced by unpublished opinions” and that such opinions should only be cited in the limited circumstance where no published case adequately addresses the issue before the Court.<sup>117</sup>

State appellate courts’ “plague of inconsistency”<sup>118</sup> is further illustrated by certain jurisdictions’ arbitrary variations within their own internal rules. Oklahoma, for instance, allows citation of unpublished criminal matters, but bars citation of unpublished civil matters.<sup>119</sup> Likewise, Pennsylvania, which maintains two intermediate appellate courts, forbids citation to its Superior Court’s unpublished opinions, yet allows citation to its Commonwealth Court’s unpublished opinions for persuasive value—notwithstanding the two courts’ hierarchically equal positions.<sup>120</sup>

In 2001, Melissa M. Serfass and Jessie L. Cranford compiled and comprehensively charted federal and state court jurisdictions’ publication and citation rules.<sup>121</sup> A comparison of the *Serfass-Cranford* chart against the Appendix herein reveals state appellate courts’ considerable shift toward citability within the last fifteen years.<sup>122</sup> As recently as January 1, 2015, Arizona’s no-citation rule was replaced with a rule permitting citation for persuasive value.<sup>123</sup>

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115. See *infra* Appendix – Table 3 (N.M.).

116. See *infra* Appendix – Table 3 (Ky.).

117. *Commonwealth v. Wright*, 415 S.W.3d 606, 613 (Ky. 2013).

118. Vincent M. Cox, Comment, *Freeing Unpublished Opinions from Exile: Going Beyond the Citation Permitted by Proposed Federal Rule of Appellate Procedure 32.1*, 44 WASHBURN L.J. 105, 110 (2004).

119. See *infra* Appendix – Table 4 (Okla.).

120. See *infra* Appendix – Table 5 (Pa.).

121. Serfass & Cranford, *supra* note 7.

122. See also *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the Comm. on the Judiciary*, 107th Cong. 29 (2002) [hereinafter *2002 Hearing*] (statement of Hon. Alexander Kozinski of Ninth Circuit Court of Appeals) (relying on *Serfass-Cranford* findings to report that 38 states had some form of strict noncitation, nonpublication rule).

123. See *infra* Appendix – Table 3 (Ariz.); Serfass & Cranford, *supra* note 7, at 258 (citing ARIZ. R. SUP. CT. 111(c) (amended 2015)). See generally *Rule Change Petitions Under Consideration: R-14-0004*, ARIZ. SUP. CT. RULES F., <http://www.azcourts.gov/Rules-Forum/aft/446> (last visited Mar. 31, 2016) (Arizona



Similarly, Wisconsin repealed its no-citation provision effective July 2009, also in favor of citation for persuasive value.<sup>124</sup> In the Judicial Council's Note, the council comments that this change was based on Wisconsin's unpublished appellate opinions' increasing online availability and "conforms to the practice in numerous other jurisdictions."<sup>125</sup> Since the 2001 *Serfass-Cranford* chart, other states that have abolished their citation bans include, but are not limited to: Alaska, Arkansas, Hawaii, Iowa, Kentucky, Louisiana, Massachusetts, Texas, and West Virginia.<sup>126</sup>

#### V. DISCORD AMONG STATE COURTS' CITATION POLICIES IS ATTRIBUTABLE TO DIFFERING PHILOSOPHIES EMBRACED BY DIFFERENT JURISDICTIONS

How is it that fifty-one jurisdictions all follow such diverse publication policies? Much of the ambiguity surrounding the role of unpublished opinions in precedential law can be attributed to varying philosophies embraced by different jurisdictions.<sup>127</sup> Since the conception of selective publication plans in the United States, commentators have demonstrated strong fervor on both sides of the debate. This section lays out the central arguments against citation to unpublished authority and demonstrates how they are surmounted by supporters' plea for fair administration of the law throughout the judiciary.

##### A. *The No-Citation Rule's Defense: Arguments Opposing Citation to Unpublished Authority*

##### 1. Growing Caseloads Prevent Judges from Giving Precedent-Worthy Consideration to So Many Cases

A leading argument opposing citation to unpublished authority is that appellate courts do not have sufficient resources to craft carefully written judicial opinions for every case on a given docket.<sup>128</sup> Preparing a published opinion entails weeks of drafting, editing,

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practitioners commenting on the petition to amend the state's citation rule for unpublished opinions).

124. See *infra* Appendix – Table 3 (Wis.); Serfass & Cranford, *supra* note 7, at 285 (citing WIS. STAT. ANN. § 809.23(3) (repealed 2008)).

125. § 809.23 judicial council's note to 2008 amendment (West Supp. 2015).

126. Compare *infra* Appendix, with Serfass & Cranford, *supra* note 7, at 258.

127. Daniel Schlein, *Rethinking the Role of Unpublished Authority*, 281 N.J. LAW. 59, 59 (2013).

128. 2002 Hearing, *supra* note 122, at 31–34 (statement of Hon. Alexander Kozinski).

polishing, and revising, whereas unpublished opinions require substantially less effort.<sup>129</sup> “Unpublished opinions traditionally consist of an inferior quality of writing, detail, and reasoning, requiring less time and resources from judges and their clerks.”<sup>130</sup> They simply inform the parties of who won, who lost, and a shorthand analysis of why, without requiring an elaborate elucidation of all relevant facts and legal principles.<sup>131</sup>

Critics argue that allowing citation to unpublished opinions will require judges to exert the same amount of energy into unpublished opinions as they give to their published counterparts.<sup>132</sup> As Chief Judge John M. Walker, Jr. of the Second Circuit commented: “[The] efficiency [of unpublished opinions] is made possible only when the authoring judge has confidence that short-hand statements, clearly understood by the parties, will not later be scrutinized for their legal significance by a panel not privy to the specifics of the case at hand.”<sup>133</sup> If unpublished opinions can be relied on, commentators assert that judges will have to treat them as “mini-opinions,” which “would be impossible to do . . . without neglecting [their] other responsibilities.”<sup>134</sup> Critics further argue that this added workload will also mean a longer waiting time for parties to receive their unpublished decisions.<sup>135</sup> Where parties currently receive their unpublished opinion in just a few days, such a change could cause them to have to wait over a year.<sup>136</sup>

## 2. Unpublished Opinions are Written for a More Limited Audience

Commentators argue that judges write unpublished opinions for a very different audience than published opinions, rendering them unreliable.<sup>137</sup> Unpublished opinions are written solely for the

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129. *Id.* at 32.

130. Damman, *supra* note 27, at 913.

131. See 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, 1884 (1978).

132. See 2002 Hearing, *supra* note 122, at 34.

133. Memorandum from Hon. Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules to J. David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 163 (May 14, 2004), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Report s/AP5-2004.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Report%20s/AP5-2004.pdf) [hereinafter Report of Advisory Comm. on Appellate Rules].

134. See 2002 Hearing, *supra* note 122, at 34.

135. Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 36 (2005).

136. *Id.*

137. See Joan M. Shaughnessy, *Commentary: Unpublication and the Judicial Concept of Audience*, 62 WASH. & LEE L. REV. 1597, 1599–1600 (2005).

litigants, attorneys, and the lower court, whereas published opinions are written for the legal community at large—that is, for members of the bar, future judges, law students, the legislature, and the public.<sup>138</sup> Since litigants are already familiar with their case, unpublished opinions often lack critical facts that underlie the court's legal analysis.<sup>139</sup> Since the facts are not fully known, it is impossible to accurately distinguish them from other cases.<sup>140</sup> As Judge Kozinski put it: "When the people making the sausage tell you it's not safe for human consumption, it seems strange . . . to go ahead and eat it anyway."<sup>141</sup> Critics fear that relying on a court's holding outside of its factual context will cause judges and parties to be misled and will result in unintended consequences for precedential law.<sup>142</sup>

### 3. Unpublished Opinions Create No New Law

Supporters of no-citation rules contend that unpublished opinions merely apply the well-settled legal principles of that jurisdiction to the circumstances of a given case.<sup>143</sup> Because they do not add to or change the law, allowing citation to unpublished opinions would only "clutter up the law books and databases with redundant and thus unhelpful authority."<sup>144</sup> Critics contend that "it would become a hunting ground for lawyers," who would focus in on small nuances in language and argue the existence of spurious distinctions in the facts in an effort to portray the law as favorable to their client.<sup>145</sup> Because the informational value of unpublished opinions range from negative to naught, they are best not cited at all.<sup>146</sup>

### 4. Unpublished State Opinions are Not Equally Accessible

Federal courts are required by the E-Government Act of 2002 to make all published and unpublished opinions accessible online.<sup>147</sup>

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138. *Id.*; see also Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813–14 (1961).

139. See *Aaron v. Everett*, 644 S.W.2d 301, 302 (Ark. Ct. App. 1982).

140. *Winrock Inn Co. v. Prudential Ins. Co.*, 928 P.2d 947, 954 (N.M. Ct. App. 1996).

141. Hon. Alexander Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 FED. LAW. 36, 37 (2004).

142. See Schiltz, *supra* note 135, at 33.

143. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 156–57.

144. *Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001).

145. See *2002 Hearing*, *supra* note 122, at 28 (statement of Hon. Alexander Kozinski).

146. See 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, 959 (1989) (citing RICHARD POSNER, *THE FEDERAL COURTS* 124 (1985)).

147. 44 U.S.C. § 3501 (2012); Solomon, *supra* note 33, at 188 n.9.

However, no equivalent to the E-Government Act exists at the state court level and, consequently, the availability of unpublished opinions in state appellate courts remains wholly erratic.<sup>148</sup> For instance, in Texas—a state that allows citation for persuasive value—the availability of unpublished opinions “varies considerably from court to court.”<sup>149</sup> Texas’s fourteen intermediate appellate courts each have very different policies on how unpublished opinions are made available, if at all.<sup>150</sup> “This chaotic availability makes it virtually impossible to comprehensively research the state’s unpublished appellate decisions.”<sup>151</sup>

Because unpublished opinions are not accessible across the board, critics contend that allowing citation to them would impose undue burdens on practitioners.<sup>152</sup> Regardless of availability, all unpublished opinions are still public documents—that is, anyone can walk in off the street to the court clerk’s office and pay the appropriate fee for a copy.<sup>153</sup> “[T]he inequality between persons knowing of unpublished opinions and those who did not would exist well before a matter reached the courts.”<sup>154</sup> Critics contend that solo practitioners, smaller firms, and public defenders would be especially disadvantaged, since they lack the resources of larger firms to stay on top of unpublished dispositions.<sup>155</sup>

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148. Solomon, *supra* note 33, at 222.

149. Andrew T. Solomon, *Practitioners Beware: Under Amended TRAP 27, “Unpublished” Memorandum Opinions in Civil Cases are Binding and Research on Westlaw and Lexis is a Necessity*, 3 ST. MARY’S L.J. 693, 720 n.111 (2009) (quoting MARK E. STEINER, *AFTER THE FLOOD: LEGAL RESEARCH IMPLICATIONS OF THE TRAP AMENDMENTS* 19.6 (2003)).

150. Solomon, *supra* note 33, at 210–11. “[S]ome [Texas] unpublished opinions are completely unavailable, some . . . are only available via Westlaw, some . . . are only available via LEXIS, some . . . are only available via the court websites, and some unpublished opinions are available from multiple sources.” *Id.* at 211.

151. *Id.*

152. J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419, 423 (2005).

153. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 220 (1999).

154. Sullivan, *supra* note 152.

155. See Schiltz, *supra* note 135, at 39.

*B. The Paramount Position: Arguments Supporting Citation to Unpublished Authority*

1. Citation Will Ensure Judicial Accountability

No-citation rules undermine judicial accountability insofar as they permit judges to decide cases without having to properly explain themselves.<sup>156</sup> This gives judges latitude to essentially disregard precedent and effect “an underground body of law good for one place and time only.”<sup>157</sup> Several commentators have gone so far as to liken no-citation rules to gag orders.<sup>158</sup> After issuing an unpublished disposition, judges can more or less say: “I forbid you, on pain of sanction that I will impose, to even mention to me a public action that I took in my official capacity.”<sup>159</sup>

Like supporters of no-citation rules, opponents agree that the ability to cite unpublished opinions will force judges to craft their words with more care.<sup>160</sup> The difference is that critics of no-citation rules question *what is so bad about that*—that is, why putting pressure on judges to interpret and reason the law with precision could be seen as a negative<sup>161</sup>:

Can we ever give judges a pass not to be precise in their language? Of course not. From something as simple as an informal letter to litigants to formal published opinions, judges must say what they mean and mean what they say. Even if it is only the mere litigants before the court, not the rest of the world, that will be guided and informed by the text, judges have an absolute obligation to speak clearly.<sup>162</sup>

Ultimately, the ability for practitioners and courts to remind judges of their own words would reduce inconsistent resolutions of cases and increase judicial accountability.<sup>163</sup>

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156. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 78.

157. *Anastasoff v. United States*, 223 F.3d 898, 904 (2000); Beth Zeitlin Shaw, *Please Ignore This Case: An Empirical Study of Nonprecedential Opinions in the Federal Circuit*, 12 GEO. MASON L. REV. 1013, 1027 (2004).

158. Schiltz, *Much Ado About Little*, *supra* note 45, at 1467.

159. *Id.* at 1468.

160. See Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215, 1222 (2004).

161. *Id.*

162. *Id.*

163. See Damman, *supra* note 27, at 912; see also 2002 Hearing, *supra* note 122, at 48 (statement of Kenneth J. Schmier).

## 2. No-citation Rules Cultivate "Lost Precedent"

No-citation rules of unpublished opinions breed three different forms of "lost precedent": (1) significant yet unpublished opinions; (2) factually similar yet inconsistent unpublished opinions; and (3) erroneous unpublished opinions.<sup>164</sup> All three forms of "lost precedent" undermine the integrity of the judiciary and demonstrate the real and considerable harm that no-citation rules cause.

A notorious example of a significant opinion marked not-for-publication is *Edge Broadcasting Co. v. United States*, in which the Fourth Circuit declared an Act of Congress unconstitutional.<sup>165</sup> Although the Supreme Court on appeal claimed that "it [is] remarkable and unusual" that the Court of Appeals "found it appropriate to announce its judgment in an unpublished *per curiam* opinion,"<sup>166</sup> in reality, such missteps are not uncommon.<sup>167</sup> Courts have a tendency to overlook issues of first impression, assuming that once a rule of law is announced, all cases thereafter need not be precedential.<sup>168</sup> However, the application of the rule of law to varying fact patterns can often be as informative as the rule of law itself.<sup>169</sup> No-citation rules serve as arbitrary barricades, preventing attorneys and courts from assessing valuable opinions merely because they were not marked for publication.

Another negative effect of no-citation rules is the issuance of similar unpublished opinions with inconsistent outcomes. In *United States v. Rivera-Sanchez*, the Ninth Circuit drew attention to twenty different unpublished dispositions incompatibly solving the same problem.<sup>170</sup> The Dallas Area Rapid Transit (DART) authority cases<sup>171</sup>

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164. Lawrence R. McDonough, *To Be or Not To Be Unpublished: Housing Law and the Lost Precedent of the Minnesota Court of Appeals*, 35 HAMLINE L. REV. 1, 6-17 (2012).

165. *Edge Broad. Co. v. United States*, No. 90-2668, 1992 WL 35795, at \*3 (4th Cir. Feb. 27, 1992), *published in full*, 5 F.3d 59 (4th Cir. 1992).

166. *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 n.3 (1993), *rev'g* *Edge Broad. Co. v. United States*, 5 F.3d 59 (4th Cir. 1992).

167. *See, e.g.*, *Siler v. Siler*, No. CA93-10-081, 1994 WL 386106 (Ohio Ct. App. July 25, 1994), *overrul'g* *King v. King*, 78 Ohio App. 599 (1992); *Zalusky v. Zalusky*, No. 0199-02-4, 2002 WL 31553133 (Va. Ct. App. Nov. 19, 2002) (addressing the classification of intellectual property interests as marital property for the first time).

168. Brett R. Turner, *Unpublished Opinions: Precedential Value, Persuasive Value, and Choice of Law*, 18 DIVORCE LITIG. 181 (2006).

169. *See id.*

170. 222 F.3d 1057, 1063 (9th Cir. 2000). The disposition dates of the twenty inconsistent cases spanned from December 4, 1998 to February 2, 2000. *See id.*

171. *Compare* *Anderson v. Dall. Area Rapid Transit*, No. CA3:97-CV-1834-BC, 1998 U.S. Dist. LEXIS 15493 (N.D. Tex. Sept. 29, 1998), *aff'd*, 180 F.3d 265 (5th Cir. 1999)

demonstrate an even greater travesty, where the same litigant in the same factual setting bore the brunt of inconsistent treatment while defending five separate lawsuits—with only the ultimate disposition being published.<sup>172</sup> No-citation rules perpetuate such detrimental inconsistencies by forbidding attorneys from bringing the prior decisions to the court's attention and by requiring courts to continually treat these already-litigated issues as cases of first impression.<sup>173</sup> "No-citation rules keep issues 'in play'—and thus encourage litigation—much longer than necessary."<sup>174</sup> Judges make a decision, then bar future parties from telling them what they have done. If a judge makes miscalculations, nobody can correct them, because they are forbidden from mentioning it.<sup>175</sup> Judge Arnold said it best, albeit mockingly: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday."<sup>176</sup>

The final form of "lost precedent," and arguably also the most acute, is erroneous unpublished opinions. Erroneous unpublished opinions "deprive[] [litigants] of justice *under law* because the non-publication and no-citation rules combine[] to allow the judges to free themselves of the rule of law, and make rules that cannot possibly affect the public generally."<sup>177</sup> These consequences are tragically illustrated in the case of *Commonwealth v. McKeithan*.<sup>178</sup>

(per curiam) (unpublished); *Tolbert v. Vasquez*, No. 3:93-CV-1468-X, 1998 U.S. Dist. LEXIS 17616 (N.D. Tex. Mar. 27, 1998), *aff'd*, 163 F.3d 1355 (5th Cir. 1998) (per curiam) (unpublished); *Davis v. Mathis*, 846 S.W.2d 84 (Tex. App. 1992) (denying writ on same grounds), *with* *Young v. Dall. Area Rapid Transit*, No. 3:95-CV-2596-X, 1999 U.S. Dist. LEXIS 4470, at \*3 (N.D. Tex. Mar. 24, 1999); *Williams v. Dall. Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001).

172. *See Williams*, 242 F.3d at 318 & n.1; *see also* David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 147–48 (2009). *See generally* *Williams v. Dall. Area Rapid Transit*, 256 F.3d 260, 260–63 (5th Cir. 2001), *denying reh'g en banc from Williams*, 242 F.3d 315 (5th Cir. 2001) (Smith, J. dissenting) ("The refusal of the en banc court to rehear this case en banc is unfortunate, for this is an opportunity to revisit the questionable practice of denying precedential status to unpublished opinions.").

173. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 86.

174. *Id.*

175. *See id.* at 78.

176. *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000).

177. 2002 *Hearing*, *supra* note 122, at 51 (statement of Kenneth J. Schmier, Chairman, Comm. for the Rule of Law).

178. *See supra* notes 179–83 and accompanying text. For the purpose of disclosure, note that the author of this Comment personally consulted on the *McKeithan* case under the

In 1983, Dennis McKeithan was convicted of robbery and criminal conspiracy in Pennsylvania and sentenced to an aggregate term of 55 to 110 years confinement. McKeithan alleged innocence since day one, and in 2008, he finally discovered evidence to prove it. McKeithan filed a petition for relief under Pennsylvania's Post-Conviction Relief Act (PCRA)<sup>179</sup> and asserted the "after-discovered evidence" exception to the PCRA's one-year filing limitation.<sup>180</sup> However, in an unpublished opinion,<sup>181</sup> the Pennsylvania Superior Court improperly found that McKeithan failed to establish an exception to the time-bar, by implementing a four-factor test that was explicitly abrogated by the Supreme Court of Pennsylvania in 2007.<sup>182</sup> This critical error procedurally barred McKeithan's claim from being considered on the merits. McKeithan's request for leave to appeal was denied by the Pennsylvania Supreme Court,<sup>183</sup> as are most requests following unpublished dispositions. As a result, McKeithan has no option but to continue serving his undue sentence day-for-day in a Pennsylvania correctional facility.

Would the Superior Court have researched the law more thoroughly if it knew that its opinion would be citable in future cases?<sup>184</sup> In 2013, the Superior Court of Pennsylvania published a mere 326 opinions out of 4,860 total opinions filed.<sup>185</sup> In other words, a staggering 93% of the Superior Court's filed opinions in 2013 were non-published and barred from citation.<sup>186</sup> One cannot help but wonder how many other litigants' cases receive short shrift,

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supervision of an attorney and associate professor at the University of Baltimore School of Law. The astonishment and dismay caused by the outcome of this case was the inspiration for this Comment topic.

179. 42 PA. STAT AND CONS. STAT. ANN. §§ 9541–43 (West 2007).

180. § 9545(b)(1)(ii); Amended Petition Under Post-Conviction Relief Act and Affidavits, Commonwealth v. McKeithan, No. 2318-EDA-2013 (Phila. Ct. Com. Pl. Jan. 18, 2013) (on file with author).

181. Commonwealth v. McKeithan, No. 2318-EDA-2013, at 9.

182. See *id.*; see also Commonwealth v. Bennett, 930 A.2d 1264, 1270–72 (Pa. 2007), *abrogating* Commonwealth v. Holmes, 905 A.2d 507 (Pa. Super. Ct. 2006) (explaining that the *Holmes* court, among others, "erroneously engrafted *Brady*-like considerations" into its analysis and spelling out the proper test to be used) (footnote omitted).

183. Commonwealth v. McKeithan, No. 474-EAL-2014 (Pa. Feb. 11, 2015) (*per curiam*), <http://www.pacourts.us/assets/opinions/Supreme/out/474EAL2014%20-%201021057133111885.pdf?cb=1>.

184. See 2002 Hearing, *supra* note 122, at 51 (statement of Kenneth J. Schmier, Chairman, Comm. for the Rule of Law).

185. 2013 Annual Statistical Report, SUPERIOR CT. OF PA. 9, <http://www.pacourts.us/assets/files/setting-3829/file-3586.pdf?cb=8b35b7> (last visited Mar. 31, 2016).

186. *Id.*



simply tucked away where the public will not notice or be affected by them. Some commentators stand firm that there is little evidence to support the notion that no-citation rules cause “substantial practical harm”<sup>187</sup>—but is that surprising? As one critic put it: “[U]nless all cases are precedent, each of us stands alone, without recourse, before the enormous and unaccountable power of the judiciary, with no real mechanism for correcting our law.”<sup>188</sup>

### 3. Judicial Systems Need Transparency

“Our government, to the greatest extent practicable, should conduct its business in the open. That principle is central to the proper operation of a democracy.”<sup>189</sup> No-citation rules “create the appearance that courts have something to hide” or are using unpublished opinions improperly.<sup>190</sup> After all, lawyers are allowed to cite practically *anything*—from Supreme Court opinions to law review articles to op-ed articles in local newspapers.<sup>191</sup> No-citation rules beg the question of why unpublished opinions, authored by sworn government officials, are the only medium that courts and practitioners are forbidden from referencing.<sup>192</sup> This suspicion undermines the public’s perception of the judiciary by implying secrecy and the subsistence of dishonest activity.<sup>193</sup>

Further, no-citation rules cultivate “a subordinate class of appellate authority”<sup>194</sup>—especially so, considering that a disproportionate amount of published opinions appears to involve wealthy litigants represented by prominent attorneys.<sup>195</sup> Hence, two classes of justice are formed: “high-quality justice for wealthy parties represented by

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187. See, e.g., Schiltz, *Much Ado About Little*, *supra* note 45, at 1467.

188. See *2002 Hearing*, *supra* note 122, at 50 (statement of Kenneth J. Schmier, Chairman, Comm. for the Rule of Law).

189. Howard J. Bashman, *It’s Time to Abolish ‘Invisible’ State Appellate Court Rulings*, JAIL4JUDGES.ORG (Jan. 9, 2007), [http://www.jail4judges.org/J.A.I.L.\\_News\\_Journals/2007/2007-01-09.html](http://www.jail4judges.org/J.A.I.L._News_Journals/2007/2007-01-09.html).

190. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 79.

191. See Letter from J. Frank H. Easterbrook, Seventh Circuit Court of Appeals to Peter G. McCabe, Sec’y, Comm. on Rules of Practice and Procedure (Feb. 13, 2004).

192. *Id.*

193. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 79; Schiltz, *Much Ado About Little*, *supra* note 45, at 1468.

194. Sloan, *supra* note 46, at 907.

195. Schiltz, *Much Ado About Little*, *supra* note 45, at 1469.

big law firms, and low-quality justice for 'no-name appellants represented by no-name attorneys.'"<sup>196</sup>

Although some judges insist that such impressions of the judiciary are simply arrant nonsense,<sup>197</sup> alas, when it comes to public opinion, perception triumphs. Regardless of whether judges actually use unpublished opinion improperly, "to the extent that . . . the bar *believes* that this occurs, whether it does or not . . . allowing citation serves a salutary purpose and reinforces public confidence in the administration of justice."<sup>198</sup> If nothing else, the allowance of citation to unpublished opinions would appease the public's suspicions of foul play.

#### 4. Judges Cannot Predict Ex-Ante Whether a Case Will Have Precedential Value

Since a judge cannot determine ahead of time whether the facts of a given case will be relevant in the future, no-citation rules are arbitrary blockades of justice.<sup>199</sup> The precedential relevance of an earlier decision only materializes when another case with similar factual circumstances appears.<sup>200</sup> As one practitioner remarked:

[T]he assumption that *any court* can know, at the time of issuing a decision, that the decision neither adds (whatsoever) to already existing case law and that it could *never* contribute (in any way) to future development of the law, strikes me as hero-worship taken beyond the cusp of reality.<sup>201</sup>

Further, critics contend that courts often define cases of first impression too narrowly:

Once a rule of law is announced, future cases applying that rule tend not to be published. But . . . [p]ractitioners often find considerable value in case law applying a settled rule of law to a fact situation materially different from the situation

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196. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 80 (statement of Beverly B. Mann, Esq.).

197. See 2002 Hearing, *supra* note 122, at 35 (statement of Hon. Alexander Kozinski).

198. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 79 (statement of Hon. Frank H. Easterbrook).

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

200. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 76 (statement of Richard B. Cappalli, Professor, Temp. U., James E. Beasley Sch. of L.).

201. *Id.* (statement of Michael N. Loebl, Esq.).

in which it was originally recognized. Yet this type of case disproportionately tends to be unpublished.<sup>202</sup>

Notably, researchers have found that “[t]he more experience a judge had with an area of law in practice, the less likely the judge is to publish opinions in that area (which, ironically, means that citable opinions in that area will disproportionately be published by the judges who know the least about it).”<sup>203</sup> Although there is concededly a practical value in selectively publishing opinions, if the selection process cannot be done correctly, then the ability to cite unpublished opinions can at least combat the court’s nonexistence of omniscient powers.<sup>204</sup>

#### VI. CONFLICTING POLICIES GOVERNING UNPUBLISHED OPINIONS AMONG STATE APPELLATE COURTS UNDERMINE JUDICIAL INTEGRITY AND CREATE CONFUSION

State appellate courts’ unpublished opinion practices lack any sort of cohesion or uniformity.<sup>205</sup> This lack of uniformity is pervasive both between and within states.<sup>206</sup> These considerable variations are problematic in that they leave practitioners and judges alike befuddled in respect to the proper usage of unpublished opinions, if they should be used at all.<sup>207</sup> As one commentator stated: “Anyone who states that lawyers and judges have a common understanding of how to handle unpublished decisions is either misinformed or less than candid.”<sup>208</sup> The layers of ambiguity surrounding unpublished opinions, a form of disposition that occupies an overwhelming majority of dispositions on the merits in most states,<sup>209</sup> is truly a cause for concern.<sup>210</sup> It results in unintended precedent, penalties for unwitting parties, patent evasions of the law, and arbitrariness in the administration of justice.

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202. Turner, *supra* note 168.

203. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 77.

204. See Turner, *supra* note 168.

205. See *supra* discussion Part IV.

206. See *supra* discussion Part IV.

207. See Cox, *supra* note 118, at 106.

208. See Sloan, *supra* note 46, at 899 (citation omitted).

209. See, e.g., *supra* notes 185–88 and accompanying text; *Opinions*, CAL. CTS., [www.courts.ca.gov/opinions.htm](http://www.courts.ca.gov/opinions.htm) (last visited Mar. 31, 2016) (“The majority of [California] Court of Appeal opinions are not certified for publication . . .”).

210. See Sloan, *supra* note 46, at 915–16.

*A. The Issuing Court is Not Necessarily the Court that Determines How Unpublished Opinions Will be Used*

The issuing court's rules governing unpublished opinions only dictate how the opinions may be used within that jurisdiction's borders.<sup>211</sup> Principles of state sovereignty<sup>212</sup> prevent an issuing court from defining how *other* state courts may use the issuing court's unpublished opinions.<sup>213</sup> Since other states courts' "local rules determining how unpublished opinions may be used in their own jurisdictions" are not affected by the local rules of the issuing court, there is a strong interstate interest in establishing consistency and clarity in the law governing citation of unpublished opinions.<sup>214</sup>

In *Monarch Consulting, Inc. v. National Union Fire Insurance Co.*, the Appellate Division of the New York Supreme Court was faced with the dilemma of how much weight to afford a factually apposite unreported decision from the California Court of Appeal<sup>215</sup>: "[T]he California Rules of Court prohibit citation to unpublished decisions. We are not, of course, bound by the California Rules of Court, nor do our own Rules of Court contain any prohibition against citing to unpublished opinions."<sup>216</sup> The New York court chose not to adhere to California's no-citation rule, reasoning that "New York state courts routinely cite unreported cases of other jurisdictions" and that other jurisdictions, including Illinois and Delaware, have also specifically considered unpublished California Court of Appeals cases.<sup>217</sup> Similarly, in *Eastern Air Lines, Inc. v. New Jersey Department of Labor Board of Review*, the Superior Court of New Jersey—which, notably, is prohibited from citing its *own* unpublished opinions<sup>218</sup>—nonetheless cited and considered a factually apposite unpublished opinion from a Massachusetts state agency.<sup>219</sup>

At first blush, one may fail to see the trepidation caused by an out-of-state court citing an unpublished opinion from a no-citation state. However, the perceived audience for which one is writing affects the way the text is written. Since the audiences for unpublished

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211. Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 735 (2008).

212. See 3 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 34:1 (3d ed. 2011).

213. Payne, *supra* note 211, at 735.

214. See *id.*

215. 123 A.D.3d 51, 66 (N.Y. App. Div. 2014).

216. *Id.* at 67 (citations omitted).

217. *Id.* at 67–68.

218. See *supra* note 98.

219. 588 A.2d 396, 399 (N.J. Super. Ct. App. Div. 1991); see also Schlein, *supra* note 127, at 60.

dispositions are chiefly seen as the parties and their attorneys, the drafter does not necessarily detail the facts or allege sweeping declarations of how the legal principles are applied.<sup>220</sup> As a result, if a judge in a no-citation jurisdiction perceives that only the litigants and their attorneys will be reading her disposition, she is less likely to craft it with the same care as she would when writing an opinion set for publication.<sup>221</sup> Consequently, an out-of-state court's reliance on a no-citation state's unpublished opinion raises a red flag that hurried, factually ambiguous language, which was never intended to see the light of day, may transform into binding precedential law.<sup>222</sup> Variations among states in their citation policies also mean variations among judges' perceived audiences when drafting unpublished opinions. An unpublished opinion issued in Virginia—which allows citation for persuasive value—is likely to be more comprehensive and detailed than an unpublished opinion issued in Maine—a no-citation state.

Moreover, the practice of citing out-of-state unpublished opinions only heightens the discord among jurisdictions' citation policies. Like most other aspects of unpublished opinions, states tackle this issue differently as well. In New York, as *Monarch Consulting* pointed out, it is a routine practice to cite other jurisdictions' unpublished dispositions.<sup>223</sup> Conversely, in Oregon, the Supreme Court agreed to withdraw its citation of a no-citation jurisdiction's unpublished opinion “as a matter of comity.”<sup>224</sup> A small minority of states extends their no-citation rules to encompass “any unpublished opinion from any state.”<sup>225</sup>

In Kentucky, there is a difference in opinion within its Court of Appeals whether its prohibition against citation to unpublished opinions extends to citation to unpublished decisions from other jurisdictions.<sup>226</sup> Where some judges interpret their citation ban to concern only unpublished *Kentucky* cases, other judges believe “that it is fundamentally inconsistent to allow citation to unpublished

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220. See *supra* discussion Part V.A.2.

221. See Shaughnessy, *supra* note 137, at 1599–1601.

222. See Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 166 (2012).

223. See *supra* notes 215–18 and accompanying text.

224. *In re Conduct of Davenport*, 57 P.3d 897, 898 (Or. 2002) (per curiam).

225. Turner, *supra* note 168.

226. 19 SHERYL G. SNYDER ET AL., KENTUCKY PRACTICE SERIES, APPELLATE PRACTICE § 16:7 (2013).

foreign opinions, but not to unpublished Kentucky cases.”<sup>227</sup> The judges in the latter category contend that the rule bars citation to all unpublished opinions across the board.<sup>228</sup> Until this issue is settled, Kentucky practitioners are instructed to proceed with caution when citing out-of-state unpublished opinions, since the law is being applied inconsistently.<sup>229</sup>

Washington’s courts were facing a similar predicament to that of Kentucky, in which its Divisions of the Court of Appeals were “tak[ing] differing approaches to the issue of whether parties may cite non-Washington unpublished decisions.”<sup>230</sup> To resolve this confusion, Washington amended its court rules in 2007 to expressly provide that, despite their prohibition on citation to unpublished Washington appellate opinions, a party *may* cite as an authority an unpublished opinion “that has been issued by any court from a jurisdiction *other than Washington state*, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.”<sup>231</sup>

Currently, Washington is the only state that has clarified its statutory law in this regard.<sup>232</sup> The discrepancies among states’ publication policies make it difficult for judges drafting unpublished opinions to recognize whom they are writing to, since it is unpredictable whether another jurisdiction will eventually rely on that opinion’s language. Thus, such variations pose a risk of unintended language—likely originating from a no-citation state—transforming into precedential law.<sup>233</sup> Consistency in unpublished opinion policies is hence critical, so that practitioners and judges are able to fundamentally understand the value and quality of an unpublished opinion, regardless of the jurisdiction that it originated from.

### *B. Unclear Rules Create Risks of Penalty for Unwitting Parties*

The ambiguities that persist among states’ unpublished opinion policies create undue hardships for practitioners, who are at risk of

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227. *Id.*

228. *Id.*

229. *Id.*

230. 2 KARL B. TEGLAND, WASHINGTON PRACTICE § 14.1 (7th ed. 2014).

231. WASH. R. GEN. APPLICATION 14.1 (emphasis added).

232. Vermont’s case law allows courts to rely upon an out-of-state unpublished decision for persuasive value, however the matter is not addressed in their formal Rule. See *Gamache v. Smurro*, 2006 VT 67, ¶ 11 n.4, 904 A.2d 91, 97 n.4 (citing an unpublished opinion from the California Court of Appeals and relying on the opinion in its analysis).

233. Soucek, *supra* note 222, at 166.

incurring sanctions or professional discipline for citing an “uncitable” opinion.<sup>234</sup> Attorneys are obliged to comb through “inconsistent formal no-citation rules and informal practices,” hoping to not make a mistake along the way.<sup>235</sup> In *Dwyer v. J.I. Kislak Mortgage Corp.*, the Court of Appeals of Washington imposed sanctions against the mortgagee’s counsel for “cit[ing] and discuss[ing] at length in their appellate brief an unpublished opinion of this court” in violation of Washington’s citation ban.<sup>236</sup>

As a precursor, attorneys should not be subjected to sanctions for pointing out to a court how it has ruled in the past.<sup>237</sup> But even more so, attorneys should not be penalized based on their inability to navigate a jurisdiction’s obscure formal and informal citation rules. Attorneys who practice in many jurisdictions, or who represent clients that are contractually bound by choice-of-law clauses,<sup>238</sup> are especially hampered by the lack of cohesion among and within the states’ policies.<sup>239</sup> If a practitioner is unfamiliar with an informal nuance in the rules and unwittingly violates it, he or she risks, at the least, a tongue-lashing by the presiding judge.<sup>240</sup> In a broader sense, the ambiguities surrounding proper usage of unpublished opinions could discourage lawyers from taking cases in multiple jurisdictions by making it too burdensome to find out how to conform to local practices.

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234. See Barnett, *supra* note 7, at 488.

235. See Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 49.

236. *Dwyer v. J.I. Kislak Mortg. Corp.*, 13 P.3d 240, 244 (Wash. Ct. App. 2000) (“Ironically, it is that doctrine of precedent on which we rely in imposing sanctions and which we are loathe to ignore. . . . [O]ur case law holds that [unpublished] cases do not become part of the common law of our state.”); see also WASH. R. GEN. APPLICATION 14.1(a).

237. See J. Lyn Entrikin Goering, *Legal Fiction of the “Unpublished” Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27, 89–90 (2005).

238. A choice of law clause is “a provision in a contract in which the parties stipulate that any dispute between them arising from the contract shall be determined in accordance with the law of a particular jurisdiction.” WEBSTER’S NEW WORLD LAW DICTIONARY 71 (Susan Ellis Wild ed., 2006).

239. See Goering, *supra* note 237, at 47–49.

240. See, e.g., *Baugus v. Special Indem. Fund*, 1998 OK Civ. App. 146, ¶ 5 n.1, 966 P.2d 801, 803 n.1.

*C. Ambiguities Allow Courts and Practitioners to Regularly Circumvent Unpublished Opinion Procedures, Undermining the Integrity of the Judiciary*

The obscure nature of state courts' rules governing citation to unpublished opinions invites judges and attorneys alike to exploit potential loopholes and, thereby, cite allegedly uncitable decisions.<sup>241</sup> As one commentator provided: "[L]awyers, district court judges, and appellate judges regularly read and rely on unpublished decisions despite prohibitions on doing so."<sup>242</sup>

In several jurisdictions, courts have gone so far as to informally carve out exceptions to their citation bans. A New Jersey court, which is statutorily banned from citing unpublished opinions, "concluded that if an unpublished case is discussed and quoted at length, yet not cited as authority, the integrity of the rule is maintained."<sup>243</sup> In a Nebraska case, the Court of Appeals felt "compelled" to examine the rationale of two unpublished decisions that were factually apposite with the present case, despite recognizing "that unpublished decisions of this court do not carry precedential weight."<sup>244</sup>

The language of Maryland Rule 1-104 is particularly susceptible to circumvention, providing that an unreported Maryland appellate opinion may be cited "for any purpose other than as precedent within the rule of stare decisis or as persuasive authority."<sup>245</sup> In 2009, the Court of Special Appeals effectively circumvented this prohibition by allowing the appellant to cite an unpublished decision in its brief on the grounds that it was not cited for precedential authority and that the court "can take judicial notice of [its] own opinions."<sup>246</sup>

Even in no-citation states, it is common practice for judges to read and consider unpublished opinions.<sup>247</sup> When attorneys and judges skirt formal procedural rules, the integrity of the judiciary suffers.

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241. Schlein, *supra* note 127, at 60–61.

242. See Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 74 (statement of Richard Frankel, Esq.).

243. Schlein, *supra* note 127, at 60.

244. *State v. James*, 573 N.W.2d 816, 820–21 (Neb. Ct. App. 1998).

245. MD. R. 1-104(b).

246. *Evans v. County Council*, 185 Md. App. 251, 255 n.2, 969 A.2d 1024, 1027 n.2 (2009).

247. See *McCoy v. State*, 80 P.3d 757, 761 (Alaska Ct. App. 2002) ("And even in those states that forbid the parties from mentioning unpublished opinions, judges read unpublished opinions and pay attention to them." (citing *Wortel v. Somerset Indus., Inc.*, 770 N.E.2d 1211, 1220 n.5 (Ill. App. Ct. 2002))); *State v. Locklear*, 20 P.3d 993, 996 n.11 (Wash. Ct. App. 2001).



Courts must be consistent with the application of the law, including procedural law, for the judicial system to maintain its legitimacy.<sup>248</sup> The disparities and ambiguities both among and within states' procedures invite just the opposite. They encourage members of the bar to construct "wiggle room" within states' positive laws and, ultimately, allow judges to operate with no boundaries.<sup>249</sup>

*D. Lack of Consistency in Treatment of Opinions Creates Arbitrariness and Injustice*

With dozens of obscure local rules at odds with one another, unfair results are inevitable. Courts inconsistently administer their jurisdiction's respective policies, and practitioners have unequal access to the courts' issued opinions.<sup>250</sup> Although each individual variance may seem minor, "in the aggregate, they reflect very different policies regarding the development of precedential law" among the states.<sup>251</sup> The considerable gaps between and among rules pose a real danger of shaping the law in a negative or unintended way.<sup>252</sup> A predictable and cohesive body of law is not achieved by treating unpublished opinions as the "red-headed stepchildren" of precedent—but rather, by ensuring that the application of both substantive and procedural law is consistent, notwithstanding the disposition's publication status.<sup>253</sup>

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248. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if they Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 778 (1995).

249. Compare OKLA. SUP. CT. R. 1.200(c)(5) (providing that unpublished opinions "shall not be considered as precedent by any court or cited in any brief or other material presented to any court"), with 5 HARVEY D. EILLIS, JR. & CLYDE A. MUCHMORE, OKLAHOMA APPELLATE PRACTICE § 14:132 (2015 ed.) (explaining the "appropriate course of action" to citing an otherwise uncitable unpublished opinion notwithstanding the state's no-citation rule).

250. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 130 (1990).

251. Sloan, *supra* note 46, at 915.

252. See *id.* at 926.

253. See Fox, *supra* note 160 at 1223–24.

VII. PROPOSED SOLUTION: STATES SHOULD ADOPT A  
UNIFORM RULE THAT VALUES UNPUBLISHED  
OPINIONS AS PERSUASIVE AND GUARANTEES  
COMPREHENSIVE ELECTRONIC ACCESS TO  
APPELLATE DISPOSITIONS NOTWITHSTANDING THEIR  
PUBLICATION STATUS

In order to put an end to the confusion and apprehension surrounding unpublished opinions, it is critical that state appellate courts adopt a uniform rule, to the extent permissible,<sup>254</sup> standardizing state courts' unpublished opinion citation policies. Ultimately, the emphasis here is less on the *terms* of the uniform rule, and more on the fundamental need for *any* uniform practice to be established and adopted nationwide. Simply put, the current discord among states' policies creates such a circumstance where "it is more important that the applicable rule of law be settled than that it be settled right."<sup>255</sup>

Nonetheless, some solutions are obviously more viable than others. One promising resolution, in particular, is a uniform rule whose functions would be two-fold: first, it would specify unpublished opinions' value within the precedential law hierarchy; and second, it would require that unpublished opinions be categorically available online.

While most jurisdictions' unpublished opinion practices "lag behind the realities of the legal profession and technological change,"<sup>256</sup> several states are blazing the trail for the modern unpublished opinion.<sup>257</sup> An examination of states' publication

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254. An analysis of possible separation-of-powers-related implications of such an adoption is outside the scope of this Comment; however, it should be noted that the method by which a given state can adopt a uniform rule governing judicial procedure varies from state to state, based on the power each states' constitution grants to its respective legislature. Cf. JUDIE ZOLLAR, SEPARATION OF POWERS: WHEN STATUTES AND COURT RULES CONFLICT 2 (2005), <http://www.house.leg.state.mn.us/hrd/pubs/ss/ssseppw.pdf> (providing that if the Minnesota legislature passes a law pertaining to "procedural rules that apply in court proceedings," and that law is in conflict with a court rule, "the court will find the statute unconstitutional on separation of powers grounds").

255. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

256. Schlein, *supra* note 127, at 62.

257. See *infra* Appendix – Table 3 (Ariz.) (allowing citation for persuasive value); *infra* Appendix – Table 2 (W. Va.) (court establishing a unique three-tier system of precedent); *infra* Appendix – Table 5 (Wash.) (allowing parties to cite as an authority an unpublished opinion "issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court"); *In re Arkansas Supreme Court and Court of Appeals Rule 5-2*, 2009 Ark. 330 (2009) (per curiam),

policies over the last decade reveals a clear trend in favor of citability and judicial transparency.<sup>258</sup> The nation-wide adoption of a uniform rule would eliminate the antiquated, arcane, and arbitrary practices of states and replace them with a clear and rational procedural guideline. The adoption of a uniform rule affording persuasive value and online access to unpublished opinions will have wide-reaching effects on the clarity and justiciability of precedential law.

### *A. The Upside in Uniformity*

Uniform laws and model rules are frequently proposed and adopted to standardize “what the law is or should be” for specific jurisdictions.<sup>259</sup> Uniform laws are helpful in that they “provide[] states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”<sup>260</sup> Much of the confusion surrounding unpublished opinions hinges on their varying treatment. A uniform law would do away with the considerable “ambiguities and hidden loopholes” that many jurisdictions’ current rules are riddled with.<sup>261</sup>

### *B. The Proposed Uniform Law Should Allow Citation of Unpublished Opinions for Persuasive Value*

Specifically, the proposed uniform law should eliminate no-citation rules and prospectively allow citation to unpublished opinions for their persuasive value. A nationwide adoption of such a rule is an equitable compromise. As an Arizona practitioner in support of its recently amended court rule commented:

Any concerns a court might have that a particular case does not warrant an opinion of precedential value—because of difficult facts or inadequate briefing—is adequately addressed by limiting citation . . . for its persuasive value

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<http://opinions.aoc.arkansas.gov/WebLink8/0/doc/236929/Electronic.aspx> (“Arkansas will be the first state in the nation to publish and distribute the official report of its appellate decisions electronically.”).

258. See discussion *supra* Part IV.

259. Mary Whisner, *There Oughta be a Law — A Model Law*, 106 L. LIBR. J. 125, 125 (2014). These laws are drafted by various organizations, including the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), and other interest groups or associations that want to promote specific policies. See *generally id.* (providing an overview of the various types of model laws).

260. *About the ULC*, UNIF. LAW COMM’N, <http://www.uniformlawcommission.com/Narrative.aspx?title=About%20the%20ULC> (last visited Mar. 31, 2016).

261. See Whisner, *supra* note 259, at 125.

only and by imposing no obligation on the court or parties to research or distinguish the decision.<sup>262</sup>

This uniform rule would set forth a “compromise position” between those who want an outright prohibition on citation to unpublished opinions and those who want unpublished opinions to be fully citable.<sup>263</sup> Like newspaper or law review articles, unpublished opinions will only be cited and relied upon if they are valuable, with valueless dispositions simply disappearing into the archives.<sup>264</sup> Still, the ability to cite those dispositions that *are* valuable will promote judicial accountability by allowing litigants to bring errors or areas of uncertainty to the court’s attention. As one commentator provided:

[T]he task of creating a coherent and sensible body of law is not one that the judges carry out alone. On the contrary, under the adversary system, the judges work, or should work, in partnership with the lawyers. When a litigant, through counsel, informs the court that a prior panel has improvidently made new law in an unpublished opinion, the court should welcome that information and either assimilate the holding into the body of law, or forthrightly repudiate it.<sup>265</sup>

Moreover, with unpublished appellate opinions universally valued on the same field, judges will be able to more acutely forecast who their audience will be, beyond just the parties to the case. Since the rule would be prospective in nature, it would also give adequate notice to courts in present no-citation states to modify their drafting practices. The ability to cite unpublished opinions will hold judges more accountable for their words and reduce the likelihood of unintended language developing into precedential law.

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262. Comment in Support of Petition to Amend, In the Matter of Petition to Amend Rule 111, Ariz. R. Sup. Ct., Rule 28, Ariz. R. Civ. App. P., and Rule 31.24, Ariz. R. Crim. P., (No. R-14-0004), <http://www.azcourts.gov/Rules-Forum/aft/446> [hereinafter American Academy of Appellate Lawyers’ Comment].

263. See Stiegler, *supra* note 18, at 543.

264. See Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 78.

265. 2002 Hearing, *supra* note 122, at 64 (statement of Arthur Hellman, Professor, U. of Pittsburgh Sch. of L.).

*C. The Proposed Uniform Law Should Require States to Make their Unpublished Opinions Available Online*

The second function of the proposed uniform law is to create a state equivalent to the E-Government Act of 2002 and, thereby, require each state appellate court to establish a website with access to “all written opinions issued by a court, regardless of whether such opinions are to be published in the official court reporter.”<sup>266</sup> Any advantages of a uniform law allowing citation for persuasive value are negated absent unpublished opinions’ guaranteed online availability.<sup>267</sup> If unpublished opinions are not readily accessible, attorneys cannot be expected to research and know the law.<sup>268</sup> This would be an undue burden and result in disparate representation “based on whether the attorney has access” to the forum state’s unpublished opinions.<sup>269</sup>

Technological advances have transformed legal research and case publication as we once knew it.<sup>270</sup> “These changes alone cry out for a reevaluation of the concept of limited publication and precedent.”<sup>271</sup> The expansion of technology makes high quantities of information exponentially more manageable, and, so long as it is effectively utilized, renders the philosophies supporting states’ no-citation rules antiquated. The no-citation system was the product of an environment “limited to print resources”—a setting that simply does not exist in today’s technological age.<sup>272</sup>

Concededly, comprehensive availability of unpublished dispositions will increase the volume of case law for practitioners and courts to research.<sup>273</sup> However, “the exponential increase in efficiency through online search-term queries avoids what would have become a seemingly insurmountable project in the past.”<sup>274</sup> If today’s practitioner is unduly burdened, is it not by added unpublished cases to sift through, but rather, by no-citation gag orders that capriciously forbid her from referencing the court’s very own past decisions. A state equivalent to the E-Government Act,

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266. E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 1116 Stat. 2899, 2913 (codified at 44 U.S.C. § 3501 (2012)); see also Cox, *supra* note 118, at 115–16.

267. See Solomon, *supra* note 33 at 220–21.

268. *Id.*

269. *Id.* at 222–23.

270. Cleveland, *supra* note 172, at 87–88.

271. *Id.* at 88.

272. *Id.* at 89.

273. Damman, *supra* note 27, at 899–900.

274. *Id.*

coupled with the comprehensive allowance of citation of unpublished authority, will combat jurisdictions' unfounded aversion from securing Internet accessibility for the public<sup>275</sup> by requiring that the judiciary maintain transparency and accountability.<sup>276</sup>

### VIII. CONCLUSION

The time has come to end state appellate courts' "plague of inconsistency,"<sup>277</sup> in favor of a clean and coherent uniform law. Allowing universal citation to precedential opinions rightly shifts the duty of determining a decisions impact to the precedent-*applying* court, and away from the precedent-*setting* court.<sup>278</sup> A uniform law will promote consistent administration of the law, both procedurally and in substance.

Although they once may have been an effective method to combat unmanageable appellate caseloads, no-citation rules, in whole or part, have no place in today's technological age. The trend is clearly supportive of citation to unpublished opinions for persuasive value, so as to maintain a predictable, transparent, and cohesive body of law. Comprehensive online accessibility is also critical to refute public perceptions of "secret law"<sup>279</sup> and uphold democratic notions of openness. By valuing appellate opinions, not by their publication status, but by their precedential merit, the integrity of the judiciary will be restored and this nation's commitment to stare decisis will prevail once again.

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275. See, e.g., *infra* Appendix – Table 5 (Me.) (providing that memorandums of decision "will not be published on the Judicial Branch website").

276. Bashman, *supra* note 189.

277. Cox, *supra* note 118, at 109.

278. See Cappalli, *supra* note 199, at 773.

279. See Solomon, *supra* note 33, at 194.

## APPENDIX

## CLASSIFICATION OF STATE COURTS' CITATION RULES

Table 1: States that Prospectively Publish All Dispositions

	STATE	CITATION RULE
1.	Arkansas	ARK. SUP. CT. R. 5-2(c) ("Every Supreme Court and Court of Appeals opinion issued after July 1, 2009, is precedent and may be relied upon and cited by any party in any proceeding."); <i>In re</i> Ark. Supreme Court & Court of Appeals Rule 5-2, 2009 Ark. 330 (2009) (per curiam), <a href="http://opinions.aoc.arkansas.gov/WebLink8/0/doc/236929/Electronic.aspx">http://opinions.aoc.arkansas.gov/WebLink8/0/doc/236929/Electronic.aspx</a> .
2.	Connecticut	CONN. GEN. STAT. ANN. §§ 51-212(b), -215a(b) (West 2005) (providing that all appellate case dispositions are published).
3.	Mississippi	MISS. R. APP. P. 35-A(b), -B(b) (providing that all opinions issued after November 1, 1998 are published and that opinions issued before this date may not be cited to).
4.	New York	N.Y. JUD. LAW § 431 (McKinney 2005); <i>see also</i> Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co., 123 A.D.3d 51, 67 (N.Y. App. Div. 2014) ("[T]here is no [] rule in New York which prevents the citation of unpublished decisions.").

Table 2: States that Allow Citation to Unpublished Opinions as Binding Precedent

	STATE	CITATION RULE
1.	Delaware	DEL. SUP. CT. R. 14(b)(vi)(B)(2), 17(a).
2.	Louisiana	LA. CODE CIV. P. 2168 (allowing unpublished opinions to be cited as authority). This code was legislatively enacted in 2006, replacing a no-citation court rule. <i>See</i> LA. CT. APP. UNIF. R. 2-16.3 (amended 2007).

3.	Ohio	OHIO REP. OP. R. 3.4 (“All opinions of the courts of appeals issued after May 1, 2002 may be cited as legal authority and weighted as deemed appropriate by the courts without regard to whether the opinion was published or in what form it was published.”). Ohio technically falls into two camps, because all Ohio Supreme Court opinions are published. OHIO REP. OP. R. 2.1. However, because Ohio still selectively publishes their court of appeals opinions, it is best suited for this category.
4.	Utah	UTAH R. APP. P. 30(f) (“[U]npublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State.”). <i>See generally</i> Grand Cty. v. Rogers, 2002 UT 25, ¶ 16, 44 P.3d 734, 738 (striking down “no citation” rule).
5.	West Virginia	West Virginia’s Supreme Court of Appeals recently established a three-tier system of precedent in order to clarify the weight of their Court opinions. <i>See</i> State v. McKinley, 764 S.E.2d 303, 313 (W. Va. 2014). Memorandum decisions, which are simply unsigned and unpublished decisions by the Court, have the lowest precedential value: “[W]hile memorandum decisions may be cited as legal authority, and are legal precedent, their value as precedent is necessarily more limited; where a conflict exists between a published opinion and a memorandum decision, the published opinion controls.” <i>Id.</i>

**Table 3: States that Allow Citation to Unpublished Opinions for Persuasive Value**

	STATE	CITATION RULE
1.	Alaska	ALASKA R. APP. P. 214(d)(1) (“Citation of unpublished decisions . . . is not encouraged. If a party believes, nevertheless, that an unpublished decision has persuasive value in relation to an issue in the case, and that there is no published opinion that would serve as well, the party may cite the unpublished decision.”).



2.	Arizona	ARIZ. R. SUP. CT. 111(c)(1)(C) (allowing unpublished opinions issued after January 1, 2015 to be cited for persuasive value if no other opinion adequately addresses the issue before the court and the citation is not to an opinion with depublished content); <i>see also</i> ARIZ. R. CIV. APP. P. 28(c).
3.	Georgia	GA. CT. APP. R. 33(b) (“An unreported opinion is neither a physical nor binding precedent . . .”). <i>But see</i> Barnett, <i>supra</i> note 7 at 483 n.67 (“But ‘there is no rule against’ citing [unreported opinions] for persuasive value, and that is done, although infrequently.”) (citation omitted). <i>See also</i> GA. CT. APP. R. 24(d) (providing instructions for citation to unreported cases).
4.	Hawaii	HAW. R. APP. P. 35(c) (providing that dispositions filed after July 1, 2008 may be cited for persuasive value but not precedent).
5.	Iowa	IOWA R. APP. P. 6.904(2)(c); <i>see also In re Guardianship of Barros</i> , 2005 ND 122, ¶ 15, 701 N.W.2d 402, 407 (“The Iowa courts allow citation to unpublished decisions only for their persuasive value and not as controlling precedent.”).
6.	Kansas	KAN. SUP. CT. R. 7.04(g)(2) (providing that the citation of unpublished opinions is not favored and “may be cited only if the opinion has persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court”) (amended 2003).
7.	Kentucky	KY. R. CIV. P. 76.28(4)(c) (“[U]npublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court.”); <i>see also</i> Young v. Vista Homes, Inc., 243 S.W.3d 352, 364 n.4 (Ky. Ct. App. 2007) (holding that Kentucky courts are not prohibited from citing unpublished decisions rendered before 2003).

8.	Massachusetts	MASS. REG. APP. PRAC. R. 1:28. <i>But see</i> Commonwealth v. Gray, 951 N.E.2d 931, 935 n.1 (Mass. App. Ct. 2011) (providing that, because unpublished memorandum are often conclusory and missing imperative factual context, they are not accorded precedential weight).
9.	Michigan	MICH. CT. R. 7.215(C)(1) (“An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented.”) (effective May 1, 2016).
10.	Minnesota	MINN. STAT. ANN. § 480A.08 (West 2014); MINN. R. CIV. APP. P. 136.01(1)(b) (“Unpublished opinions and order opinions are not precedential except as law of the case, res judicata or collateral estoppel, and may be cited only as provided in Minnesota Statutes, section 480A.08, subd. 3 (1996).”); 9 HENRY W. MCCARR & JACK S. NORDBY, MINNESOTA PRACTICE, CRIMINAL LAW AND PROCEDURE § 37:31 (4th ed. 2015) (“The [Minnesota] Court of Appeals has criticized a trial court for relying on an unpublished opinion and discouraged their use generally. These opinions, the court said, are ‘not precedential,’ but at best ‘of persuasive value.’”) (footnotes omitted).
11.	Nevada	NEV. R. APP. P. 36(c)(3) (“A party may cite for its persuasive value, if any, an unpublished disposition issued by this court on or after January 1, 2016.”).
12.	New Mexico	N.M. R. APP. P. 12-405(C); State v. Gonzales, 1990-NMCA-040, ¶ 50, 110 N.M. 218, 227, 794 P.2d 361, 370 (“[I]f counsel concludes that language in a memorandum opinion or calendar notice is persuasive, we see no reason why it cannot be presented to the court for consideration.”).

13.	North Carolina	N.C. R. APP. P. 30(e)(3) (“[C]itation of unpublished opinions . . . is disfavored . . . . If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion . . .”).
14.	North Dakota	<i>In re Guardianship of Barros</i> , 2005 ND 122, ¶ 15, 701 N.W.2d 402, 408 (“Although our Court has not formally adopted such a rule, we believe [unpublished] decisions should only have value for their persuasive reasoning.”).
15.	Vermont	<i>See Gamache v. Smurro</i> , 2006 VT 67, ¶ 11 n.4, 904 A.2d 91, 97 n.4 (citing an unpublished opinion from the California Court of Appeals and finding it persuasive in its application of the governing statute).
16.	Virginia	VA. SUP. CT. R. 5.1(f) (“The citation of judicial opinions, orders, judgments, or other written dispositions that are not officially reported, whether designated as ‘unpublished,’ ‘not for publication,’ ‘non precedential,’ or the like, is permitted as informative, but shall not be received as binding authority.”).
17.	Wisconsin	WIS. STAT. ANN. § 809.23(3) (West Supp. 2015) (allowing citation of unpublished opinions issued on or after July 1, 2009 for persuasive value); <i>see also id.</i> judicial council note (2008) (“Section (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in numerous other jurisdictions . . .”).
18.	Wyoming	<i>See Barnett, supra</i> note 7, at 482 n.63 (“Wyoming has no rule against citing unpublished opinions, and they can be cited for persuasive value.”) (citation omitted).

Table 4: Hybrid States

	STATE	CITATION RULE
1.	Colorado	All opinions of the Colorado Supreme Court are published. <i>See</i> COLO. REV. STAT. ANN. § 13-2-122 (West 2014); 18 LEONARD P. PLANK & ANNE WHALEN GILL, COLORADO PRACTICE, APPELLATE LAW & PRACTICE § 21.5 (2d ed. 2014). Opinions of the Colorado Court of Appeals are selectively published, and the citation of unpublished opinions is forbidden unless decided between January 1, 1970 and November 1, 1975. <i>See</i> COLO. APP. R. 35(f); <i>Woods v. Delgar Ltd.</i> , 226 P.3d 1178, 1181 n.1 (Colo. App. 2009).
2.	Florida	Although Florida publishes all Supreme Court opinions, “a per curiam affirmance without written opinion, even one with a written dissent, has no precedential value and should not be relied on for anything other than res judicata.” <i>St. Fort ex rel. St. Fort v. Post</i> , 902 So.2d 244, 248 (Fla. Dist. Ct. App. 2005); <i>see also</i> <i>Dep’t of Legal Affairs v. Dist. Ct. of Appeal, 5th Dist.</i> , 434 So. 2d 310, 311 (Fla. 1983) (“The issue is whether a per curiam appellate court decision with no written opinion has any precedential value. We hold that it does not.”).
3.	Indiana	IND. R. APP. P. 65(D) (stating that all Supreme Court opinions are published, but “memorandum decision[s]” issued by the Court of Appeals “shall not be regarded as precedent and shall not be cited to any court”); <i>see also</i> <i>Selective Ins. Co. of South Carolina v. Erie Ins. Exch.</i> , 14 N.E.3d 105, 113 n.4 (Ind. Ct. App. 2014) (clarifying that Rule 65(D) only prohibits citation to decisions issued by the Court of Appeals of Indiana and allows citation to unpublished U.S. district court cases).
4.	Nebraska	<i>See</i> NEB. CT. R. APP. P. § 2-107; <i>see also</i> <i>State v. James</i> , 573 N.W.2d 816, 820–21 (Neb. Ct. App. 1998) (recognizing “that unpublished decisions of this court do not carry precedential weight,” but feeling “compelled” to examine the rationale of two unpublished decisions that were on all fours with the present case).

5.	New Hampshire	Effective January 1, 2016, the Supreme Court of New Hampshire adopted a series of amendments to its court rules, allowing litigants to cite and discuss unpublished opinions, while providing that they do not constitute binding precedent. <i>See Supreme Court Orders</i> , N.H. BAR ASSOC. (Dec. 16, 2015), <a href="https://www.nhbar.org/publications/archives/display-news-issue.asp?id=8194">https://www.nhbar.org/publications/archives/display-news-issue.asp?id=8194</a> ; <i>see also</i> N.H. SUP. CT. R. 12-D(3) (“An order issued by a 3JX panel shall have no precedential value, but it may, nevertheless, be cited or referenced in pleadings or rulings in any court in this state, so long as it is identified as a non-precedential order.”) (effective Jan. 1, 2016). <i>But see</i> N.H. SUP. CT. R. 25(5) (“Cases summarily disposed of under this rule shall not be regarded as establishing precedent or be cited as authority.”).
6.	Oklahoma	Oklahoma draws a line between criminal and civil matters. <i>Compare</i> OKLA. R. CRIM. APP. 3.5(C)(3) (stating that “parties may cite and bring to the Court’s attention the unpublished decisions of this Court provided counsel states that no published case would serve as well the purpose for which counsel cites it”), <i>with</i> OKLA. SUP. CT. R. 1.200(c)(5) (providing that unpublished opinions “shall not be considered as precedent by any court or cited in any brief or other material presented to any court”).
7.	Oregon	Oregon has no statute or rule regarding the publishing of opinions or the precedential value of unpublished decisions, however cases that are affirmed without an opinion may not be cited to. OR. R. APP. P. 5.20(5).
8.	New Jersey	New Jersey’s citability rule, uniquely, diverges on the basis of the role of the actor. <i>See</i> N.J. CT. R. 1:36-3 (stating that “no unpublished opinion shall be cited by any court” while also permitting parties to bring unpublished opinions to the attention of the court).

9.	Tennessee	Tennessee's citation rules hinge on whether the opinion was issued by the Supreme Court or the Court of Appeals. <i>Compare</i> TENN. SUP. CT. R. 4(G)(1) ("[U]npublished opinions . . . shall be considered persuasive authority."), <i>with</i> TENN. CT. APP. R. 10 ("When a case is decided by memorandum opinion it . . . shall not be published, and shall not be cited or relied on for any reason in any unrelated case.").
10.	Texas	TEX. R. APP. P. 47.7 (providing that all opinions in civil cases issued after January 1, 2003 are published, whereas opinions in criminal cases are selectively published and nonprecedential, but may be cited).

**Table 5: No-Citation States**

	STATE	CITATION RULE
1.	Alabama	<i>See</i> ALA. R. APP. P. 53(d), 54(d) (prohibiting citation of and affording no precedential value to "No Opinion" Affirmances).
2.	California	CAL. R. CT. 8.1115(a) ("[A]n opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.").
3.	District of Columbia	D.C. CT. APP. R. 28(g) ("Unpublished orders or opinions of this court may not be cited in any brief . . .").
4.	Idaho	IDAHO SUP. CT. OP. R. 15(f) ("If an opinion is not published, it may not be cited as authority or precedent in any court.").
5.	Illinois	ILL. SUP. CT. R. 23 (providing that unless a case is disposed of by a published opinion, it "is not precedential and may not be cited by any party").

6.	Maine	<i>See</i> ME. R. APP. P. 12(c) (“A memorandum of decision decides a case, but does not establish precedent and will not be published on the Judicial Branch website or in the Maine Reports); ME. R. APP. P. 12 advisory notes to 2004 amendment (“A memorandum of decision may be used to decide cases in which the law governing resolution of the case is clear and no legal principle is being newly established or modified.”).
7.	Maryland	MD. R. 1-104(b) (“An unreported opinion of [the Court of Appeals or Court of Special Appeals] may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority.”). <i>But see</i> Evans v. County Council, 185 Md. App. 251, 255 n.2, 969 A.2d 1024, 1027 n.2 (2009) (stating that the inclusion of an unpublished decision in a party’s brief is not in violation of Rule 1-104(b), because the court can take judicial notice of their own opinions and it was not cited as precedential authority).
8.	Missouri	MO. SUP. CT. R. 84.16(b) (providing that a written statement attached to a memorandum decision or written order “shall not be reported, and shall not be cited or otherwise used in any case before any court”).
9.	Montana	MONT. SUP. CT. INTERNAL OP. R. § 1(3)(c)(ii) (providing that the decision of a case classified as a memorandum opinion “shall not be citeable as binding precedent”).

10.	Pennsylvania	PA. SUPER. CT. I.O.P. § 65.37 (“An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding . . .”). Cf. COMMONW. CT. I.O.P. § 414 (allowing parties to cite unreported panel decisions of Commonwealth Court issued after Jan. 15, 2008 for persuasive value). Pennsylvania’s Commonwealth Court is one of two intermediate appellate courts, “primarily responsible for matters involving state and local governments and regulatory agencies.” <i>Learn</i> , UNIFIED JUD. SYS. OF PA., <a href="http://www.pacourts.us/learn">http://www.pacourts.us/learn</a> (last updated Sept. 2013).
11.	Rhode Island	R.I. SUP. CT. R. 16(j) (“Unpublished orders will not be cited by the Court in its opinions and such orders will not be cited by counsel in their briefs. Unpublished orders shall have no precedential effect.”).
12.	South Carolina	S.C. APP. CT. R. 268(d)(2) (“Memorandum opinions and unpublished orders have no precedential value and should not be cited . . .”).
13.	South Dakota	S.D. R. APP. P. § 15-26A-87.1(E).
14.	Washington	WASH. R. GEN. APPLICATION 14.1 (providing that “[a] party may not cite as an authority an unpublished opinion of the Court of Appeals[,]” but may cite as an authority an unpublished opinion “issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.”).